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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

SEPTEMBER TERM, 1898—JANUARY TERM, 1899.

VOLUME LVII.

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THE SUPREME COURT

OF

NEBRASKA.

1898.

CHIEF JUSTICE,

T. O. C. HARRISON.

JUDGES,

T. L. NORVAL,
J. J. SULLIVAN.

COMMISSIONERS,

ROBERT RYAN,
JOHN M. RAGAN,
FRANK IRVINE.

OFFICERS.

ATTORNEY GENERAL,

C. J. SMYTH.

CLERK AND REPORTER,

D. A. CAMPBELL.

DEPUTY CLERK,

W. B. ROSE.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

First District—

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

Second District—

B. S. RAMSEY.....Plattsmouth

Third District—

A. J. CORNISH.....Lincoln
LINCOLN FROST.....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—

J. A. GRIMISON.....Schuyler
C. HOLLENBECK.....Fremont

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. LVI

BECKER, GEO. E.
BROWN, ERNEST J.
BROWN, J. H.
COLLINS, D. E.
HOLCOMB, C. H.
KAMANSKI, CHAS.
KERL, THOMAS T.
LINDERMAN, JOHN H.
MARTIN, WALTER A.
THOMAS, DEXTER L.

SUPREME COURT COMMISSIONERS.

(Laws 1893, chapter 16, page 150.)

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

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

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

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1898.

PRESENT:

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

JOHN COMSTOCK V. JOHN KERWIN.

FILED DECEMBER 8, 1898. No. 8476.

1. **Ejectment:** PLAINTIFF'S TITLE. A plaintiff in ejectment cannot rely on a defect in the title of his adversary, but must recover, if at all, on the strength of his own title or right to the property.

2. **Clerk of Court:** AUTHENTICATION OF TRANSCRIPTS. Ordinarily, the clerk of one court has not the authority to authenticate transcripts of the records kept by another court.

3. **Evidence:** TRANSCRIPT OF RECORD: AUTHENTICATION. A transcript of the record of a foreign court is not admissible in evidence, unless authenticated according to the provisions of section 414 of the Code of Civil Procedure.

4. ——: RECORD OF ENTRY ON GOVERNMENT LAND: TRANSCRIPT. One cannot invoke section 62, chapter 73, Compiled Statutes, unless he has complied with the provisions thereof.

5. ———: INDORSEMENTS ON DOCUMENTS. The introduction in evidence of an instrument or document will not carry with it the indorsements thereon, unless the offer is sufficiently broad to include them.

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

Barnes & Tyler, for plaintiff in error.

J. J. McCarthy and *W. F. Norris, contra.*

NORVAL, J.

This action was brought by John Comstock against John Kerwin to recover possession of 120 acres of land in Dixon county. A judgment for the defendant, on a trial to the court, was entered, and plaintiff brings error.

On July 1, 1873, two patents were issued by the United States,—one conveying eighty acres of the land in controversy, and the other the remaining forty acres. The patents are alike, except as to the description of the lands, the number of the certificate of the register of the United States land office, and the number of the surveyor general's certificate. A copy of one of such patents follows:

"SURVEYOR GENERAL'S CERTIFICATE No. 293G.

"The United States of America, to all to whom these presents shall come, greeting:

"Whereas, by the 3d section of the act of congress approved June 2, 1858, entitled 'An act to provide for the location of certain confirmed private land claims in the state of Missouri, and for other purposes,' it is enacted 'that in all cases of confirmation by this act, or where any private land claim has been confirmed by congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor general of the district in which such claim was situ-

ated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant, or his legal representative, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied, which certificate may be located upon any of the public lands of the United States subject to sale at private entry at a price not exceeding one dollar and twenty-five cents per acre: *Provided*, That such location shall conform to legal divisions and subdivisions.' And in the 4th section of the said act it is declared 'That the register of the proper land office, upon the location of such certificate, shall issue to the person entitled thereto a certificate of entry, upon which, if it shall appear to the satisfaction of the commissioner of the general land office that such certificate has been fairly obtained, according to the true intent and meaning of this act, a patent shall issue as in other cases.' [11 U. S. Statutes at Large, p. 294, ch. 81.]

"And whereas, on the thirty-first day of August, A. D. 1872, the surveyor general of the United States for the state of Louisiana, in conformity with the provisions of the act aforesaid, issued his certificates of location, numbered 293A to 293H, inclusive, each for eighty acres, in full satisfaction of the unlocated and unsatisfied claim of L. Chance, entered as number sixty in list of actual settlers of the report made on the twenty-fourth day of July, A. D. 1821, by Cosby and Skipwith. Confirmed by act of congress approved August 6, A. D. 1846.

"And whereas it appears, by certificate number 407 of the register of the United States Land office at Dakota City, in the state of Nebraska, which said certificate has been deposited in the general land office of the United States, that by virtue of the surveyor general's certificate, as aforesaid, number 293G, for eighty acres, there has been located the following described tract of land in part satisfaction of the aforesaid claim of L. Chance, to-wit: The east half of the southeast quarter of section

thirty-two, in township twenty-eight, of range six east, in the district of lands subject to sale at Dakota City, Nebraska, containing eighty acres, according to the official plat of the survey of the said land, returned to the general land office:

"Now know ye, that the United States of America, in consideration of the premises, and in conformity with the aforesaid act of congress of June 2, 1858, have given and granted, and by these presents do give and grant, unto the said L. Chance or his legal representatives the tract of land above described; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said L. Chance, or his legal representatives, and to his or their heirs and assigns forever.

"In testimony whereof, I, Ulysses S. Grant, president of the United States of America, have caused these letters to be made patent, and the seal of the general land office to be hereunto affixed.

"Given under my hand at the city of Washington, the first day of July, in the year of our Lord one thousand eight hundred and seventy-three, and of the independence of the United States the ninety-seventh.

"[L. S.] By the President: U. S. GRANT.
By S. D. WILLIAMSON, *Secretary.*
"Vol. 3, page 407. E. A. FISKE,
"Recorder of the General Land Office, ad interim."

Plaintiff claims the lands through various transfers, the following being his chain of title, in addition to the patents aforesaid: Sale on March 21, 1872, in the parish court of East Feliciana, Louisiana, of the settlement land claim of L. Chance to David C. Hardee; David C. Hardee and wife to Isabella Ann Fluker, warranty deed, dated November 3, 1874; quitclaim deed from the heirs at law of Isabella Ann Fluker to John Comstock, the plaintiff herein, bearing date May 22, 1886. The defendant asserts title through *mesne* conveyance, the first in point of time of execution being a tax deed.

It is a familiar principle that a plaintiff in ejectment must recover on the strength of his own title or right to the property, and cannot rely upon defects in the title of his adversary. (*Gregory v. Kenyon*, 34 Neb. 640; *Bigler v. Baker*, 40 Neb. 325; *Omaha Real Estate & Trust Co. v. Kragscow*, 47 Neb. 592; *Wildman v. Shambaugh*, 43 Neb. 371.) The right of John Comstock to the real estate in controversy is no stronger than the weakest link in his chain of title; hence if any one of the transfers indicated is not sufficient to convey any title or right to the lands, this action must fail. It will be observed that the patents were issued by the United States in the name of "L. Chance or his legal representatives."

It is insisted by counsel that L. Chance was dead at the time the patents were issued, and that D. C. Hardee, one of the grantors in plaintiff's chain of title, was the legal representative of said Chance, and therefore the title to these lands at once vested in him upon the execution and delivery of the patents, and the same was conveyed through the subsequent *mesne* conveyances to John Comstock. Numerous decisions* are cited to sustain the proposition that when a patent is issued in the name of a particular person "or his legal representatives," the words quoted include and embrace assignees and grantees of the person so designated in the patent, as well as his administrator and heirs and next of kin. Conceding the rule stated to be sound, then the important question presented is whether it has been shown by competent evidence that D. C. Hardee was the legal representative of L. Chance. It is strenuously insisted by plaintiff that L. Chance was a resident of Louisiana, parish of East Feliciana, and at the time of his death owned a settlement land claim against the United States, which had never been located by him; that his estate was

**Simmons v. Saul*, 138 U. S. 439; *Warnecke v. Lembca*, 71 Ill. 91; *Hammons v. Mason & Hamlin Organ Co.*, 92 U. S. 724; *Phelps v. Smith*, 15 Ill. 573; *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 597; *New York Life Ins. Co. v. Flack*, 3 Md. 341; *Wear v. Bryant*, 5 Mo. 164; *Hogan v. Page*, 2 Wall. [U. S.] 607; *Carpenter v. Rannels*, 19 Wall. [U. S.] 138.

administered in the probate court of the said parish of East Feliciana, and in pursuance of an order of said court said claim or right to locate upon a certain number of acres of the public lands of the United States was sold to D. C. Hardee. It does with sufficient certainty appear that the surveyor general of the United States for the state of Louisiana, in conformity with the act of congress, and in satisfaction of the said settlement land claim of L. Chance, issued certificates of location Nos. 293F and 293G, each for eighty acres; and that said certificates were subsequently located on the lands in controversy at the United States land office at Dakota City, Nebraska, and in pursuance of such locations the patents were issued. For the purpose of establishing the purchase of said settlement land claim by Hardee there was introduced in evidence that which purports to be a copy of the record of the proceedings in the probate court of the parish of East Feliciana, in the state of Louisiana, relating to the administration on the estate of L. Chance, deceased, and the succession sale of his settlement claim against the United States for 640 acres of land. The receipt, as evidence of said pretended transcript, was at the time objected to by the defendant, on the ground, among others, that the same was not sufficiently authenticated to entitle it to be admitted in evidence. The objection was, however, overruled, and since the cause was tried without the aid of a jury, we must assume that the court, in rendering its decision, discarded and rejected all improper and incompetent testimony which had been adduced on the hearing, and on a review of the case we must weigh alone the material and competent evidence.

The pretended transcript of the record already mentioned contained the certificate following:

"STATE OF LOUISIANA, }
PARISH OF EAST FELICIANA. }

"I certify the above and the foregoing six pages to be

a true and complete transcript of all the original papers in this case now on file in my office.

"Witness my official signature and seal of office at Clinton, parish and state aforesaid, this 30th day of July, A. D. 1894.

"[SEAL.] THOMAS L. EAST,
"Clerk 13th District Court."

There was no other or further authentication of the document whatsoever. It is very evident that the foregoing certificate was insufficient proof of the record of, and proceedings had in, the probate court of the parish of East Feliciana, in the state of Louisiana, for two reasons: First. No clerk or other officer of said court has certified to the genuineness of the copy or transcript placed in evidence. The sole certificate is over the official signature and seal of the office of the clerk of the thirteenth district court, an independent tribunal from that in which the purported record was made, and proceedings were had. Ordinarily, the clerk of one court has no authority to authenticate transcripts of the record of another and different court. If it be true that the probate court of the parish of East Feliciana has ceased to exist, and the thirteenth district court has succeeded to its jurisdiction, and in pursuance of law the records of the former have been deposited in the office of the clerk of the last mentioned court, it devolves upon the plaintiff to establish the same, for they are matters of which this court cannot take judicial cognizance.

Again, the transcript in question is not competent proof of the records of a foreign court, because it was not authenticated in the manner provided by the act of the congress of the United States, and by section 414 of the Code of Civil Procedure of this state. The two statutes are substantially the same. Our section 414 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." This transcript is not attested by either the judge or clerk of the probate court of the parish of East Feliciana, and, therefore, was inadmissible as evidence for any purpose. (*Names v. Names*, 48 Neb. 701.)

It is urged that the proceedings of said probate court were properly received in evidence under section 62, chapter 73, Compiled Statutes, entitled "Real Estate." That section is in the language following:

"Section 62. Whenever any person referred to in the third section of the act of congress entitled 'An act to provide for the location of certain confirmed land claims in the state of Missouri, and for other purposes,' approved June 21, 1828 (11 Statutes at Large, 294 and 295), has had a private land claim which has not been located and satisfied, has died before making the entry therein authorized of public land, and his right so to do has been sold by order of the probate court of the county and state of his residence, and the entry of public lands in this state has been made by the purchaser or his grantee, and letters patent of the United States have issued to the original claimant or his legal representative, it shall be competent for the owner of the land under the patentee to cause to be recorded in the book of deeds in the office of the county clerk of the county in which the land is situate a copy of the proceedings of the said probate court upon which the right of the original claimant was sold as aforesaid, together with the proceedings of the several officers on said sale, which copy shall be duly certified by the clerk of said court or of any court which has succeeded to the jurisdiction of said probate court, and in which the records of said probate court are by law deposited, and the record so made in the county clerk's office shall be taken and held by all the courts of this state as evidence of the transfer of the right to make such entry in the land office, and of the title of the purchaser at said probate sale, and his grantees under the said sale to the lands patented as

aforesaid, and a copy of the said record in the county clerk's office, certified by that officer, may be read in evidence with the like force and effect as the original papers."

Assuming, for the purposes of this case, the validity of said section, plaintiff cannot invoke its provisions, for the reason it has not been shown that the proceedings of the said probate court were ever recorded in the office of the county clerk of the county in which these lands are situate. The section quoted above declares "a copy of said record in the county clerk's office, certified by that officer, may be read in evidence with like force and effect as the original papers." The document in question was not tendered as an exemplified copy of any record in Dixon county, as the following excerpt from the bill of exceptions will disclose: "The plaintiff now offers in evidence an exemplified copy of the records of the probate court of the parish of East Feliciana, in the state of Louisiana, by which is conveyed, by succession sale, the rights of L. Chance, the patentee in the Exhibits 'A' and 'B,' to one David C. Hardee, which said exemplified copy is hereto attached, marked for identification 'Exhibit C,' and made a part hereof." In this connection it should be stated that there appears on the back of said transcript, or "Exhibit C," the following indorsement:

"STATE OF NEBRASKA, }
DIXON COUNTY, } SS.

"Filed for record October 27, 1894, at 8 A. M., and recorded book R of Deeds, pages 174, 75, 76, 77, 78, & 80 & 81.

T. J. SHEIBLEY,
"County Clerk."

This indorsement was not introduced in evidence, as the offer copied above was not sufficiently broad to cover the same. (*Noll v. Kenneally*, 37 Neb. 882; *Schroeder v. Nielson*, 39 Neb. 335; *Cummins v. Vandeventer*, 52 Neb. 478; *Johnson v. English*, 53 Neb. 530; *Levy v. Cunningham*, 56 Neb. 348.) It follows that plaintiff has not estab-

lished any title or rights to the lands in himself, and the judgment must accordingly be

AFFIRMED.

WILLIAM MEDLAND, APPELLANT, V. WILLIAM J. CONNELL ET AL., APPELLEES.

FILED DECEMBER 8, 1898. No. 8510.

1. **Void Sale for Portion of Taxes.** A tax sale is invalid where it was not made for all delinquent taxes against the land, with interest and costs.

2. ———: LIEN FOR OTHER TAXES. A sale of land for taxes due for one year does not discharge those levied and delinquent for previous years.

3. **Tax Sale:** RETURN OF TREASURER: PRIVATE SALE. A private sale of real estate for taxes is invalid where the treasurer has failed to make return to the county clerk of the public sale required by statute.

4. **Void Tax Sale:** RIGHTS OF PURCHASER: SUBROGATION. Where a tax sale is invalid, the purchaser is subrogated to the rights of the public to the lien for the taxes and for all legal prior and subsequent taxes levied against the property, by him paid, with interest at the same rate which the taxes were drawing when paid.

5. **Taxes:** FRAUDULENT LEVY: EVIDENCE. Evidence examined, and *held* insufficient to establish that the levy of county taxes for 1892 was fraudulent and excessive.

6. ———: ———: REMEDY. Where a taxpayer is dissatisfied with the assessment of his property, he should apply to the board of equalization for relief.

7. **Pleading:** NEW MATTER. New matter relied upon as constituting an affirmative defense to a cause of action must be pleaded in the answer.

8. ———: ———: TAXES: FORECLOSURE OF LIEN. In a suit to foreclose a tax lien the defense that the levy for county purpose exceeded the constitutional limit is not available, unless raised by suitable averments in the answer.

9. **Metropolitan Cities:** LEVY OF SPECIAL TAXES. A city council of a metropolitan city cannot lawfully pass an ordinance levying special taxes until, as a board of equalization, it has determined the sum to be assessed against the real estate as benefits.

10. ———: EQUALIZATION OF TAXES: NOTICE. Notice of the sitting of the city council as a board of equalization, under sections 73 and 85, chapter 12*a*, Compiled Statutes 1887, "for at least six days prior thereto" by publication in the official paper, is a prerequisite to legal action.

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

Henry W. Pennock, for appellant.

D. D. Gregory and *Connell & Ives, contra.*

NORVAL, J.

This suit was to foreclose two certificates of tax sales, one on the east half of lot 6, in Griffin & Smith's Addition to the city of Omaha, and the other covering the west half of the same lot. Plaintiff purchased the property at private sale on February 1, 1894, for taxes levied by the city of Omaha for the year 1890. He has paid prior and subsequent taxes and special assessments, and for the several amounts so paid he seeks to enforce a lien. The decree was for the defendants, and the plaintiff appeals.

There were such irregularities in the proceedings leading up to the tax sales as to render them invalid for two reasons: The city taxes for 1889 were at the time delinquent, and the same were not included in the sales, nor were they paid by the purchaser until some time thereafter. (*State v. Helmer*, 10 Neb. 25; *Tillotson v. Small*, 13 Neb. 202; *O'Donohue v. Hendrix*, 13 Neb. 257; *McGavock, v. Pollack*, 13 Neb. 535; *Adams v. Osgood*, 42 Neb. 451.) Again, it does not appear that the county treasurer of Douglas county made return to the county clerk of the public sale of lands in his county for taxes as required by section 113, article 1, chapter 77, Compiled Statutes. (*State v. Helmer*, 10 Neb. 25; *Ludden v. Hansen*, 17 Neb. 354; *Adams v. Osgood*, 42 Neb. 450; *Johnson v. Finley*, 54 Neb. 733.) Notwithstanding the sales were invalid, the taxes for the non-payment of which plaintiff purchased

the lot being valid, he is subrogated to the rights of the public and is entitled to a lien for the amount of his bid, with interest thereon at the same rate the taxes bore when paid. (*Pettit v. Black*, 8 Neb. 52; *Adams v. Osgood*, 42 Neb. 450; *Weston v. Meyers*, 45 Neb. 95; *Johnson v. Finley*, 54 Neb. 733.)

Another argument is that the sale of the lot by the county treasurer for the taxes due thereon for the year 1890 alone discharged the prior delinquent taxes against the property for 1889, which were not included in the sale. This court has decided the question the other way, holding that when a tax sale is invalid the purchaser is entitled to a lien against the real estate, not only for the taxes for which the property was sold, but for all prior and subsequent taxes existing against the real estate paid by him, with interest at the same rate the taxes drew after becoming delinquent. (*Adams v. Osgood, supra; Stegeman v. Faulkner*, 42 Neb. 53; *Roads v. Estabrook*, 35 Neb. 297.) There is no room to doubt the soundness of the proposition last above stated when section 116, article 1, chapter 77, Compiled Statutes, is considered. This section declares: "The purchaser acquires a perpetual lien of the tax on the land, and if after the taxes become delinquent he subsequently pays any taxes levied on the same, whether levied for any year or years previous or subsequent to such sale, he shall have the same lien for them, and may add them to the amount paid by him in the purchase, and the treasurer shall make out a tax receipt and duplicate for the taxes," etc. The language is clear and explicit, and creates a lien for prior and subsequent legal taxes paid by the purchaser. Plaintiff paid the county tax assessed against the lot for the year 1892, which the defendants insist was void, upon the grounds: (1.) The levy was made on a fraudulent and excessive valuation. (2.) The tax was paid while a suit was pending against Douglas county to restrain the collection thereof. (3.) The aggregate amount of the county levy for the year 1892 exceeded the constitutional

limit. These objections will receive attention in the order just stated.

The proofs fail to sustain the charge of fraudulent levy. It does appear that the property was valued for assessment in the year 1892 at $5,400, and that during the five preceding and two subsequent years the lot was assessed at no time at a valuation exceeding $2,275; but this was insufficient to defeat the levy for 1892, although there had been no increase in the value of the lot. Moreover, if the assessment was too high, defendants should have applied to the board of equalization for relief.

There are two ready answers to the contention that the county taxes of 1892 were paid in violation of injunction or restraining order. In the first place no such issue was tendered by the answers of the defendants. That was new matter of defense for them to allege and prove. (*St. Felix v. Green*, 34 Neb. 800; *Gran v. Houston*, 45 Neb. 813; *Home Fire Ins. Co. v. Berg*, 46 Neb. 600; *Sharpless v. Giffen*, 47 Neb. 146.) Again, plaintiff was not a party to the injunction suit instituted by Connell, to have said tax declared invalid, and it does not even appear that the county treasurer was restrained from receiving the amount of said tax.

The objection that the county levy for 1892 was unconstitutional and void is without merit. True the aggregate amount of tax imposed that year by Douglas county for all county purposes was sixteen and seven-tenths mills on the dollar valuation, while section 5, article 9, of the constitution declares that "County authorities shall never assess taxes the aggregate of which shall exceed one and a half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county," yet this court would not be justified in deciding that the levy in question exceeded the constitutional limit, since that issue was not raised or tendered by the pleadings. The de-

fendants should have pleaded that defense in the answer, and having failed to do so, they cannot urge it for the first time in this court. A levy for county purposes of taxes exceeding fifteen mills on the dollar valuation for any one year is not necessarily unconstitutional. It may exceed that sum to meet an indebtedness existing at the adoption of the constitution, or when the levy is sanctioned by a vote of the people of the county. Whether the levy was beyond the power conferred by the constitution should have been presented to the trial court by suitable averments in the answer to make the question available here. The validity of the levy of 1892 was in no form challenged in the answer.

It appears with sufficient clearness that plaintiff paid subsequent to the tax sales a special grading tax assessed against the real estate by the city of Omaha for grading Thirty-sixth street from Leavenworth street to Park street, amounting to $250.80, and also paid a special assessment of $9.27 levied by the municipality upon a portion of said lot 6 for damages sustained by reason of the grading of Thirty-sixth street. Both of these special assessments were void, because the city council of the city of Omaha only gave five days' notice of its sitting as a board of equalization, while the statute required that notice of the meeting should be given for at least six days prior thereto. (Compiled Statutes 1887, ch. 12*a*, secs. 73, 85; *Leavitt v. Bell*, 55 Neb. 57.) The authorities of a city of the metropolitan class possess no power to levy a special tax for street improvement until, as a board of equalization, it has determined the amount to be assessed against the real estate as benefits. Counsel for plaintiff concede the invalidity of these special taxes. The decree is reversed and the cause is remanded to the district court with directions to render a decree for the plaintiff for the amount of all taxes paid by him on the real estate and interest, excepting the special taxes aforesaid.

REVERSED AND REMANDED.

R. L. CROSBY, APPELLEE, V. GEORGE T. BASTEDO, APPELLANT, ET AL.

FILED DECEMBER 8, 1898. No. 8518.

1. **Conflicting Evidence:** REVIEW. Conflicting evidence will not be weighed on appeal.
2. **Pleading:** NEW MATTER IN ANSWER: REPLY. The averments of new matter contained in the amended answer were put in issue by the refiling of the reply to the original answer.

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

A. S. Churchill and *G. T. Bastedo,* for appellant.

H. M. Uttley, contra.

NORVAL, J.

In 1892 G. T. Bastedo was the county clerk of Boyd county, and as such officer it was his duty to transcribe from the records of Holt county all deeds, mortgages, and other instruments, and judgments affecting any real estate situate in Boyd county which had prior to its organization been attached to the county of Holt. During said year the plaintiff, R. L. Crosby, under and in pursuance of an agreement entered into with Bastedo, procured from the records of Holt county copies of all such instruments and judgments, and recorded the same in the proper records of Boyd county. After the transcribing and recording was completed, plaintiff presented to the county board a bill for his services, which was rejected on the advice of the county attorney, that the claim could be properly allowed alone to Bastedo; whereupon the latter made out and presented to the county board in his own name, in pursuance with an understanding or agreement with Crosby, an account for the sum of $825.29, that being the amount of compensation legally chargeable for such services, which claim

was audited and allowed. Warrants were drawn therefor in the name of Bastedo, one for $400 and the other for $425.29, which were delivered to him and he refused to surrender them to plaintiff. This suit was instituted by Crosby to have said warrants adjudicated his property, to require their delivery to him, and to enjoin Frank G. Russell, as county treasurer of Boyd county, from paying the same to any one other than to the plaintiff. A decree was entered as prayed, and the defendant Bastedo appeals.

It is admitted that Crosby was employed by Bastedo to transcribe certain of the records of Holt county, and that plaintiff performed the work as agreed. The real dispute between the parties is as to the amount of compensation it was agreed Crosby should have for his services, and there is a sharp conflict in the testimony adduced on this point. Plaintiff testified, and he is corroborated by more than one disinterested witness, that the contract was he was to receive as compensation for transcribing the records of Holt county the entire fees which the law allowed for such work; that the bill should be filed in the name of Bastedo as county clerk, and when allowed by the county board plaintiff was to receive the warrant or warrants drawn in payment of the claim. On the other hand, the testimony introduced by defendants tends to establish the averment in the answer that Crosby was to perform the services for one-half of the fees allowed by law for said work, which amounted to $412.64½. The rule is inflexible that this court will not undertake to weigh conflicting evidence, or disturb the finding based thereon. The district court specifically found the contract to be as alleged by the plaintiff, and a perusal of the bill of exceptions convinces us that such finding has abundant support in the evidence.

It is suggested the pleadings admitted the contract was that Crosby was to perform the work for one-half of the legal fees chargeable for such services, and there-

fore, under the pleadings, a decree should have been rendered against plaintiff. This argument is based upon the fact that no new reply was filed to the amended answer of Bastedo pleading the contract under which the latter claims the work was performed. The original reply was refiled subsequent to the filing of the amended answer, and put in issue the averment of new matter contained therein.

It is also insisted that the insolvency of Bastedo was neither alleged nor proven on the trial. His solvency or insolvency was of no importance in the case, since the suit, in its scope and effect, was to obtain a specific execution of the contract or agreement. The decree is

AFFIRMED.

JASPER C. DEWEESE, EXECUTOR, V. CATHERINE MUFF.

FILED DECEMBER 8, 1898. No. 8442.

Negotiable Note: INDORSEMENT IN BLANK: PAYMENT TO AGENT. Where a negotiable note, indorsed by the payee in blank, is delivered to an agent for collection, the payment thereof by the maker in good faith to the agent while the note is in the possession of the latter, after the death of the principal and without notice of his death, will discharge the debt.

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

The opinion contains a statement of the case.

Thomas Ryan and *James W. Dawes*, for plaintiff in error:

The death of the principal terminated the agency, and subsequent payment to the agent did not discharge the debt or release the maker of the note. (*Ish v. Crane*, 8 O. St. 521, 13 O St. 575; *Davis v. Windsor Savings Bank*, 46 Vt. 728; *Galt v. Galloway*, 4 Pet. [U. S.] 344; *Long v. Thayer*, 150 U. S. 520; *Travers v. Crane*, 15 Cal. 12; *Wilson*

v. Edmonds, 4 Foster [N. H.] 572; *Rigs v. Gage*, 2 Hump. [Tenn.] 350; *Cleveland v. Williams*, 29 Tex. 204; *Hunt v. Rousmanier*, 8 Wheat. [U. S.] 173; *Blades v. Free*, 9 Barn. & Cr. [Eng.] 167; *Smout v. Ilbery*, 10 Mees. & Wels. [Eng.] 1.)

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

The agent of payee and the maker of the note having acted in ignorance of payee's death, their acts were binding. (*Ish v. Crane*, 8 O. St. 521, 13 O. St. 575.)

Payment to the agent was binding. (18 Am. & Eng. Ency. Law 190; *Stoddard v. Burton*, 41 Ia. 582; *Edwards v. Parks*, 60 N. Car. 598; *Loomis v. Downs*, 26 Ill. App. 257; *Davis v. Lusitanian Portuguese Benevolent Ass'n*, 20 La. Ann. 24.)

Payment made in any manner requested or agreed to by the creditor will discharge the debtor, though the money never reached the creditor's hands. (18 Am. & Eng. Ency. Law 195; *Gurney v. Howe*, 9 Gray [Mass.] 404.)

The delivery of a note to the agent of the holder for collection will authorize such agent to receive the money when due and to deliver the note to the maker on payment. (18 Am. & Eng. Ency. Law 192; *Yazel v. Palmer*, 81 Ill. 82; *Padfield v. Green*, 85 Ill. 529; *Johnson v. Glover*, 121 Ill. 283; *Camp v. Wiggins*, 72 Ia. 643; *Thomassen v. Van Wyngaarden*, 65 Ia. 687.)

Maker's possession of note is *prima facie* evidence of payment. (18 Am. & Eng. Ency. Law 206; 1 Greenleaf, Evidence [13th ed.] secs. 38, 527; *Peavy v. Hovey*, 16 Neb. 416; *Smith v. Gardner*, 36 Neb. 741.)

The principal's death did not terminate the agency. (1 Am. & Eng. Ency. Law [2d ed.] 1223, 1224; *Bank of New York v. Vanderhorst*, 32 N. Y. 553; *Merry v. Lynch*, 68 Me. 94; *Hess v. Rau*, 95 N. Y. 359; *Garrett v. Trabue*, 82 Ala. 227.)

An indorsement in blank makes the instrument transferable by delivery and payable to bearer. (Tiedeman,

Commercial Paper [ed. 1889] sec. 266; *Palmer v. Nassau Bank*, 78 Ill. 380; *Morris v. Preston*, 93 Ill. 215; *Curtis v, Sprague*, 51 Cal. 239; *Krueger v. Klinger*, 30 S. W. Rep. [Tex.] 1087.)

NORVAL, J.

On July 1, 1892, Catherine Muff executed a note whereby she promised to pay to the order of James E. Jones the sum of $2,000 on September 1 of the same year, with interest thereon at seven per cent per annum. The payee resided in England, but the note was delivered to him personally at Crete, Nebraska; at which time he stated, in substance, to Mrs. Muff, in the presence of one J. H. Gruben, her business manager, that he would probably sell the note to C. C. Burr of Lincoln, as he, Jones, was going to England and desired to take the money with him, and that the maker should pay the note to Mr. Burr. The latter had been and then was the agent of Mr. Jones. Instead of selling the note, the payee, soon after it was given, indorsed the same in blank and delivered the instrument to Mr. Burr for collection. On September 19, 1892, Mrs. Muff paid $1,000 on the note to Mr. Burr, and on November 11, 1892, she paid him the balance due, and the instrument was at the time delivered to her indorsed "Paid Nov. 11th, '92. C. C. Burr." On October 16, 1892, James E. Jones died, leaving a will, and Jacob Bigler was duly appointed executor of his estate, and qualified as such. The executor repudiates the payment made to Mr. Burr on November 11, claiming that the latter's authority to collect the note had been previously revoked by the death of Mr. Jones, and this action was brought to recover from Mrs. Muff the amount of said payment as the balance alleged to be due on the note. The jury returned a verdict for the defendant, under a peremptory instruction of the court so to do, and error has been prosecuted from the judgment entered thereon. After the filing of the record in this court Jacob Bigler died, and the action was revived in the name of Jasper C. De-

weese, as executor *de bonis non* of the estate of James E. Jones, deceased.

It is disclosed that Mrs. Muff paid the amount due on the note to Burr in good faith, without any notice or knowledge whatsoever that he was not the owner of the paper, or that Mr. Jones, the payee, was dead. It is insisted that the court erred in directing a verdict for the defendant, because the death of Jones revoked the authority or power of Mr. Burr to receive from the maker payment of the obligation, although she was unaware of the death of the payee. Undoubtedly the rule is that the death of a principal instantly terminates the agency; but it by no means follows that all dealings with the agent thereafter are absolutely void. Where in good faith one deals with an agent within his apparent authority, in ignorance of the death of the principal, the heirs and representatives of the latter may be bound, in case the act to be done is not required to be performed in the name of the principal. There is a sharp conflict in the authorities on the question, but it is believed that the better reasoned cases sustain the proposition stated, among which are the following: *Ish v. Crane*, 8 O. St. 520, 13 O. St. 574; *Cassidy v. M'Kenzie*, 4 Watts & Serg. [Pa.] 282; *Davis v. Lane*, 10 N. H. 156; *Dick v. Page*, 17 Mo. 234; *Moore v. Hall*, 48 Mich. 143; 1 Am. & Eng. Ency. Law [2d ed.] 1224.

We quote the following apposite language from the opinion in *Ish v. Crane*, 8 O. St. 520: "Now upon what principle does the obligation, imposed by the acts of the agent after his authority has terminated, really rest? It seems to me the true answer is, public policy. The great and practical purposes and interests of trade and commerce, and the imperious necessity of confidence in the social and commercial relations of men, require that an agency, when constituted, should continue to be duly accredited. To secure this confidence, and consequent facility and aid to the purposes and interests of commerce, it is admitted that an agency, in cases of actual

revocation, is still to be regarded as continuing, in such cases as the present, toward third persons, until actual or implied notice of the revocation. And I admit that I can perceive no reason why the rule should be held differently in cases of revocation by mere operation of law. It seems to me that in all such cases the party who has, by his own conduct, purposely invited confidence and credit to be reposed in another as his agent, and has thereby induced another to deal with him in good faith, as such agent, neither such party nor his representatives ought to be permitted, in law, to gainsay the commission of credit and confidence so given to him by the principal. And I think the authorities go to that extent. (See *Pickard v. Sears*, 6 Ad. & Ell. [Eng.] 69.) The extensive relations of commerce are often remote as well as intimate. The application of this doctrine must include factors, foreign as well as domestic, commission merchants, consignees and supercargoes, and other agents remote from their principal; and who are required for long periods of time not unfrequently, by their principal, to transact business of immense importance, without a possibility of knowing perhaps even the probable continuance of the life of the principal. It must not unfrequently happen that valuable cargoes are sold and purchased in foreign countries by the agent, in obedience to his instructions from his principal, after and without knowledge of his death. And so, too, cases are constantly occurring of money being collected and paid by agents, under instructions of the principal, after and without knowledge of his death. In all these cases there is certainly every reason for holding valid and binding the acts so done by the agency which the principal had, in his life, constituted and ordered, that there would be to hold valid the acts of one who had ceased to be his agent, by revocation of his power, but without notice to the one trusting him as agent."

In the case at bar it was not necesary for the agent, Mr. Burr, to collect or receive the money in the name of

Mr. Jones, nor did he do so. The defendant was justified in paying the money under the circumstances disclosed by the evidence. The note was properly indorsed by the payee in blank, and it was at the time in possession of Mr. Burr. Payment to him without knowledge that the note was held for collection, or that the owner was dead, discharged the debt. (*Davis v. Lusitanian Portuguese Benevolent Ass'n*, 20 La. Ann. 24; 18 Am. & Eng. Ency. Law 190; *Edwards v. Parks*, 60 N. Car. 598; *Loomis v. Downs*, 26 Ill. App. 257; *Stoddard v. Burton*, 41 Ia. 582; *Boyd v. Corbitt*, 37 Mich. 52; *Johnson v. Hollensworth*, 48 Mich. 143.) In the case last cited a negotiable note was indorsed by the payee and delivered to an agent for collection. Subsequently the payee died. It was held that the authority to collect was not thereby revoked. A verdict for the defendant was properly directed in the case at bar. The conclusion reached obviates an examination of the instructions tendered by the plaintiff and refused by the court. The judgment is

AFFIRMED.

RYAN, C., not sitting.

N. P. FEIL V. KITCHEN BROTHERS HOTEL COMPANY.

FILED DECEMBER 8, 1898. No. 9856.

1. **Intoxicating Liquors:** LICENSE: INTEREST OF REMONSTRATOR. One is a competent remonstrator against the granting of a liquor license on the ground that notice of the application for such license was not published in the newspaper having the largest circulation in the county, notwithstanding he is personally interested in the determination of the question.

2. ———: ———: NOTICE OF APPLICATION. Notice of an application for liquor license is required to be given for two weeks prior to the hearing in a newspaper published in the county having the largest circulation therein, unless no newspaper is published in such county. Where a notice is inserted in a daily paper, it must be published daily for the period stated.

3. ——: ——: ——: NEWSPAPERS. Whether several editions of a daily paper are separate and distinct publications is a question of fact, to be determined, in the first instance, by the license board.

4. ——: ——: ——: ——. Where the matter published in each of two editions of a daily paper is not substantially the same, and each edition has a different heading or name, and is sent to a different list of subscribers, notice of an application for liquor license is required to be inserted in but one edition thereof daily for the requisite length of time, and its circulation alone is to be considered in determining whether the proper newspaper was selected. *Rosewater v. Pinzenscham*, 38 Neb. 835, followed.

5. ——: ——: ——: ——. Though the notice should be inserted in the newspaper having the largest circulation, the publication will not be declared invalid if bad faith cannot be properly imputed to the applicant in making choice of the newspaper.

6. ——: ——: ——: ——. License board has no authority, by resolution or otherwise, to designate the newspaper in which the publication of notices of applications for license shall be made.

7. **Findings:** EVIDENCE: REVIEW. Findings of the trial court, when sustained by sufficient evidence, will not be disturbed on review.

ERROR from the district court of Douglas county. Tried below before FAWCETT, DICKINSON, and BAKER, JJ. *Affirmed.*

Edward W. Simeral, for plaintiff in error.

Hall & McCulloch, contra.

NORVAL, J.

Kitchen Brothers Hotel Company presented an application to the board of fire and police commissioners of the city of Omaha for license to sell intoxicating liquors in said city. Notice of the filing of the application was published in the Omaha *Daily World-Herald*, and before the hearing N. P. Feil filed with said board a protest or remonstrance against the issuance of the license upon the following grounds:

"1. Notice of the application was not published in the

newspaper published in Douglas county, having the largest *bona fide* circulation therein.

"2. There is no legal newspaper printed or published in said county known as the Omaha *Daily World-Herald*, as set forth in the affidavit of publication attached to the notice.

"3. Neither the *Morning World-Herald* nor the *Evening World-Herald* has as large a *bona fide* circulation in Douglas county as the Omaha *Evening Bee*.

"4. That the applicant did not publish the notice in good faith, believing that the same was inserted in the newspaper having the largest circulation in the county."

At the hearing before the board the remonstrance was overruled, and a license was ordered issued as prayed. The remonstrator prosecuted an appeal from the decision to the district court, where the matter was heard before Judges Baker, Dickinson, and Fawcett, who made special findings of fact, among others the following:

"First. The contents of the *Morning World-Herald* and *Evening World-Herald* of the same date are not substantially the same, and they do not constitute one newspaper.

"Second. That the Omaha *Evening Bee* was a newspaper published in Douglas county of the greater circulation therein, and that the notice for the license was not inserted in the newspaper having the largest circulation in the county.

"Third. That applicant acted in good faith in making its choice of a newspaper in which to publish its said notice."

Upon the strength of this last finding the court affirmed the order and decision of the license board, Judge Dickinson dissenting from the first finding, all the judges concurring in the second, and Judge Fawcett dissenting from the last finding as well as the judgment of affirmance based thereon.

It is argued in the brief of counsel for applicant that the remonstrator has no standing in court to object to

the issuance of the liquor license, and that the judgment should be affirmed, because the remonstrance is by N. P. Feil, manager of the Bee Publishing Company, and was not filed for the public good, but as a mere business proposition. The protest or remonstrance on its face shows that it was made by Mr. Feil as an individual, and not in any representative capacity whatever. It is a fact it was developed on the trial that remonstrator was the business manager of the corporation which publishes the Omaha *Evening Bee* and other newspapers, and that a favorable decision might inure to the benefit of the corporation of which he was the representative. But these considerations did not make Mr. Feil an incompetent remonstrator, or preclude him from demanding that applicant should comply with the plain requirements of law by publishing the notice of its application for a license in the newspaper published and having the largest circulation in Douglas county. The statute does not specify that disinterested persons alone shall be competent remonstrators against the granting of license to sell intoxicating liquors, and this court has neither the inclination nor the power to interpolate into the statute a provision neither in express terms nor impliedly adopted by the lawmaking body. As we view the statute, any person, though interested, may protest against the granting of a liquor license, if sufficient cause or ground therefor exists. Whatever may have been the motive which induced or prompted Mr. Feil to take the step he did, there can be no doubt that he was not disqualified from doing so.

The proof of the publication attached to the copy of the notice of the application states substantially that such notice was published the requisite period of time in the Omaha *Daily World-Herald*. One of the grounds of protest is that no such newspaper is published in Douglas county. The proofs adduced on the hearing before the board of fire and police commission disclose beyond the possibility of a doubt that no newspaper is

published in Douglas county under the heading or name of "Omaha *Daily World-Herald*," but that said term is employed to designate the *Morning World-Herald* and *Evening World-Herald* published at Omaha by the same corporation. Both publications are entered in the mails and postage is paid thereon as the *Daily World-Herald*. In view of these facts, suppose an indictment should be returned charging the accused with the publication of a certain libelous article in the Omaha *Daily World-Herald*, could a conviction be had by proof of the insertion of such article in the *Morning World-Herald* or *Evening World-Herald*, or both of them combined? Clearly not, since there would be a fatal variance between the averments and proofs. So in the case at bar there is a failure of evidence to establish that any newspaper is published in Douglas county under the particular heading or name stated in the proof of publication filed with the license board. But this fact alone did not divest such board of jurisdiction to grant a license to appellant herein, for the evidence is clear and undisputed that the notice in question appeared for the length of time required by law in the *Morning World-Herald* and in the *Evening World-Herald* as well. If these publications constituted a single newspaper, having the largest circulation in Douglas county, the remonstrance was without merit, and must fail in its purpose.

Counsel for appellants insist that the *Morning World-Herald* and the *Evening World-Herald* are the morning and evening editions of the same paper, and constitute a single newspaper. In *Rosewater v. Pinzenscham*, 38 Neb. 845, it was said: "Whether or not the several editions of a daily paper are separate and distinct publications is a question of fact to be determined from the proof, in the first instance, by the license board. If the matter published in each edition of a daily paper is not substantially the same, and each edition has a different heading or name, and is sent to different subscribers, it would be quite clear that the combined circulation of all

cannot be counted, for the purpose of ascertaining the newspaper in which notices like the one in question should be published. * * * All that the law requires is that the notice shall be published in the newspaper having the largest circulation in the county. If several editions of a daily paper in fact constitute but one paper, then the notice must be published in each of said editions. If each edition is a separate and distinct publication, a publication in one, if the same has the largest circulation in the county, will be sufficient." No reason has been suggested for departing from the doctrine above stated, and it will be adhered to at this time. It is conceded by counsel for applicant that the *Morning World-Herald* and the *Evening World-Herald* usually are not delivered to the same subscribers, and for the purposes of this case, that the circulation of the Omaha *Evening Bee* at the time of the trial exceeded that of either the *Morning* or *Evening World-Herald.* It required no argument to show that publications claimed to be the two editions of the *World-Herald* are not published under the same heading or name, one being called the *Morning World-Herald* and the other the *Evening World-Herald.* It may be, as suggested in argument, that the words "Morning" and "Evening" are merely descriptive of the time of day the publications are made, but each word is none the less a portion of the name or heading of the publication.

A question quite analogous to the one we are considering was determined in *Russell v. Gilson*, 36 Minn. 366. The county board of Hennepin county designated the Minneapolis *Tribune* as the paper in which the delinquent tax list and notice should be inserted. The publication was made in the Minneapolis *Weekly Tribune*, which paper was published by the same company that issued the Minneapolis *Daily Tribune.* It was held there was no legal publication of the list and notice, the court saying: "In short, there was no paper of the name designated by the board, and the one in which the list and notice was published was not any paper designated by

the resolution. It is immaterial that both papers were published by the same company. It is the newspaper, and not the publisher, that is required to be designated. Although a part of the name of each was common to both, yet the names of the two papers were just as different as if, for example, one had been called 'The Minneapolis Commercial Tribune,' and the other 'The Minneapolis North Star Tribune.'"

In the present case we do not wish to be understood as holding that the difference in the names "*Morning World-Herald*" and "*Evening World-Herald*" alone is sufficient to establish that they constitute two newspapers and not merely two editions of the same paper. Another element is to be taken into consideration in determining the question in dispute, namely, are the contents of the *Evening World-Herald* and the *Morning World-Herald* substantially the same? The court below expressly found that the contents of these two publications issued on the same day, or the editions of one newspaper, as claimed by counsel for applicant, are not substantially alike, and that such publications do not constitute a single newspaper. As already indicated, the court below likewise found that the Omaha *Evening Bee*, at the date of the hearing before the license board, had the largest circulation in Douglas county of any newspaper then published therein. This court is unanimous in the opinion that these findings are sustained by the proofs. It can serve no useful purpose to discuss the evidence, or to point out the particular portions thereof upon which we base our conclusion. The facts are perfectly familiar to both parties to this controversy, and it would unduly prolong this opinion, and that too without profit, to set out a synopsis of the testimony. We decline in this case, in obedience to the universal rule obtaining in this court, to disturb a finding based upon sufficient competent evidence.

There is another important inquiry which is presented by the record, and that is, did the Kitchen Brothers

Hotel Company act in good faith in the selection of the newspaper in which the notice of the application for a license was inserted? If bad faith cannot be imputed to it in that regard, then, under the rule announced in *Lambert v. Stevens*, 29 Neb. 283, and *Rosewater v. Pinzenscham*, 38 Neb. 835, the license was properly granted. The record shows that prior to the filing of the application for license the board of fire and police commissioners of the city of Omaha adopted the following resolutions, which were spread upon the records of said board:

"*Resolved*, That the liquor dealers are hereby advised that under the law they should publish their notices in the newspaper of largest circulation in Douglas county for two weeks, and that these publications should be completed before the expiration of their present licenses.

"*Resolved*, That this board will abide by and recognize the decision of the board made upon the 3d day of January, 1896, wherein, after an investigation, it was found that the *Daily World-Herald* was the paper of the largest circulation in Douglas county, until the further order of this board."

The adoption of the foregoing had some influence with the applicant herein in determining the newspaper in which the notice of its publication should be inserted. In *Rosewater v. Pinzenscham, supra*, we condemned, as being unauthorized, the practice of license boards designating the newspaper in which the publication of notices like the one before us should be made. We adhere to everything we then said upon the subject, and emphasize our disapproval of the adoption of the foregoing resolutions, as tending to unduly influence liquor dealers, druggists, and saloon-keepers in the publication of notices of their applications for liquor licenses. The evidence introduced to establish the good faith of the applicant herein is quite unsatisfactory, but we are all agreed that bad faith is not so clearly made by the evi-

dence as to justify us in disturbing the finding of the court below on that question. The judgment is accordingly

AFFIRMED.

JOHN C. DREXEL ET AL. V. FRANK S. PUSEY, TRUSTEE, ET AL.

FILED DECEMBER 8, 1898. No. 8514.

1. **Bills and Notes:** INDORSEMENT IN BLANK: PAROL EVIDENCE. When one not a payee signs his name in blank upon the back of a promissory note before the delivery thereof, the law presumes he signs as maker; but as between the original parties and those not innocent purchasers of the paper for value and without notice the true character of the obligation assumed, as that he signed as accommodation indorser or grantor, may be shown *aliunde* and by parol.

2. ———: INDORSEMENTS: LIABILITY OF INDORSER. Where, at the inception of a note, a person other than the payee writes his name on the back of the instrument preceded by the words "Notice and protest waived," such indorsement is notice to the original payee and subsequent owners of the paper that the liability assumed is not that of a joint maker.

3. **Principal and Surety:** JUDGMENT: RELEASE OF LIEN. The release of property of the principal debtor from the lien of a judgment rendered on a note, without the consent or knowledge of an accommodation indorser, discharges the latter *pro tanto.*

4. ———: ———. The rendition of a judgment against principal and surety on a note, without having judicially determined on the record which defendant was the principal debtor and which the surety, in accordance with section 511 of the Code of Civil Procedure, does not extinguish the relation of suretyship between the parties, and the duties of the creditor with reference thereto.

5. ———: ———. *Potvin v. Meyers*, 27 Neb. 749, distinguished.

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

The opinion contains a statement of the case.

G. W. Shields, F. C. O'Hollaren, and *Read & Beckett,* for plaintiffs in error:

As to Pritchett or his assigns, Coffman bore no different relation to the note than Morrison, Meadimber, or Boyd. Where one, not the payee, writes his name on the back of a promissory note before delivery, he is a maker and held as though he had signed on its face. (*Draper v. Weld*, 13 Gray [Mass.] 580; *Eisley v. Horr*, 42 Neb. 3; *Rice v. Cook*, 71 Me. 559; *Boothby v. Woodman*, 66 Me. 389; *Baker v. Briggs*, 8 Pick. [Mass.] 122; *Chaffee v. Jones*, 19 Pick. [Mass.] 260; *Martin v. Boyd*, 11 N. H. 385; *Currier v. Fellows*, 27 N. H. 366; *Carpenter v. McLaughlin*, 12 R. I. 270; *Chaffe v. Memphis, C. & N. R. Co.*, 64 Mo. 193; *Colburn v. Averill*, 30 Me. 310; *Norton v. Coons*, 6 N. Y. 33; *Knapp v. Parker*, 6 Vt. 642; *Flint v. Day*, 9 Vt. 345; *Schultz v. Howard*, 65 N. W. Rep. [Minn.] 363; *Gumz v. Giegling*, 66 N. W. Rep. [Mich.] 48; *Peninsular Savings Bank v. Hosie*, 70 N. W. Rep. [Mich.] 890; *Jackson Bank v. Irons*, 18 R. I. 718; *Flint v. Day*, 9 Vt. 345; *Sanford v. Norton*, 14 Vt. 228; *Strong v. Riker*, 16 Vt. 554; *Moor v. Folsom*, 14 Minn. 260; *Schmidt v. Schmaelter*, 45 Mo. 502; *Lincoln v. Hinzey*, 51 Ill. 435.)

Coffman was not discharged from liability by the release of Morrison's property from the lien of the judgment. (*Neel v. Harding*, 2 Met. [Ky.] 247; *Wilson v. Foot*, 11 Met. [Mass.] 287; *Murray v. Graham*, 29 Ia. 520; *Shriver v. Lovejoy*, 32 Cal. 574; *Orvis v. Newell*, 17 Conn. 97; *Goodman v. Litaker*, 84 N. Car. 8; *Torrence v. Alexander*, 85 N. Car. 143; *Paul v. Berry*, 78 Ill. 158; *Vary v. Norton*, 6 Fed. Rep. 808; *McCarter v. Turner*, 49 Ga. 309; *Roberts v. Bane*, 32 Tex. 385; *Draper v. Weld*, 13 Gray [Mass.] 580; *Gipson v. Ogden*, 100 Ind. 20; *Yates v. Donaldson*, 5 Md. 389.)

Coffman, by the rendition of a joint judgment against him on the note, is estopped from setting up that he was an accommodation indorser, and not a joint maker of the note. (*Sturtevant v. Randall*, 53 Me. 149; *Lenox v. Prout*, 3 Wheat. [U. S.] *520; *McNutt v. Wilcox*, 1 Free. Ch. [Miss.] 116; *Paul v. Berry*, 78 Ill. 158; *La Farge v. Herter*, 3 Den. [N. Y.] 157; *Findlay v. Bank of United*

States, 2 McLean [U. S.] 44; *Pole v. Ford*, 2 Chit. [Eng.] 125; *Bay v. Tallmadge*, 5 Johns. Ch. [N. Y.] 305; *Dougherty v. Richardson*, 20 Ind. 412; *Laval v. Rowley*, 17 Ind. 36; *Potvin v. Meyers*, 27 Neb. 749.)

Edward W. Simeral, contra.

References: *Salisbury v. First Nat. Bank of Cambridge*, 37 Neb. 872; *Minick v. Brock*, 41 Neb. 512; *Chambers v. Cochran*, 18 Ia. 159; *Young v. Morgan*, 89 Ill. 199; *Matzen v. Shaeffer*, 65 Cal. 81; *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 548.

NORVAL, J.

This suit was instituted by Frank S. Pusey, trustee, and Victor H. Coffman to enjoin the collection of a judgment at law, and from a decree rendered in their favor the defendants have prosecuted error.

Edward C. Pritchett loaned Charles T. Taylor the sum of $3,000, and the latter gave a promissory note for that amount executed by himself, and four other persons also signed the same as sureties. On June 1, 1891, this note was surrendered to Taylor on the giving of a renewal note, a copy of which follows:

"$3,000 OMAHA, NEB., June 1, 1891.

"Six months after date we, or either of us, promise to pay to Edward C. Pritchett, or order, three thousand dollars at the Merchants National Bank of Omaha, Nebraska, with interest at the rate of ten per cent per annum from date until paid.

"C. T. TAYLOR.
"MORRIS MORRISON.
"THOMAS F. BOYD.
"E. D. MEADIMBER."

Prior to the delivery of this note to the payee the plaintiff Victor H. Coffman, at the request of Taylor, indorsed the same as follows: "Notice and protest waived. V. H. Coffman." Neither Morrison, Boyd, Mead-

imber, nor Coffman received any portion of the consideration for either of said notes. The latter was an accommodation indorser merely, and Morrison, Boyd, and Meadimber signed the note upon its face as makers, so far as Coffman at the time had any knowledge, although in fact they executed the instrument as sureties of Taylor. On April 4, 1892, Pritchett obtained in the district court of Douglas county a joint judgment on said renewal note for the sum of $3,200 against Coffman and the four persons who signed on the face of the instrument, which judgment was assigned to one Hugh McCaffrey, who, without the knowledge or consent of Coffman, in consideration of Morrison's paying one-half of the amount of said judgment, released in writing, from the lien of such judgment, real estate of the latter of the value of $60,000. Subsequently McCaffrey, for value, assigned the judgment to the defendant James C. Jamison, who caused an execution to be issued thereon, which was delivered to the defendant Drexel, as sheriff. The writ was levied upon certain real estate upon which the judgment was a lien, but which real estate, prior to such levy, Coffman had transferred by warranty deed to the plaintiff Pusey, subject to a mortgage of $7,500 in favor of Kimball-Champ Investment Company, which was on record prior to the rendition of said judgment. Upon these facts the trial court finds that Coffman was an accommodation indorser, and was not liable to contribute as between those co-sureties who signed the note on its face as makers, and that the release from the lien of the judgment of the real estate of Morrison by McCaffrey released Coffman from all liabilities upon said judgment.

It is argued in the brief of defendants below that, as to Pritchett or his assigns, Coffman bore no different relation to the note from Morrison, Meadimber, or Boyd. The three persons last above named unquestionably were joint makers with Taylor and were his sureties. The rule in this state is when one not a payee signs his name in blank upon the back of a promissory note be-

fore the delivery thereof to the payee, the presumption is he signed as maker; but as between the original parties and those not innocent purchasers of the paper for value and without notice, parol evidence is admissible to show the true character of the obligation assumed, as that he signed as accomodation indorser or grantor. (*Salisbury v. First Nat. Bank of Cambridge*, 37 Neb. 872.) Pritchett knew that Taylor was the principal debtor and that Coffman was merely an accommodation indorser or grantor. Neither McCaffrey nor Jamison purchased the note, but they bought the judgment entered thereon. It appeared upon the face of the record in the case in which the judgment was obtained that Coffman signed the note: "Notice and protest waived. V. H. Coffman." This was sufficient to charge them with notice that Coffman's relation to the paper was other than that of joint maker, and evidence *aliunde* was admissible to show the real intention. There is not the least room to doubt that Coffman was an accommodation indorser, and not a co-surety with Morrison, Boyd, and Meadimber, but a surety for all of them and Taylor. If Coffman were a joint maker and co-surety with the signers on the face of the note other than Taylor, the cases cited in the brief of defendants would be in point here, but as Coffman is entitled to the rights of an accommodation indorser, those decisions are not entitled to consideration as precedents against the proposition that he was discharged from liability by the release of Morrison's property, since the latter, as to Coffman, was the principal debtor, and the general rule is that the release of property of the principal without the knowledge and consent of the surety will discharge the latter *pro tanto*. (*Dixon v. Ewing*, 3 O. 281; *Blazer v. Bundy*, 15 O. St. 57; *Trotter v. Strong*, 63 Ill. 272.)

It is argued that Coffman, by the rendition of a joint judgment against him on the note, is estopped from setting up that he was an accommodation indorser, and not a joint maker of the note. Authorities are cited in the

brief which fully sustain the contention of counsel, but an examination of the adjudicated cases discloses that there is some conflict in the decision on the subject. We adopt that which is deemed the better rule, namely, that the judgment entered on the note did not preclude Coffman from proving that he signed as accommodation indorser merely, and from insisting that he was discharged by the release by the judgment creditor of the property of Morrison. Judge Dillon, in *Chambers v. Cochran*, 18 Ia. 160, said: "It is true that in the case at bar the note upon which the plaintiff's judgment was founded did not disclose on its face that Brock was surety, but, conformably to the decisions of other courts (*Carpenter v. King*, 9 Met. [Mass.] 511, and authorities there referred to), this court held that the fact of suretyship may be shown *aliunde* and by parol. (*Kelly v. Gillespie*, 12 Ia. 55; *Corielle v. Allen*, 13 Ia. 289.) And as a judgment does not abrogate the independent and collateral fact of suretyship, this relation continues even after judgment, and the creditor cannot violate the duties which a knowledge of this relation imposes upon him without being answerable for the consequences of such violation." The same principle is laid down in the authorities which follow: 1 Brandt, Suretyship sec. 40; *Bangs v. Strong*, 4 N. Y. 315; *Trotter v. Strong*, 63 Ill. 272; *Moss v. Pettingill*, 3 Minn. 145; *Manufacturers & Mechanics Bank v. Bank of Pennsylvania*, 7 W. & S. [Pa.] 335; *Hubbel v. Carpenter*, 5 Barb. [N. Y.] 520; *Commercial Bank of Lake Erie v. Western Reserve Bank*, 11 O. 444; *Commonwealth v. Miller*, 8 S. & R. [Pa.] 452; *Duffield v. Cooper*, 87 Pa. St. 443; *Carpenter v. King*, 9 Met. [Mass.] 511; *Curan v. Colbert*, 3 Ga. 239; *Newell v. Hamer*, 4 How. [Miss.] 684; *Carpenter v. Devon*, 6 Ala. 718; *Rice v. Morton*, 19 Mo. 263; *Smith v. Rice*, 27 Mo. 505; *West v. Brison*, 99 Mo. 684. Shaw, C. J., in discussing the same question, in *Carpenter v. King*, 9 Met. [Mass.] 511, observed: "There is the same reason for admitting evidence *aliunde* to show the relations of parties who are joint

debtors in a judgment, as in a contract. *Prima facie*, they are equally as well as jointly liable. Take the common case of a bond, where on the face of it one is principal and the other surety, yet the judgment is joint. By the record, apparently, both are principal debtors. If the grounds of the judgment could not be inquired into, so as to rebut the presumption of an equal liability, the surety, in case of paying the judgment, would have no remedy over against his principal for money paid; and in case the principal should pay it, he would have an action against his own surety for contribution. If it can be inquired into, to adjust the relations of the debtors to each other, it can be to determine the relation of the creditor to each debtor, where the fact becomes material to the respective rights. Suppose the creditor himself holds collateral security of the principal; it has been often decided that the surety is entitled to the benefit of it, and if the creditor voluntarily surrenders it, he discharges the surety wholly or *pro tanto*. (*Hayes v. Ward*, 4 Johns. Ch. [N. Y.] 123.) Would not this principle apply as well after a joint judgment against the debtors as before? And yet it would involve the necessity of an inquiry into the judgment, to show that it was rendered on a contract in which one was principal and the other surety. The judgment is technically a security of a higher nature, but it is a security for the same debt or duty as the contract on which it is founded. (*Davis v. Maynard*, 9 Mass. 242.) So if a judgment be rendered on several demands, for some of which a third person is liable, but not for all, the fact may be shown by evidence *aliunde*. (*Stedman v. Eveleth*, 6 Met. [Mass.] 114.)"

It is urged that the rule announced in the foregoing authorities should not obtain in this state, in view of section 511 of our Code of Civil Procedure, which provides: "In all cases where judgment is rendered in any court of record within this state, upon any other instrument of writing, in which two or more persons are jointly and severally bound, and it shall be made to

appear to the court, by parol or other testimony, that one or more of said persons so bound signed the same as surety or bail for his or their co-defendant, it shall be the duty of the clerk of said court, in recording the judgment thereon, to certify which of the defendants is principal debtor and which are sureties or bail." The section further declares that the property of the principal debtor shall be exhausted before the property of the surety or bail shall be seized under execution. We discover nothing in this legislation which militates against the doctrine herein laid down. The provisions of said section were enacted for the benefit of the surety, and he may avail himself thereof if he so desires, and in case he obtains his relation to the principal debtor to be established by the judgment rendered on the debt, the law then points out the mode for the enforcement of the judgment. The purpose of the statute was to enlarge the legal rights of the surety by requiring the property of the principal to be first exhausted before levy on the property of the surety where the latter has caused his relation to be certified when the judgment is rendered, and not to take away or destroy the rights of the surety to be protected in his suretyship. But the surety is not required to have the entry made by the clerk as contemplated by statute, and the omission to do so will not bar him from thereafter asserting that he was liable as surety merely, and was discharged by the releasing by the creditor without his consent of the property of the principal debtor. In the action on the note Coffman did not ask that his relation to the other parties to the instrument be determined, nor was the matter passed upon by the court, and the judgment on the note is not *res judicata* of the question.

We have examined the two Indiana cases cited by defendants below, and find them readily distinguishable from the one with which we are dealing. In one of them (*Laval v. Rowley*, 17 Ind. 36) it appears that a joint judgment was recovered against the principal and surety on

a promissory note. There was no determination of the question of suretyship. The surety paid the judgment, and subsequently caused an execution to issue thereon and the property of the principal debtor to be sold thereunder. In the state of Indiana there are statutory provisions quite similar to our section 511, to which reference already has been had, and in addition the following: "When any defendant surety in a judgment * * * has been or shall be compelled to pay any judgment or any part thereof, * * * the judgment shall not be discharged by such payment, but shall remain in force for the use of the bail or surety, * * * and after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use." The court held that the surety having paid off the judgment without any judicial determination of his suretyship, he cannot sue out an execution on the judgment for his own use. Upon that decision we have no criticism to make. If we had a statute like the Indiana provision copied above, and Coffman had paid the judgment and was seeking to enforce contribution from the makers by execution on the judgment, then the decision in *Laval v. Rowley, supra*, would fairly be considered a precedent for us to follow. But as Coffman is not seeking contribution, but is complaining of the release of the property of one of the principal debtors exceeding in value the amount of the judgment, the Indiana case is without analogy.

In *Dougherty v. Richardson*, 20 Ind. 412, a joint judgment was entered against a principal and surety and the latter omitted to have himself declared a surety, and there was nothing on the record to indicate the relation he bore to his co-defendant. The judgment was assigned to a third party and real estate was purchased on the faith of the legal presumption that both judgment debtors were principals. It was held that the surety was estopped to set up against innocent third parties his true relation. The record in the case in which judgment was

rendered against Coffman disclosed that the latter was not in fact the principal debtor; hence he is not precluded in asserting his suretyship against the assignee of the judgment.

In *Day v. Ramey*, 40 O. St. 446, it appeared that Ramey & Co. recovered a joint judgment upon default against the principal and sureties on a promissory note payable to one Ogan, who sold and transferred the note to the judgment plaintiffs. The relation of principal and surety was not judicially determined. Execution was issued and levied on the real estate of the principal debtor, and the levy was subsequently abandoned without the consent of the surety. It was insisted in that case, as here, that the omission of the surety upon the rendition of the judgment against him to have entered upon the record that he was a surety, as authorized by the statute of Ohio identical with section 511 of our Code of Civil Procedure, precluded him from asserting that he was not the principal debtor. Dickman, J., in speaking for the court upon the question, observed: "It is urged that Herman Day did not avail himself of the statutory provision, and at the rendition of judgment on the promissory note secure the proper entry by the clerk, certifying which of the defendants was principal debtor and which surety. The statute was designed to enlarge the legal rights of the surety, and although by such omission Hiram Day lost the right of compelling the creditor to first exhaust the property of the principal debtor before his property could be taken in execution, he did not thereby lose any of his equitable rights as surety. The contract of the surety is with the creditor and not with the debtor, and the creditor who accepts a surety is none the less bound to notice the nature of his engagement, because he is required to first proceed against the goods or lands of the principal. After judgment was rendered against Hiram Day the relation between him and Oliver Day, as principal and surety, still continued, and he was then entitled to the same

privileges, and was discharged by the same acts of the creditor as before judgment. * * * In our view, therefore, Ramey & Co., by dismissing their second levy upon the property of Oliver Day, the principal debtor, and releasing the property levied on, discharged the surety, Hiram Day, to the extent of the value of the property so released."

The final argument advanced in the brief of counsel for defendants is that the case at bar is controlled by the decision in *Potvin v. Meyers*, 27 Neb. 749. In that cause a joint judgment was rendered upon default against the makers and indorser of a note. Execution was issued on the judgment, and the amount due thereon was paid by the indorser to the sheriff, and he returned the writ with the money to the clerk of the court, who paid the same to the judgment plaintiff. Afterwards he assigned the judgment to the defendant by whom the money was paid, who caused an execution to be issued and levied upon the real estate of one of his co-defendants, and the same sold. The district court, on motion, set aside the sale on the ground that the judgment had been satisfied prior to the issuance of the execution, which decision was approved by this court. That case was correctly determined. The judgment having been fully paid, nothing remained which could be assigned. But that decision is not in point here, inasmuch as the facts in the two cases are so materially unlike. The question now before the court was not decided in *Potvin v. Meyers, supra*, nor was it attempted to be determined. There the question of suretyship was made an issue in the application to set aside the sale, and the court found that the proofs did not show that this relation existed. Of course if the person paying the judgment was not the surety for this co-defendant, the right of contribution did not exist. It follows that the judgment now under review must be

AFFIRMED.

STATE OF NEBRASKA, EX REL. FORREST L. WHEDON, V. SIDNEY E. SMITH, COUNTY CLERK OF BUFFALO COUNTY.

FILED DECEMBER 8, 1898. No. 10427.

1. **Appearance:** JURISDICTION. A general appearance in an action by a defendant confers jurisdiction over his person, though no summons was ever served upon him.

2. **Jurisdiction.** Jurisdiction of the subject-matter is the power to hear and determine the cause.

3. ———: MANDAMUS. This court has original jurisdiction in actions of mandamus.

4. **Nominations:** OFFICES: COUNTY COMMITTEE: NOTICE OF MEETING. A nomination to public office made by four out of twenty-eight members of a county committee chosen by a political party is invalid, where previous notice of the time and the place of the meeting of the committee has not been given to the other members thereof.

ORIGINAL application for mandamus to compel respondent to omit from official ballots the names of persons whose nominations were invalid. *Writ allowed.*

H. M. Sinclair, for relator.

F. E. Beeman, contra.

NORVAL, J.

This was a petition for a peremptory mandamus to compel the respondent, as county clerk of Buffalo county, to print the official and sample ballots for the general election in November, 1898, without names of J. M. Easterling and Emery Wyman as nominees of the democratic party for representatives of the fifty-eighth representative district. To the application the respondent demurred for the reasons following: (1.) The court has no jurisdiction over his person or the subject-matter. (2.) The petition does not state sufficient facts to constitute a cause of action. Just prior to the said election a

submission was taken on the demurrer, its sufficiency was sustained, and a peremptory writ was awarded as prayed. This opinion is filed in pursuance of the announcement then made.

We are all agreed that jurisdiction over the person of the respondent was acquired by his entering a general appearance herein by counsel, without the issuance and service of a summons in the cause. (*South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank*, 45 Neb. 29.)

The question of jurisdiction of the subject-matter in this kind of a proceeding ought to be no longer an open one in this state. Jurisdiction has been entertained of similar causes in *State v. Allen*, 43 Neb. 651, and *Woods v. State*, 44 Neb. 430, and the recent case of *State v. Clark*, 56 Neb. 584, although the question of jurisdiction was not raised in any of them, but was necessarily involved in all. The last was an original application for mandamus to require the county clerk of Nuckolls county to place on the ballots for use at the election held in November last the name of Joseph Patterson as candidate for county commissioner. Certificate of his nomination in due form had been filed with the respondent therein, yet he declined to recognize the validity of the certificate and refused to place the name of Patterson upon the ballots as the nominee for said office. A peremptory writ issued. In *State v. Piper*, 50 Neb. 25, the question of jurisdiction of this court over the subject-matter was squarely raised, and decided adversely to the contention of the respondent herein. RYAN and IRVINE, CC., did not sit in the cause, and RAGAN, C., filed an opinion dissenting from the conclusion of the court on that proposition. The decision on that point was followed in *State v. Piper*, 50 Neb. 39, 40, 42. In the opinion reported in 50 Neb. 25 this court, in passing upon the jurisdictional question, after quoting section 136, chapter 26, Compiled Statutes 1895, said: "A mere reading of the foregoing is sufficient to disclose that it was the purpose of the legislature to give to the secretary of state, or other officer

with whom certificates of nomination are required to be filed, the power, in the first instance, to pass upon all objections to such certificates or nomination papers, and whose decision in the premises is at the furthest limit to be regarded as final, where no 'order shall be made in the matter by the county court, or by a judge of the district court, or by a justice of the supreme court at chambers,' within the time fixed by the statute. If the determination of the secretary of state is absolutely final, it could not anywhere else be questioned. That his decision is not necessarily conclusive follows from the fact that the statute has made provision for reviewing the same, or rather for the determination of the questions by the county court, or by a judge of the district or supreme court. Whether that portion of the act is valid which attempts to confer power in such matters upon a judge of this court at chambers has been seriously doubted,—so much so that the present judges have not entertained such jurisdiction. The rulings of the secretary of state could be deemed final only when not reviewed by the court or officer authorized by the statute so to do, and when he properly determines such questions alone as he is empowered by law to decide; that is, when he has proceeded legally and within his jurisdiction. If he has acted illegally, or without jurisdiction, his decision is without validity. Suppose a certificate of nomination should be filed after the statutory period, and he should determine to certify the names of the nominees therein mentioned; his action would not be conclusive or binding. Or should he refuse to certify the names of the candidates mentioned in a certificate in due form, who were properly nominated, and against such certificate no protest has been filed; his action would not be final, even though no order had been made in the premises by the court or judge mentioned in the law, and most assuredly mandamus would lie to compel him to certify the names of such nominees to the county clerks, because the duty is purely a ministerial one en-

joined by law, involving no discretion. Again, should the secretary of state determine which of two rival conventions of the same political party was the regular convention, where both were called and held in accordance with the usages of the party, and each made nominations in good faith and certified the same in due form to him within the statutory time, and should certify the names of one set of candidates and decline to certify the other, mandamus could be invoked against him. His decision would not be final should he, without a hearing of objections properly made and filed to a certificate of nomination, determine that the names of the candidates therein mentioned should or should not appear upon the official ballot. There are many other instances which might be given where mandamus would be the appropriate proceeding to compel the secretary of state to act. Clearly it was not the purpose of the election law to take away the right theretofore conferred upon the courts to compel by mandamus the performance by an officer of a purely ministerial duty enjoined by law." We adhere to that decision. It is true said chapter has not conferred upon this court power to control the action of the county clerk or other officer, whose duty it is made by statute, in the first instance, to pass upon questions of the validity of nominations and whose names shall appear upon the official and sample ballots, but that is no valid argument against the power of this court to hear and determine this controversy. The constitution and the statute have conferred original jurisdiction upon this court in mandamus, and no other or further authority is required to entertain the action. Jurisdiction is the power to hear and decide a legal controversy, and there is no escaping the conclusion that the court has cognizance of the subject of the cause. The question of the jurisdiction of the subject-matter is not whether this is a proper case for the issuance of a writ of mandamus, but has this court the power to hear and decide the matter. We entertain no doubt of it. (*State v. Elliott*, 48 Pac. Rep. [Wash.] 734.)

The sufficiency of this petition to entitle relator to the relief demanded remains to be considered, and this involves the question of the right of J. M. Easterling and Emery Wyman to have their names appear upon the ballots as nominees of the democratic party for representatives of the fifty-eighth representative district, comprising the county of Buffalo. The respondent insists that under the averments of the petition, which the demurrer admits to be true, they have such right. The petition, or application for the writ, discloses that on September 24, 1898, a democratic convention for said district and county was held in the city of Kearney, which convention named a candidate for county attorney, and adjourned without making any nominations for the offices of representatives, but chose a county central committee composed of twenty-eight members, elected a chairman and secretary of said committee, and adopted a resolution authorizing and empowering said central committee to fill any vacancy or vacancies that then existed or should thereafter occur upon the ticket; that on October 1, 1898, five members of said committee met, with the chairman, without the entire membership of the committee having been notified of such meeting, and nominated said Easterling and Wyman as candidates of the democratic party for representatives; that thereafter there was filed with the respondent a certificate in due form of their nominations, and within three days thereafter relator filed with the county clerk a protest against said nominations, and to the placing of their names on the official ballot for the said district as nominees of the democratic party for the said offices, setting up in such protest, as grounds of objection, the facts already stated. A hearing was had thereon before the respondent, who overruled the objections, after making the following findings of fact and conclusions of law:

"1. That said democratic county convention assembled on the 24th day of September, 1898, in the city of Kearney, but did not make nominations for said offices, but

selected a county central committee, as set forth in said objections, and passed the resolution attached to said certificate of nomination. That said committee was composed of at least twenty-three members, besides its chairman and secretary.

"2. That on the 26th day of September nineteen members of the said committee were notified by a postal card sent by the chairman and addressed to each member at his post office address, stating, in substance, that on October 1, 1898, at his office, in the city of Kearney, at 2 P. M., a meeting of said committee would be held to consider the advisability of filling or putting on the democratic ticket nominees for said offices.

"3. That there was no evidence adduced, except in one instance,—the committeeman from Shelton township,—as to whether or not said notices were received by the absent committeemen, and on this point I make no finding. That only nineteen of the members of said committee were attempted to be notified.

"4. That on October 1, at the office of the chairman in the city of Kearney, five members of said committee met with the chairman and four of said members, with the chairman, made the nomination set forth in said certificate. I further find that W. S. Lampson, member from Elm Creek, was one of the five who met with the chairman but refused to participate in said nomination.

"5. I further find from evidence that it has been the usual custom of the democratic party in Buffalo county that in actions taken by the central committee, to act or take action, by those present, irrespective as to whether a majority of said committee were present or otherwise.

"CONCLUSIONS OF LAW.

"First. That said county central committee, by reason of their following their usual custom, had a legal right to act with a less number than a majority present, and that said committee therefore had the legal right to make said nominations evidenced by said certificate.

"Second. That said objections should be overruled and the names of the said candidates placed upon the official ballot as the democratic nominees for said offices. And it is so ordered."

It is unnecessary for the court at this time to decide whether the acts of a central or managing committee of a political organization, or party, are valid when taken at a meeting by a less number than a majority present and participating in accordance with party custom and usage, but assuming for the purpose of the present case that custom may control in the absence of specific directions given by the party, yet the pretended nominations of Easterling and Wyman cannot be sustained. They were not selected as candidates for said offices at a regular or stated meeting of the county central committee, but by a minority of the members thereof, who were specially convened for that purpose without notice to, or any attempt to notify all, the other members of the committee. It is not averred, nor did the respondent find upon the hearing had before him, that it was the custom or usage of the democratic party of Buffalo county in calling special meetings of the central committee not to notify each member thereof of the time and place fixed for convening; hence the usual rule applicable to other bodies or boards may be invoked. The authorities are quite uniform in holding that where a board or public body transacts business at a called or special session all members must have been given notice of the time and place of meeting in time to attend, or all must have been present, or such acts will be invalid. (*Lee v. Parry*, 4 Den. [N. Y.] 125; *Stewart v. Wallis*, 30 Barb. [N. Y.] 344; *Crocker v. Crane*, 21 Wend. [N. Y.] 211; *People v. Coghill*, 47 Cal. 361; *State v. Wilkesville Township*, 20 O. St. 288; *State v. James*, 4 Wis. 408; 19 Am. & Eng. Ency. Law 465.) This court held in *People v. Peters*, 4 Neb. 254, by LAKE, C. J., that a majority of a school district board cannot bind the district where the other members were absent and had not been notified of the meeting and

given an opportunity to attend. (See *Russell v. State*, 13 Neb. 69; *State v. Bemis*, 45 Neb. 724; *In re State Treasurer's Settlement*, 51 Neb. 116.) A nomination to fill a vacancy made by a minority of the county central committee was held void. (*In re Stucker's Nomination*, 18 Pa. Co. Ct. 227.) The following have more or less bearing upon the question before the court: *Schenck v. Peay*, 1 Woolw. [U. S.] 175; *North Carolina R. Co. v. Swepson*, 71 N. Car. 350; *In re Rogers and Sterr's Nomination*, 18 Pa. Co. Ct. 230; *In re Brown's Nomination*, 18 Pa. Co. Ct. 232; *In re Rutledge's Nomination*, 18 Pa. Co. Ct. 317; *In re Kooser's Nomination*, 18 Pa. Co. Ct. 360; *In re Hucy's Objection*, 19 Pa. Co. Ct. 138. As the entire membership of the county central committee was not notified of the meeting, or of the proposed action, the nominations in question are invalid, though party usage may have sanctioned the transaction of business by a minority of the body.

WRIT ALLOWED.

IRVINE, C.

The power of the court to review the action of the county clerk or secretary of state in such cases as the present has been sustained by former decisions in which I did participate. On principle I would agree with the dissenting opinion of RAGAN, C., in *State v. Piper*, 50 Neb. 25.

RAGAN, C.

I think the action of the democratic central committee absolutely void; but I still adhere to views expressed in *State v. Piper*, 50 Neb. 25.

ELIZABETH J. MCCONNIFF, APPELLEE, V. ALICE E. VAN DUSEN ET AL., DEFENDANTS, AND PRATT, SIMMONS & KRAUSNICK, APPELLANTS.

FILED DECEMBER 8, 1898. No. 8491

1. **Intervention:** TITLE TO PROPERTY. A person claiming ownership of property in litigation may, at any time before trial, become a party to the action by intervention, and have his claim adjudicated.

2. **Erroneous Judgment:** REVERSAL. A judgment based on an immaterial fact or an erroneous construction of a pleading will be reversed, unless the correctness of such judgment is otherwise affirmatively shown.

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

Harwood, Ames & Pettis, for appellants.

A. G. Greenlee, contra.

SULLIVAN, J.

Elizabeth J. McConniff brought this action in the district court of Lancaster county to foreclose a chattel mortgage made and delivered to her by Alice E. Van Dusen and R. J. Brydon. At the instance of the plaintiff, a receiver was appointed and the mortgaged property, which consisted of a stock of millinery goods, was taken from the possession of the mortgagors and sold at public auction under the direction of the court. Mrs. McConniff became the purchaser. Before the commencement of the trial the appellants Pratt, Simmons & Krausnick became a party to the action by intervention. They allege in their petition, with much elaboration, that they are the owners of a portion of the property in controversy; that the mortgagors purchased and obtained possession of the same by false representations touching their financial responsibility; that the sale was seasonably re-

scinded; that the plaintiff is not a *bona fide* purchaser, nor possessed, by virtue of her mortgage or otherwise, of any valid and enforceable claim, lien, right, or title. In due time issues were joined and a trial had, which resulted in a decree dismissing the interveners' petition. They appeal and bring before us for review the pleadings, motions, interlocutory orders, and final judgment. A bill of exceptions attached to the record was, for sufficient reason, quashed at a former term. The portion of the decree disposing of the claim of Pratt, Simmons & Krausnick is as follows: "This cause having been heretofore submitted to the court upon the evidence adduced, now comes on for final determination, and after due consideration, and the court being fully advised in the premises, finds that the claim of the interveners, Pratt, Simmons & Krausnick, set forth in their answer and cross-petition herein, has not been reduced to judgment, and that there is no equity in said interveners' answer and cross-petition. The court, therefore, finds the issues joined in favor of the plaintiff and that the action of the said defendants Pratt, Simmons & Krausnick herein shall be, and the same hereby is, dismissed at their costs, taxed at $31.68, and for which execution is hereby awarded; to which the said defendants Pratt, Simmons & Krausnick duly excepted."

The writer was at first inclined to think that the court intended to base its finding of the issues on the evidence adduced at the trial; but, as the result of a closer examination and more careful analysis of the language contained in the journal entry, we are all agreed that the interveners were cast in their action because the trial court found their claim had not been reduced to judgment and that their petition was deficient in equity. These reasons are insufficient. They do not justify the conclusion or judgment. The property in question, or its proceeds, was in the custody of the court. The interveners claimed a portion of it adversely to the original parties to the action. They averred facts in their peti-

tion showing the superiority of their title over the claims of other litigants. They were entitled to intervene and to a judgment in their favor if they succeeded in establishing the material allegations of their pleading. (Code of Civil Procedure, sec. 50*a*; *Holland v. Commercial Bank*, 22 Neb. 585; *Welborn v. Eskey*, 25 Neb. 195.) We know of no reason why it was necessary that their claim should be in judgment in order to give them a standing in court. They were asserting title to the property, not prosecuting a creditor's bill. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ANDREW D. RICKETTS, EXECUTOR, V. KATIE SCOTHORN.

FILED DECEMBER 8, 1898. No. 8526.

1. **Note:** GRATUITY: CONSIDERATION. A non-negotiable note given to the payee thereof as a gratuity, being nothing more than a promise by the payor to make a gift in the future of the sum of money therein mentioned, is without consideration, and cannot, except under special circumstances, be enforced by action.

2. ———: ———: ———: ESTOPPEL. A promissory note given by the maker to the payee to enable the latter to cease work, but without any condition being imposed or promise exacted, is without consideration and may be repudiated, in the absence of circumstances creating an equitable estoppel.

3. ———: ———: ———: ———. But where the payee of such an obligation has been induced to abandon a lucrative occupation in reliance on the note being paid, and has taken such action in accordance with the expectation of the maker, neither the latter nor his legal representatives will be permitted to resist payment on the ground that there was no consideration for the promise.

4. ———: ———: ———: ———. The note in suit was executed to the plaintiff by a relative to enable her to live without working; whereupon she abandoned the occupation in which she was engaged, and remained idle for more than a year. This action on her part was contemplated by the relative as the probable consequence of the execution of the note. *Held*, That want of consideration could not be alleged as defense.

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

The opinion contains a statement of the case.

Ricketts & Wilson, for plaintiff in error:

A promissory note which is not given for a valuable consideration, as distinguished from a good consideration, cannot be enforced. (*Stenberg v. State*, 48 Neb. 299; *Kirkpatrick v. Taylor*, 43 Ill. 207; *Blanchard v. Williamson*, 70 Ill. 647; *Pratt v. Trustees*, 93 Ill. 475; *Williams v. Forbes*, 28 N. E. Rep. [Ill.] 463; *Richardson v. Richardson*, 36 N. E. Rep. [Ill.] 608; *Fink v. Fink*, 18 Johns. [N. Y.] 145; *Hadley v. Reed*, 58 Hun [N. Y.] 608; *Hill v. Buckminster*, 22 Mass. 391; *Carr v. Silloway*, 111 Mass. 24.)

It was necessary to allege and prove a consideration. (*Courtney v. Doyle*, 92 Mass. 122.)

The question of consideration was one to be proved preliminary to the admission of the note in evidence, and it was for the court to decide this preliminary fact before admitting the note in evidence. (*Robinson v. Ferry*, 11 Conn. 460; *Merrill v. Berkshire*, 11 Pick. [Mass.] 269; *Bartlett v. Smith*, 11 Mees. & W. [Eng.] 483.)

Defendant in error's liberty to continue in her employment or to enter the employment of another was as untrammelled at the time and after she received the note as it had ever been, so far as the evidence shows. The evidence does not establish a consideration. (*Mecorney v. Stanley*, 62 Mass. 87; *Manter v. Churchill*, 127 Mass. 31; *First Nat. Bank of Arlington v. Cecil*, 32 Pac.Rep. [Ore.] 393.)

Where the controlling facts are undisputed, and different conclusions cannot be drawn therefrom, what the verdict should be is a question of law for the court, and it is the duty of the court to direct a verdict. (*Gardner v. Michigan C. R. Co.*, 150 U. S. 349; *Northern P. R. Co. v. Austin*, 24 U. S. App. 336; *Powell v. Powell*, 23 Mo. App. 365.)

Lamb & Adams, contra:

There was a sufficient consideration. (*Talbott v. Stemmons*, 89 Ky. 222; *Doyle v. Dixon*, 97 Mass. 213; *Parker v. Urie*, 21 Pa. St. 305; *Appeal of Clark*, 19 Atl. Rep. [Conn.] 322; *Emery v. Darling*, 33 N. E. Rep. [O.] 715.)

A promissory note imports a consideration. (*Flint v. Phipps*, 19 Pac. Rep. [Ore.] 543; *Wilson v. Wilson*, 38 Pac. Rep. [Ore.] 189.)

To uphold a contract, it is not necessary that the promisor should receive a consideration. It is sufficient if the promisee or other beneficiary sustains the least injury or detriment, or parts with anything of the least value on the faith of the contract. (*Houck v. Frisbee*, 66 Mo. App. 16.)

Forbearance from doing an act is evidence from which the jury may infer an agreement to forbear. (*Boyd v. Freize*, 5 Gray [Mass.] 553; *Walker v. Sherman*, 11 Met. [Mass.] 172; *Breed v. Hillhouse*, 7 Conn. 523.)

It is not necessary that a consideration should exist at the time the promise is made. Before revocation of the promise, performance of the acts required of promisee renders the promise obligatory. (*Train v. Gold*, 5 Pick. [Mass.] 380; *Hilton v. Southwick*, 17 Me. 303; *L'Amoreux v. Gould*, 57 Am. Dec. [N. Y.] 524; *Brown v. Ray*, 51 Am. Dec. [N. Car.] 379.)

The note was properly admitted in evidence. (*Stevenson v. Gunning*, 25 Atl. Rep. [Vt.] 697; *Martin v. Stone*, 29 Atl. Rep. [N. H.] 845.)

Additional references as to sufficiency of consideration: *Hamer v. Sidway*, 124 N. Y. 538; *Lindell v. Rokes*, 60 Mo. 249; *Earle v. Angell*, 157 Mass. 249; *Bretton v. Prettiman*, Sir T. Raym. [Eng.] *153; *Wilkinson v. Oliveira*, 27 E. C. L. [Eng.] 490.

SULLIVAN, J.

In the district court of Lancaster county the plaintiff Katie Scothorn recovered judgment against the defend-

ant Andrew D. Ricketts, as executor of the last will and testament of John C. Ricketts, deceased. The action was based upon a promissory note, of which the following is a copy:

"May the first, 1891. I promise to pay to Katie Scothorn on demand, $2,000, to be at 6 per cent per annum. J. C. RICKETTS."

In the petition the plaintiff alleges that the consideration for the execution of the note was that she should surrender her employment as bookkeeper for Mayer Bros. and cease to work for a living. She also alleges that the note was given to induce her to abandon her occupation, and that, relying on it, and on the annual interest, as a means of support, she gave up the employment in which she was then engaged. These allegations of the petition are denied by the executor. The material facts are undisputed. They are as follows: John C. Ricketts, the maker of the note, was the grandfather of the plaintiff. Early in May,—presumably on the day the note bears date,—he called on her at the store where she was working. What transpired between them is thus described by Mr. Flodene, one of the plaintiff's witnesses:

A. Well the old gentleman came in there one morning about 9 o'clock,—probably a little before or a little after, but early in the morning,—and he unbuttoned his vest and took out a piece of paper in the shape of a note; that is the way it looked to me; and he says to Miss Scothorn, "I have fixed out something that you have not got to work any more." He says, "None of my grandchildren work and you don't have to."

Q. Where was she?

A. She took the piece of paper and kissed him; and kissed the old gentleman and commenced to cry.

It seems Miss Scothorn immediately notified her employer of her intention to quit work and that she did soon after abandon her occupation. The mother of the plaintiff was a witness and testified that she had a conversation with her father, Mr. Ricketts, shortly after the

note was executed in which he informed her that he had given the note to the plaintiff to enable her to quit work; that none of his grandchildren worked and he did not think she ought to. For something more than a year the plaintiff was without an occupation; but in September, 1892, with the consent of her grandfather, and by his assistance, she secured a position as bookkeeper with Messrs. Funke & Ogden. On June 8, 1894, Mr. Ricketts died. He had paid one year's interest on the note, and a short time before his death expressed regret that he had not been able to pay the balance. In the summer or fall of 1892 he stated to his daughter, Mrs. Scothorn, that if he could sell his farm in Ohio he would pay the note out of the proceeds. He at no time repudiated the obligation. We quite agree with counsel for the defendant that upon this evidence there was nothing to submit to the jury, and that a verdict should have been directed peremptorily for one of the parties. The testimony of Flodene and Mrs. Scothorn, taken together, conclusively establishes the fact that the note was not given in consideration of the plaintiff pursuing, or agreeing to pursue, any particular line of conduct. There was no promise on the part of the plaintiff to do or refrain from doing anything. Her right to the money promised in the note was not made to depend upon an abandonment of her employment with Mayer Bros. and future abstention from like service. Mr. Ricketts made no condition, requirement, or request. He exacted no *quid pro quo.* He gave the note as a gratuity and looked for nothing in return. So far as the evidence discloses, it was his purpose to place the plaintiff in a position of independence where she could work or remain idle as she might choose. The abandonment by Miss Scothorn of her position as bookkeeper was altogether voluntary. It was not an act done in fulfillment of any contract obligation assumed when she accepted the note. The instrument in suit being given without any valuable consideration, was nothing more than a promise to make a gift in the future of the

sum of money therein named. Ordinarily, such promises are not enforceable even when put in the form of a promissory note. (*Kirkpatrick v. Taylor*, 43 Ill. 207; *Phelps v. Phelps*, 28 Barb. [N. Y.] 121; *Johnston v. Griest*, 85 Ind. 503; *Fink v. Cox*, 18 Johns. [N. Y.] 145.) But it has often been held that an action on a note given to a church, college, or other like institution, upon the faith of which money has been expended or obligations incurred, could not be successfully defended on the ground of a want of consideration. (*Barnes v. Perine*, 12 N. Y. 18; *Philomath College v. Hartless*, 6 Ore. 158; *Thompson v. Mercer County*, 40 Ill. 379; *Irwin v. Lombard University*, 56 O. St. 9.) In this class of cases the note in suit is nearly always spoken of as a gift or donation, but the decision is generally put on the ground that the expenditure of money or assumption of liability by the donee, on the faith of the promise, constitutes a valuable and sufficient consideration. It seems to us that the true reason is the preclusion of the defendant, under the doctrine of estoppel, to deny the consideration. Such seems to be the view of the matter taken by the supreme court of Iowa in the case of *Simpson Centenary College v. Tuttle*, 71 Ia. 596, where Rothrock, J., speaking for the court, said: "Where a note, however, is based on a promise to give for the support of the objects referred to, it may still be open to this defense [want of consideration], unless it shall appear that the donee has, prior to any revocation, entered into engagements or made expenditures based on such promise, so that he must suffer loss or injury if the note is not paid. This is based on the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the donor would be estopped from pleading want of consideration." And in the case of *Reimensnyder v. Gans*, 110 Pa. St. 17, 2 Atl. Rep. 425, which was an action on a note given as a donation to a charitable object, the court said: "The fact is that, as we may see from the case of *Ryerss v. Trustees*, 33 Pa. St. 114, a contract of the kind here in-

volved is enforceable rather by way of estoppel than on the ground of consideration in the original undertaking." It has been held that a note given in expectation of the payee performing certain services, but without any contract binding him to serve, will not support an action. (*Hulse v. Hulse*, 84 Eng. Com. Law 709.) But when the payee changes his position to his disadvantage, in reliance on the promise, a right of action does arise. (*McClure v. Wilson*, 43 Ill. 356; *Trustees v. Garvey*, 53 Ill. 401.)

Under the circumstances of this case is there an equitable estoppel which ought to preclude the defendant from alleging that the note in controversy is lacking in one of the essential elements of a valid contract? We think there is. An estoppel *in pais* is defined to be "a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Mr. Pomeroy has formulated the following definition: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy." (2 Pomeroy, Equity Jurisprudence 804.)

According to the undisputed proof, as shown by the record before us, the plaintiff was a working girl, holding a position in which she earned a salary of $10 per week. Her grandfather, desiring to put her in a position of independence, gave her the note, accompanying it with the remark that his other grandchildren did not work, and that she would not be obliged to work any longer. In effect he suggested that she might abandon her employment and rely in the future upon the bounty which he promised. He, doubtless, desired that she should give

up her occupation, but whether he did or not, it is entirely certain that he contemplated such action on her part as a reasonable and probable consequence of his gift. Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration. The petition charges the elements of an equitable estoppel, and the evidence conclusively establishes them. If errors intervened at the trial they could not have been prejudicial. A verdict for the defendant would be unwarranted. The judgment is right and is

AFFIRMED.

BLAIR STATE BANK, APPELLEE, V. JAMES H. STEWART, IMPLEADED WITH I. C. ELLER, ASSIGNEE, APPELLANT, ET AL.

FILED DECEMBER 8, 1898. No. 8388.

1. **Voluntary Assignments:** ASSIGNEES. An assignee under a deed of voluntary assignment represents creditors of the assignor only to the extent that he is expressly authorized to do so by statute.

2. **Fraudulent Conveyances:** RIGHT TO PREFER CREDITORS. A debtor in failing circumstances may, while retaining dominion over his property, pay, or secure, the claims of some of his creditors to the exclusion and detriment of others. Such transactions are valid unless tainted by actual fraud.

3. ———: AUTHORITY OF ASSIGNEE TO ASSAIL CONVEYANCE. A conveyance executed by an assignor before the assignment cannot be assailed by the assignee on the ground that it was made to hinder, delay, or defraud creditors, unless such creditors have previously authorized an action to be brought for that purpose.

4. **Unrecorded Mortgages.** An unrecorded mortgage is valid and effective between the parties thereto from the date of its execution; and it is not void as to creditors generally, but only as to creditors whose deeds, mortgages, or other instruments have been first recorded.

5. **Voluntary Assignments:** PREVIOUS CONVEYANCES. Conveyances made more than thirty days before the execution of a deed of voluntary assignment are not within the inhibition of either section 42 or section 43 of the assignment law. (Compiled Statutes, ch. 6.)

6. **Indemnity Mortgage:** FORECLOSURE: APPEAL: PARTIES: TRANSCRIPTS. Where, in an action by a surety to foreclose an indemnity mortgage, it appears from the pleadings that the proceeds of the sale of the mortgaged property are to go to the creditor, who is also a party to the action, such creditor is so interested in the controversy that he may, for his own benefit, prosecute an appeal from a judgment adverse to the surety.

APPEAL from the district court of Washington county. Heard below before BLAIR, J. *Reversed in part.*

Walton & Mummert, for appellant.

Osborn & Aye, Clark O'Hanlon, and *Davis & Howell, contra.*

SULLIVAN, J.

This action was brought by the Blair State Bank to foreclose a mortgage given to it by James H. Stewart upon his undivided one-half interest in certain real estate in the city of Blair. Grant Stewart, who held a junior mortgage on the same property, was made a party defendant and answered, asserting his lien and demanding a foreclosure of the same. I. C. Eller is the successor of the sheriff of Washington county, to whom James H. Stewart made a voluntary assignment for the benefit of his creditors on July 30, 1895. The mortgage to the bank was given to secure the repayment of money borrowed at the time of its execution. The mortgage to Grant Stewart was given as partial indemnity against possible loss resulting from his suretyship for his brother, James H. Stewart, upon sixteen notes executed to said bank and amounting in the aggregate to $15,375. These notes and the indemnity mortgage were made on the same day and were related parts of the same transaction. Although both mortgages were executed on October 27,

1894, they were not filed for record until a few hours before the assignment was made. The validity of these mortgages is assailed by the assignee on the ground that they were made and delivered in contravention of the general assignment law, and also on the ground that they were executed in violation of the statute forbidding fraudulent conveyances of property.

The position occupied by an assignee, under a deed of assignment, with reference to the assignor and the assignor's creditors, has been fully and definitely settled by the decisions of this court. In *Lancaster County Bank v. Gillilan*, 49 Neb. 165, the earlier cases in this state were reviewed and the conclusion reached that the assignee is essentially the representative of the assignor, and may assert on behalf of creditors only such rights as the statute expressly confers upon him. In the second point of the syllabus the doctrine of the case upon this subject is stated as follows: "Except as authorized by statute, the assignee under a voluntary assignment for the benefit of creditors may not assert rights beyond those which the assignor might assert in the absence of the assignment, the assignee, except as otherwise provided, representing the assignor and not the creditors." It being settled, then, that the assignment act gave to the assignee the only authority which he possessed to attack conveyances made by Stewart prior to the assignment, we proceed to inquire whether the mortgages in question were within the ban of the statute. The assignee relies on sections 42 and 43 of chapter 6, Compiled Statutes 1897. Section 42 has reference to transfers or conveyances made within thirty days prior to the assignment, with a view of preventing the property transferred or conveyed from coming to the assignee in insolvency, or for the purpose of preventing such property from being distributed under the law relating to insolvency, or to defeat, hinder, or evade, in any way, the operation of that law. Section 43 relates to acts done within thirty days before the assignment, whereby any creditor is pre-

ferred "in fraud of the laws relating to insolvency." That the mortgages in suit do not come under the inhibition of these sections of the act is entirely clear, for, according to the undisputed evidence, they were made at a time when an assignment was not contemplated by any of the parties. By the common law, Stewart possessed the right, while retaining dominion over his property, to apply it as he saw fit in payment of his debts, or in securing some of his creditors to the exclusion of others. The general assignment law, however, trenches upon this right. It condemns, under certain circumstances, and during a period of thirty days prior to the making of an assignment, every preference made to evade the assignment law, or to prevent the debtor's property from being distributed under its provisions. The transactions here considered occurred nearly nine months before the assignment to the sheriff of Washington county. It is probable that Stewart did not at that time consider himself insolvent, and it is quite certain he entertained no intention of taking advantage of the assignment law; consequently the mortgages were valid and created enforceable liens upon the property.

The assignee, however, contends that the mortgages did not become effective as to creditors until they were recorded, and that, within the knowledge of all the parties, an assignment was then not only contemplated but determined upon. This contention is based on section 16, chapter 73, Compiled Statutes 1897, which provides: "All deeds, mortgages, and other instruments of writing which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments, shall be first recorded; *Provided,* That such deeds, mortgages, or

instruments shall be valid between the parties." That the mortgages were valid between the parties thereto from the date of their execution will, of course, be conceded; and under the provisions of the section quoted it is perfectly plain that they were not void as to creditors generally, but only as to creditors whose deeds, mortgages, or other instruments should be first recorded. Such was the construction given the statute in *Galway v. Malchow*, 7 Neb. 285, and approved in later cases. (*Mansfield v. Gregory*, 8 Neb. 432; *Harral v. Gray*, 10 Neb. 186; *Hubbart v. Walker*, 19 Neb. 94; *Sheasley v. Keens*, 48 Neb. 57.) The general creditors of James H. Stewart can, therefore, claim nothing under section 16. They are not within its terms. It is not applicable to them.

In regard to the claim that the mortgages should be adjudged void on the ground that their suppression constituted a fraud on creditors who dealt with Stewart on the assumption that his realty was unincumbered, it is only necessary to remark that the assignee has not shown, by either pleading or proof, that he is in an attitude to attack the conveyances on that theory. Section 30 of the assignment law (Compiled Statutes, ch. 6) prescribes the conditions on which the assignee may invoke the aid of the court for the cancellation of conveyances made to hinder, delay, or defraud the creditors of the assignor in the collection of their claims against him. It is there provided that the assignee may institute an action to annul a fraudulent conveyance "upon the direction in writing of a majority in number of the creditors owning two-thirds in amount of all the claims proven against the estate at the time fixed for proving the same." The assignee in this case was without such direction from the creditors and could not lawfully move in the mater. The judgment in favor of the Blair State Bank is affirmed and the judgment against Grant Stewart is reversed. The cause is remanded to the district court with direction to render a decree foreclosing the mortgage of Grant Stewart and for such further proceed-

ing as may be necessary to the execution of both judgments.

Since the foregoing was written the assignee has filed an additional brief in which he insists that Grant Stewart has not appealed from the judgment and is, therefore, not entitled to any relief in this court. A stipulation relating to the settlement and use of the bill of exceptions recites that both Eller and Grant Stewart are severally prosecuting an appeal. It is true that Grant Stewart has not appeared here demanding a reversal of the judgment against him, but the bank, claiming to be the equitable owner of the indemnity mortgage, does ask for that relief. In his answer Grant Stewart alleges the facts in regard to the execution of the mortgage, shows that its conditions have been broken, and that by its terms he is entitled to a decree of foreclosure. He then asks that the mortgaged property be sold and that the proceeds of the sale, after paying off the senior lien, be paid to the bank and credited upon the notes signed by him as surety for his brother. In its reply the plaintiff asserts its claim to the proceeds of the sale under the second mortgage and concedes the right of Grant Stewart to have the same credited according to the prayer of his cross-petition. It is thus established by the pleadings that the bank is the real party in interest and therefore entitled to prosecute an appeal. It is an elementary principle of equity jurisprudence that the creditor is the equitable owner of, and entitled to enforce for his own benefit, any securities with which the principal debtor has indemnified his surety. The reason is that such securities are always given to insure the payment of the debt, and that consequently the surety holds them in trust for that specific purpose. (*Moses v. Murgatroyd*, 1 Johns. Ch. [N. Y.] 119; *Phillips v. Thompson*, 2 Johns. Ch. [N. Y.] 418; *Seibert v. True*, 8 Kan. 52; *New Bedford Institute for Savings v. Fairhaven Bank*, 9 Allen [Mass.] 175; *Thornton v. National Exchange Bank*, 71 Mo. 221; *Rice's Appeal*, 79 Pa. St. 168; *Osborn v. Noble*, 46 Miss. 449.)

The entire record is here, and any of the parties desiring to prosecute a cross-appeal has a right to do so without filing a second transcript. We adhere to the conclusion above announced.

JUDGMENT ACCORDINGLY.

BLAIR STATE BANK, APPELLANT, V. JAMES H. STEWART ET AL., APPELLEES.

FILED DECEMBER 8, 1898. No. 8493.

1. **Voluntary Assignments:** OTHER CONVEYANCES: POWERS OF ASSIGNEE. An assignee under a deed of general assignment cannot, without the written consent of creditors, assail a conveyance made by his assignor, except on the ground that such conveyance was in contravention of section 42 or section 43 of the assignment law. (Compiled Statutes, ch. 6.)

2. ———: FRAUDULENT CONVEYANCES. A conveyance or transfer made without any intention to contravene or evade the assignment law, and at any time when an assignment was not contemplated, is valid and will be upheld.

3. ———: ———. A mortgage which does not in its inception contravene the assignment law will not be invalidated by a general assignment for the benefit of creditors, made by the mortgagor within thirty days after the execution of the mortgage.

APPEAL from the district court of Washington county. Heard below before BLAIR, J. *Reversed.*

Osborn & Aye and *Clark O'Hanlon*, for appellant.

Walton & Mummert, contra.

SULLIVAN, J.

This case is closely related to another bearing the same title and decided herewith. (57 Neb. 58.) The action was brought by the Blair State Bank to foreclose two chattel mortgages given to it by James H. Stewart. One of these mortgages was given April 10, 1895, and the

other July 6 of the same year. Each secured the same indebtedness and covered substantially the same property. The second was apparently intended to supersede the first. On July 30, 1895, Stewart made a voluntary assignment for the benefit of his creditors. On the same day, and just before the deed of assignment was executed, the mortgage of July 6 was filed for record, and, claiming under it, the bank took instant possession of the mortgaged property. The assignee defends the action on the ground that the mortgages in question were executed in fraud of the rights of Stewart's creditors, and, also, on the ground that they are void under the provisions of the general assignment law. The findings and judgment were in favor of the assignee, and the plaintiff, by appeal, brings the record here for review.

In regard to the first defense it is only necessary to remark that the answer contains no allegation that the creditors have authorized the assignee to assail the conveyances on the theory that they were made for the purpose of hindering, delaying, or defrauding creditors of the mortgagor. Without averment and proof of such authority the defense is not available to the assignee. (*Blair State Bank v. Stewart*, 57 Neb. 58.)

Were the mortgages given in violation of the act of June 1, 1883, regulating voluntary assignments for the benefit of creditors? Sections 42 and 43 of the act are alone pertinent to this inquiry. Section 42 forbids any person who is either insolvent or contemplating insolvency from making, within a fixed period, any transfer or conveyance of his property with a view to prevent the same "from coming to the assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or to evade," the provisions of the assignment law. Section 43 forbids a debtor who is insolvent, or in contemplation of insolvency, from giving preferences, in any form, to creditors "in fraud of the laws relating to insolvency" during a period of thirty days before making an assign-

ment. The evidence conclusively establishes the fact that Stewart did not contemplate making an assignment when the mortgages in suit were executed, nor at any time prior to the day on which the assignment was made. It is equally certain that the Blair State Bank did not take its security with any idea that an assignment would shortly follow. Neither party to the transaction contemplated any fraud upon the assignment law. The conveyances were neither given nor received with a view of preventing the property involved from coming into the hands of an assignee in insolvency, or with the intention of preventing such property from being distributed under the provisions of the act relating to assignments. It is certainly the law that a debtor, though in failing circumstances, may, in the absence of statutory provisions forbidding, prefer one or more of his creditors to the exclusion and detriment of others. The transactions here considered did not contravene any provision of the assignment law. Stewart had no unlawful purpose in executing the mortgages, and the bank had no unlawful purpose in receiving them. The conveyances were legal and valid when made, and the assignment, which was Stewart's subsequent conception, could not reach back and annul them. (*Lake Shore Banking Co. v. Fuller*, 110 Pa. St. 156; *Manning v. Beck*, 129 N. Y. 1; *Benham v. Ham*, 5 Wash. 128; *Garretson v. Brown*, 26 N. J. L. 439; *Sweetzer v. Higby*, 63 Mich. 13, 29 N. W. Rep. 506.) The judgment is reversed and the cause remanded with direction to the district court to render a decree in favor of the plaintiff and carry the same into execution.

REVERSED AND REMANDED.

MARIA W. ALDEN, APPELLEE, V. GEORGE W. FRANK IMPROVEMENT COMPANY ET AL., APPELLANTS.

FILED DECEMBER 8, 1898. No. 8503.

1. **Assignability of Contract.** A contract imposing on a party having an interest in the profits of land purchased by another for speculation a duty to pay the taxes and make sales declared in the closing sentence "that the stipulations aforesaid are to bind the heirs, executors, administrators, and assigns of the respective parties." *Held*, That the contract was assignable.

2. **Contract:** CONSTRUCTION OF ASSIGNMENT. An assignment of the "right, title, and interest" of the party on whom such duty was imposed, construed in the light of surrounding circumstances and *held* to be an assignment of the benefits of the contract and not a repudiation of its burdens.

APPEAL from the district court of Buffalo county. Heard below before SINCLAIR, J. *Reversed.*

E. C. & H. V. Calkins, for appellants.

Dryden & Main, contra.

SULLIVAN, J.

Maria W. Alden brought this action in the district court to quiet and confirm her title to certain real estate in Buffalo county, and to procure the cancellation of a written agreement entered into between herself and the defendant George W. Frank in relation to said property. A trial resulted in a general finding in favor of the plaintiff and a decree in accordance with the prayer of the petition. The contract in question is as follows:

"This agreement, made this 22d day of July, 1897, between Maria W. Alden, whose post office is New York city, party of the first part, and George W. Frank, of Kearney, Nebraska, party of the second part, witnesseth: That the party of the first part, for the sum of three thousand and twenty-seven and 20-100 (3,027.20) dollars, having purchased at the instance of the party of the second

part, for the joint benefit of the parties to this agreement, the following described real estate, situate in Buffalo county and state of Nebraska, to-wit: The north half (N. ½) of the northwest quarter (NW. ¼) of section four (4), township eight (8), range sixteen (16) west, containing seventy-five and 68-100 (75 68-100) acres according to the government survey. Now, therefore, it is both well understood and agreed by and between the respective parties hereto that either party may at any time hereafter make sale of said real estate or any part thereof, subject to the approval of both parties, at the best price that can be obtained for the same, not less than the original cost and taxes paid thereon by the party of the first part, with interest on both cost and taxes at the rate of six per cent per annum; and the party of the second part is hereby authorized to sell and contract, in the name of the party of the first part, with any person or persons purchasing said real estate or any part thereof, upon such terms as to the mode and time of payment as he may judge for the interest of the parties hereto and as may be reasonable, and the said party of the first part, upon receiving notice, shall immediately execute to the purchaser thereof a conveyance in compliance with said sale and contract. All sales to be made subject to approval of both parties. The proceeds of each sale are to be applied as follows: First, in the payment to the party of the first part of all sums of money advanced for the purchase or real estate so sold, including all taxes paid thereon by the party of the first part, and interest on both purchase-money and taxes at the rate of six per cent per annum until returned to the party of the first part. Second, the residue shall be divided equally between the parties to this agreement, share and share alike. It is further agreed that the party of the first part shall furnish the necessary money to pay the taxes assessed upon the aforesaid real estate, it being the duty of the party of the second part to pay the taxes and to do and perform all the things necessary in the

selling of said real estate. It is further understood that the stipulations aforesaid are to bind the heirs, executors, administrators, and assigns of the respective parties."

On September 19, 1888, the defendant Frank made to his co-defendant, a corporation of which he was president, the following assignment, which was indorsed on the contract:

"I hereby sell and assign to the George W. Frank Improvement Company all my right, title, and interest in and to the within contract and the property therein described. GEO. W. FRANK."

The contract was acknowledged by Frank, and both it and the assignment were recorded in the office of the register of deeds for Buffalo county.

It was the theory of the plaintiff in the court below, and it is the contention of her counsel here, that Frank's obligation was for personal services, and, therefore, not assignable; that the attempted assignment, though entirely ineffectual for the purpose intended, was a forfeiture of the contract and a release of the parties from the engagements which it evidenced. This view of the matter does not commend itself to our judgment. The parties had the right to make the contract assignable, and it seems to us that they have done so. We must ascertain their meaning by a fair interpretation of the language they have used. They have said that "the stipulations aforesaid are to bind the heirs, executors, administrators, and assigns of the respective parties." We are not authorized to say that the phrase "respective parties" means only the plaintiff. It refers to both Alden and Frank. If the contract does not truly express the agreement made the remedy is by reformation. The plaintiff's theory as to what the parties intended may be entirely right, but we cannot make the contract fit her theory by a procrustean process of construction.

There is another reason why the plaintiff cannot succeed. The assignment of Frank's "right, title, and interest" is not in terms an assignment of the contract.

Broadly construed, perhaps it is; narrowly interpreted, it is only a transfer of benefits and not of burdens. The parties, by their conduct, have given it a construction which we are disposed to accept. Frank does not consider himself absolved from his obligation "to pay the taxes and perform all things necessary in the selling of said real estate." That the plaintiff still considers him bound is shown by the fact that since the action was commenced she has called upon him to pay taxes on the land and has accepted services rendered by him under the contract. It was not alleged in the petition or proven on the trial that either Frank or the improvement company was in default of any duty due to the plaintiff. The assignment was not *per se* a repudiation of the obligations imposed by the contract. It furnished no sufficient ground for a cancellation of the agreement and a forfeiture of defendants' rights under it. There seems to be no adequate reason for the intervention of a court of equity in this case. The judgment is reversed and the action dismissed.

REVERSED AND DISMISSED.

LINCOLN LAND COMPANY V. VILLAGE OF GRANT.

FILED DECEMBER 8, 1898. No. 8519.

1. **Municipal Corporations:** ORDINANCES: TITLES. An ordinance adopted by a board of village trustees is valid only as to subjects clearly expressed in the title.

2. ———: ———: ———: WATER COMPANIES. A contract providing for the rental of five hydrants is not a subject of legislation expressed in the following title: "An ordinance authorizing the Lincoln Land Company to construct and maintain a system of water-works, and use the streets, alleys, avenues, and public grounds for laying their mains and pipes in the town of Grant, in Perkins county, Nebraska."

3. ———: ———: CONTRACTS. A contract for the rental of five hydrants contained in an ordinance entitled as aforesaid is void.

4. ———: VOID CONTRACTS: RETENTION OF BENEFITS: QUANTUM MERUIT. Where a municipal corporation receives and retains substantial benefits under a contract which it was authorized to make, but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received.

5. ———: ———: ———: RATIFICATION. In such an action it is unnecessary to establish a ratification of the contract. *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb. 775, and *Tullock v. Webster County*, 46 Neb. 211, distinguished.

ERROR from the district court of Perkins county. Tried below before GRIMES, J. *Reversed.*

W. S. Morlan and *J. W. Deweese*, for plaintiff in error.

C. P. Logan and *C. C. Flansburg, contra.*

SULLIVAN, J.

The Lincoln Land Company sued the village of Grant in the district court of Perkins county to recover the sum of $900 alleged to be due as rental for fifteen hydrants. On demurrer to the petition judgment was rendered in favor of the defendant, and the plaintiff prosecutes error to this court.

From the averments of the petition it appears that on April 13, 1889, the board of trustees of the defendant village adopted an ordinance authorizing the plaintiff to construct and maintain a system of water-works in said village, and to use the streets and alleys thereof for the term of twenty-five years for the purpose of laying down the necessary mains and pipes. The ordinance further provided that the company should furnish the village the use of fifteen hydrants free of cost for the period of four and one-half years immediately following the completion of the system, and that for the twenty and one-half years next ensuing the village should pay to the company an annual rental of $60 each for not less than fifteen hydrants. The plant was constructed, and the period during which water was to be furnished free

expired April 1, 1894. During the following year the village used the fifteen hydrants, but has refused to pay therefor the rental fixed by the ordinance. On behalf of the defendant it is insisted that the provision of the ordinance in relation to the rental of hydrants is void, for the reason that there was no antecedent appropriation to cover the expenditure as required by section 86, article 1, chapter 14, Compiled Statutes. Our attention is especially directed to section 89 of the village charter, which is as follows: "No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided." The section quoted, in connection with other kindred provisions of the act, evinces a clear legislative purpose to confine the current expenditures of municipalities of the class here in question to their current revenues, and to prevent the creation of long-time obligations which may prove burdensome in the future, although prudent and provident enough when viewed in the light of the present conditions. It would be difficult indeed to choose more explicit and imperative language to express the idea that municipal authorities have no power, unless expressly granted, to create liabilities extending beyond the current year. The legislative policy to leave future municipal revenues unincumbered being frequently declared and strongly accentuated, as will appear from an examination of sections 86, 87, 88, and 89 of the charter (Compiled Statutes, ch. 14, art. 1), the power to make a valid contract imposing on the village a serious financial burden during a quarter of a century ought not to be derived as a mere probable inference from an ambiguous statute. But in the case of the *City of North Platte v. North Platte Water-*

Works Co., 56 Neb. 403, the existence of such power was assumed without discussion. What was said on the subject is here subjoined: "By subdivision 15, section 69, of the chapter just referred to [Compiled Statutes, ch. 14, art. 1], it is provided that cities of the class in which North Platte is embraced may enact ordinances, among other things: 'To make contracts with and authorize any person, company, or corporation to erect and maintain a system of water-works and water-supply, and to give such contractors the exclusive privilege, for a term not exceeding twenty-five (25) years, to lay down in the streets and alleys of said city water-mains and supply pipes, and to furnish water to such city or village and the residents thereof and under such regulations as to price, supply, rent of water-meters as the council or board of trustees may from time to time prescribe by ordinance for the protection of the city.' The power to contract with individuals or corporations for a supply of water to be furnished for the use of the city for a term not exceeding twenty-five years implies the power to provide that payments shall be made as the right to receive them accrues, without an appropriation having been previously made with reference to the several payments as they shall mature." The writer concurred in the opinion from which the foregoing extract is taken, but is now convinced, as the result of a more critical examination of the statute in question, that the conclusion reached was incorrect, and that a city or village is only authorized to give an individual, company, or corporation an exclusive privilege for twenty-five years to lay down water-mains and supply pipes in the public streets and alleys; and, also, the exclusive right for the same period to furnish water to the municipality and its inhabitants on such terms as may be fixed by ordinance from time to time. That the terms should be reasonable is, of course, implied. Immediately following the provision of the statute contained in the foregoing excerpt it is declared that "the right to supervise and control

such corporation as above shall not be waived or set aside." Considering subdivision 15 of section 69 in connection with sections 86, 87, 88, and 89, it seems to be entirely clear that municipal authorities are without power to make contracts concerning either the quantity of water to be furnished or the price to be paid which shall extend beyond the year in which such contracts are made. If a city or village may, by ordinance, determine, from year to year, the quantity of water it will take and the price it will pay, then the owner of the water-plant has at best but a barren and anomalous contract,—one that may be eviscerated but not annulled. It is needless, however, to pursue this subject further. My associates are satisfied with the decision in *City of North Platte v. North Platte Water-Works Co., supra*, and it must therefore be accepted as a precedent for this case.

It being settled that the village was authorized to make the contract in question, we proceed now to inquire whether the power was exercised in a lawful manner. The ordinance on which the plaintiff relies was entitled "An ordinance authorizing the Lincoln Land Company to construct and maintain a system of waterworks and use the streets, alleys, avenues, and public grounds for laying their mains and pipes, in the town of Grant, in Perkins county, Nebraska." Section 79 of the charter declares that "ordinances shall contain no subject which shall not be clearly expressed in its title." Was the contract for fifteen hydrants at an annual rental of $900 clearly expressed in the title above quoted? We think it was neither clearly nor obscurely expressed. The title neither specifically nor by general terms gave notice that the ordinance contained a contract binding the city to anything in the future. The title declared that the purpose of the ordinance was to grant a franchise. It suggested nothing more. A contract for a supply of water was not a necessary incident or condition of the grant. (*State v. Mayor*, 32 Neb. 568-587.) The title was sharply restrictive and not at all calculated to

arouse aldermanic suspicion that there might be a contract concealed in the folds of the measure. The title was not an index to the contract, and the contract was void. (*White v. City of Lincoln*, 5 Neb. 505; *Ives v. Norris*, 13 Neb. 252; *Messenger v. State*, 25 Neb. 674.) Still, it does not follow that the demurrer to the petition was rightly sustained. While the action was primarily one to recover upon an express agreement, the petition, after stating that the plaintiff furnished the defendant fifteen hydrants free of cost for four and one-half years and that it continued to furnish a like quantity of water after the expiration of said term and until this action was commenced, proceeds as follows: "The service of each fire hydrant, as hereinbefore set forth, was and is reasonably worth and of the value of the sum of $60 per year, and the services of the said fifteen fire hydrants were at all the times aforesaid and is of the reasonable value of $900 per annum. This plaintiff has complied with all the terms and conditions of said ordinance on its part to be performed, and in pursuance of the terms and conditions of said ordinance has furnished to the said defendant water to the amount and value of $900, which amount defendant agreed to pay the plaintiff." It thus appears from the averments of the petition, admitted by the demurrer, that the plaintiff has furnished to the defendant water of the value of $900 which the defendant has received and appropriated to its use. This fact may not constitute a ratification of the contract contained in the ordinance. It may be that a ratification, except by ordinance, is not permissible. Such would be the rule if the case falls within the principle laid down in *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb. 775, and approved in *Tullock v. Webster County*, 46 Neb. 211. But the question now before us for decision is not whether the petition states a cause of action on contract, but whether the facts pleaded entitle the plaintiff to any relief whatever.

The case of *Clark v. Saline County*, 9 Neb. 516, was an

action to recover from the county the value of certain land conveyed by it to Clark in part payment for services and materials furnished by him in the construction of a public bridge. The title to the land had failed, and a recovery was permitted on the ground that the county should pay the fair value of what it had received. The following extract from *Pimental v. City of San Francisco*, 21 Cal. 352, was quoted with approval: "The city is not exempted from the common obligation to do justice, which binds individuals. Such obligation rests upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property, which does not belong to her, it is her duty to restore it, or, if used, to render an equivalent therefor, from the like obligation. The legal liability springs from the moral duty to make restitution; and we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics. Its command always is to do justice."

Ward v. Town of Forest Grove, 20 Ore. 355, 25 Pac. Rep. 1020, was an action by a physician to recover for services rendered in caring for persons afflicted with small-pox. The services were rendered under the authority of a resolution. The power to employ a physician in such cases could be lawfully exercised only by ordinance, but a recovery was permitted, the court saying: "The corporation had the power to make the contract with plaintiff, upon which this suit is brought, and attempted to exercise such power by a formal resolution of its board of trustees. The resolution was, perhaps, an irregular exercise of the power, but it accomplished the purpose intended, and, having received the benefit of the plaintiff's services, the defendant should be compelled to pay him the reasonable value thereof."

In *Pittsburg, C. & S. L. R. Co. v. Keokuk & Hamilton*

Bridge Co., 131 U. S. 371-389, Mr. Justice Gray delivering judgment uses the following pertinent language: "A contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid, but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received the benefit of."

In the case of *Paul v. City of Kenosha*, 22 Wis. 266, where the plaintiff had purchased certain bonds of the city which were void for want of power to issue them, it was held that he was entitled to recover the amount paid. The court said: "The city has had that amount of money and legal scrip for its city bonds, which turn out to be of no value whatever. It seems to fall under the general rule of law, that where a party sells an obligation which turns out to be valueless and not of such a character as he represents it to be, he is liable to the vendee as upon a failure of consideration. The city bonds, it appears, were void when the agents of the city sold them to the plaintiff. Is it just and equitable that the city retain the money which it has received for its worthless bonds?"

The foregoing authorities sufficiently establish the right of the plaintiff to recover in this case the value of the use of the fifteen fire hydrants. Other decisions to the same effect are: *Chapman v. County of Douglas*, 107 U. S. 348; *Marsh v. Fulton County*, 10 Wall. [U. S.] 676; *Brown v. City of Atchison*, 39 Kan. 37, 17 Pac. Rep. 465; *Livingston v. School District*, 76 N. W. Rep. [S. Dak.] 301; *City of Parkersburg v. Brown*, 106 U. S. 487; *Argenti v. City of San Francisco*, 16 Cal. 256.

It is contended that the conclusion at which we have arrived is contrary to the decision in *Tullock v. Webster County*, *supra*. The question there considered was whether ratification of a void contract resulted from an acceptance and retention of benefits by the county. It

was held that as there was no power to make the contract there could be no authority to ratify it. That is certainly sound doctrine. In this case the power to contract existed, but was not exercised in the manner prescribed by the statute. But we do not in this case decide that there was a ratification. The writer thinks there was not, but the question is left open because counsel have not discussed it. The principle upon which this decision rests was not at all considered in the *Webster County Case*. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

H. A. MERRILL, APPELLANT, V. JAMES SHIELDS ET AL., APPELLEES.

FILED DECEMBER 8, 1898. No. 8511.

1. **Municipal Corporations:** SPECIAL TAXES: BOARD OF EQUALIZATION. The city council of a city of the metropolitan class has no jurisdiction to sit as a board of equalization for the purpose of levying special taxes to cover the expenditures incident to the opening of a street, until the report of the freeholders appointed to assess damages has been made and confirmed.

2. ———: ———: LIEN: BURDEN OF PROOF. The burden of proof is on the person asserting a lien under a proceeding levying a special tax, to show a compliance, by the taxing authorities, with all essential statutory requirements.

3. ———: ———: ———: EVIDENCE: RECITALS IN ORDINANCE. The recitals in an ordinance declaring a new street open to public travel are not competent evidence in favor of a tax-lien claimant to establish the jurisdiction of the city council to levy a special tax.

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

Henry W. Pennock, for appellant.

William D. Beckett, Read & Beckett, George W. Shields, and *J. W. Woodrough, contra.*

SULLIVAN, J.

This action was brought in the district court to foreclose a tax-sale certificate on lot 10 of Godfrey's Addition to the city of Omaha. The only question presented for decision here is the validity of a special assessment made against the property to defray the expenses of opening Twenty-second street from the south line of E. V. Smith's Addition to the south line of tax lot 36. The tax is assailed on various grounds, only one of which we find it necessary to consider. By the terms of the statute under which the condemnation proceedings were conducted the necessity for appropriating private property for the use of the public as a street was required to be declared by ordinance. The mayor, with the approval of the council, was then authorized to appoint three disinterested freeholders of the city to assess the damages to the owners of the property appropriated. It was the duty of the appraisers so appointed, after taking the prescribed oath, to make their assessment and report the same to the mayor and council for their action thereon. Upon confirmation of the report, and after having considered the matter while sitting as a board of equalization, the council was authorized to levy a special tax against abutting and adjacent real estate peculiarly benefited by the opening of the new thoroughfare. Until the appraisers' report had been made and confirmed, it is quite evident the council was without jurisdiction to levy a tax. The filing of the report and its due ratification were made, by the statute, conditions precedent to the equalization and levy. The burden of proving the existence of these conditions was on the plaintiff, who was asserting the validity of the tax. The law does not imply authority to make the levy from the fact that the levy was made. Discussing this question Judge Cooley says: "It is indeed a presumption of law that official duty is performed; and this presumption stands for evidence in many cases; but the law never assumes the existence of jurisdictional facts;

and throughout the tax proceedings the general rule is that the taking of any one important step is a jurisdictional prerequisite to the next; and it cannot therefore be assumed, because one is shown to have been taken, that the officer performed his duty in taking that which preceded it." (Cooley, Taxation [1st ed.] p. 329.) The same thought is expressed by POST, J., in the case of *Smith v. City of Omaha*, 49 Neb. 883, in the following language: "It is a recognized rule of construction, especially applicable to actions of this character, that those things which the law regards as the substance of the proceeding cannot by the courts be treated as immaterial, that the record must show affirmatively a compliance with all the conditions essential to a valid exercise of the taxing power, and that their omission will not be supplied by presumptions." (*Equitable Trust Co. v. O'Brien*, 55 Neb. 735; *Leavitt v. Bell*, 55 Neb. 57.)

The correctness of the principle announced in the foregoing citations is not seriously questioned by counsel for the plaintiff, but he insists that the proof is sufficient to show the existence of the facts upon which the jurisdiction of the council depended. The evidence relied upon to establish the making and confirmation of the appraisers' report consists of the following recitals contained in the ordinance declaring Twenty-second street open to public travel from the south line of E. V. Smith's Addition to the south line of Paul street extended: "Whereas, three disinterested freeholders have been appointed by the mayor and council to appraise the value of the property to be appropriated; and whereas, said appraisers, after duly qualifying according to law and examining the property to be taken, have made their report and the city council has approved the same," etc. Manifestly this ordinance is not the primary evidence of the action of the council on the appraisers' report. The recital in relation to the matter is a mere declaration of what the council did on a former occasion. It was not inserted in the ordinance in obedience to any

law requiring it to be done. Indeed, the ordinance itself was not an essential step in either the proceeding to establish the street or to levy the tax. It was nothing more than a formal announcement to the public that the street was open and that the city asserted dominion over it. It was appropriate evidence of such announcement and assertion, but not of the fact that the property described had been duly condemned. It seems to us entirely clear that the best and only competent evidence of the council's action on the appraisement of the freeholders was the record of the vote on the motion or resolution proposing its confirmation. The city authorities might, of course, with propriety declare to the public that the street was open to travel, and there is no reason why the declaration should not be made in the form of an ordinance; but they could not, by recitals in the preamble, create evidence in support of the condemnation proceeding. The rule that the recital of jurisdictional facts in the record of the proceedings of an inferior tribunal is *prima facie* evidence of the existence of such facts, has no application here, for the reason that the council was neither called upon to pass the ordinance nor to then make any inquiry and determination in regard to the action it had previously taken on the appraisers' report. The ordinance declaring Twenty-second street open from the south line of Paul street extended to the south line of tax lot 36 does not recite any of the steps taken to condemn the property therein described; and while the defendants' lot has been taxed to defray the expense of opening this part of the street, there is not in the record the slightest evidence of any character that the council ever confirmed the freeholders' assessment of damages, or even that such an assessment was ever made. The right to tax defendants' property for opening this part of the street is not defended; and, conceding appellants' claim as to the evidential effect of the recitals above considered, the fact would still remain that some indefinite portion of the tax in controversy was levied for an un-

authorized purpose and that the special benefits were estimated on a false basis. The validity of the tax in question was not established on the trial; the district court correctly adjudged it to be void. The judgment is

AFFIRMED.

WILLIAM A. POLLOCK ET AL. V. DAVID W. WHIPPLE.

FILED DECEMBER 8, 1898. No. 8516.

Action on Injunction Bond: DAMAGES. In an action on an injunction bond conditioned that the obligors should pay to the obligee all damages which the obligee might sustain by reason of the injunction if it should be finally decided that the injunction ought not to have been granted, *held* erroneous to submit to the jury evidence of the expenses attendant upon an unsuccessful attempt, on motion, to dissolve the injunction.

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

Miller & Ready and *Barnes & Tyler,* for plaintiffs in error.

John Bridenbaugh, contra.

RYAN, C.

This was an action in the district court of Cedar county for the recovery of damages on an injunction bond. The differences between the chief litigants in this case seem to have appeared in an action of forcible entry and detainer, in which there was a judgment in favor of Whipple, the plaintiff. The defendant Pollock thereupon, on June 8, 1889, tendered an appeal bond in the penal sum of $50, which was approved by the justice of the peace who had rendered the judgment sought to be appealed from. On the day following the approval of this bond there was by said justice of the peace indorsed on the bond this language:

"This approval is hereby canceled and notice given defendant this 9th day of June, 1889.

"W. J. DE GARMO,
"*Justice of the Peace.*

"After examination of the responsibility of the sureties in this bond, I find that they are not good; therefore insufficient. I hereby refuse to approve said sureties and the amount fixed in said bond; and it is considered by me that $500 would be a reasonable amount on appeal of this cause, with two good responsible sureties. Dated this 9th day of June, 1889. W. J. DE GARMO,
"*Justice of the Peace.*"

The appellant in the forcible entry and detainer case, on the theory that these last two indorsements of the justice of the peace in no way impaired Pollock's rights upon an appeal perfected, obtained an injunction in an action brought in the said district court, whereby the appellee in the forcible entry and detainer suit was prevented from interfering with the rights which appellant claimed existed in his favor by virtue of his appeal bond having been duly approved. We are not informed by the record in this case what were the conditions of, or who were sureties on, the original injunction bond. Soon after the injunction action was brought, as we learn from the averments of the petition herein, the defendant in the injunction suit moved to dissolve said injunction, and in case the same was not dissolved moved the court for further, better, and additional security; and this motion was not sustained as to dissolving said injunction, but was sustained as to requiring the plaintiff in the injunction suit to furnish additional security. A bond was furnished in compliance with the order of the court thus described in the petition herein, and it is upon this bond that this action was begun. It is insisted by the plaintiff in error in this case that the injunction was continued in force only so long as was necessary to protect the rights of Pollock as an appellant in the forcible entry and detainer case and that, when

that case was decided, the injunction suit was, with the assent of all parties, dismissed. If there had been shown a voluntary dismissal without objection, our task would be much simpler than we find it in view of the following journal entry in the injunction case: "In the district court of Cedar county, Nebraska. William A. Pollock v. David W. Whipple and Samuel Gust. On this 15th day of March, 1892, this cause came on to be heard upon renewal of the motion of the defendants to vacate and set aside the injunction heretofore granted in this case, and was submitted to the court upon the petition and affidavits of the parties, upon consideration whereof it is ordered that said motion be sustained and said injunction is hereby vacated and set aside and said action is hereby dismissed at the costs of the plaintiff." There is in the record no disclosure of the grounds upon which was founded this motion to vacate and modify the injunction. It may therefore have been for reasons which were sufficient, and we are not required to presume the contrary in an entirely independent action; neither would it be proper under such circumstances to assume that the dismissal of the action itself was without justification. The petition for an injunction was not to be found on the trial, and secondary evidence of its contents was therefore submitted. From this evidence we learn that the injunction action was brought to preserve the rights of Pollock as an appellant in the forcible entry and detainer suit. But this does not assist Pollock in this case, for if we are to infer anything from the mere fact of the dismissal of his action by the court, that inference would probably, of necessity, be that he had failed in making proof of the allegations of his petition. Under these circumstances it is very clear that there is not presented the simple question of the rights of Pollock, as an appellant, to protection by injunction against an attempt of the justice of the peace to reconsider his approval of the appeal bond given by Pollock. It seems that in the injunction action there was a receiver, under

whose supervision the crop growing on the premises was harvested; that Whipple paid the expenses of this harvesting, and in this action introduced evidence of the amount so paid by him. After this evidence had been introduced without objection there was a motion on behalf of Pollock to strike it from the record. This was sustained in so far as such evidence referred to the prices paid for work, and, as we understand it, this ruling, in so far as Pollock is concerned, must be considered as though the evidence stricken out had never been introduced. A party, after evidence has been introduced without objection, cannot obtain an order by which such evidence is stricken from the record, and then, for the purpose of disclosing error on the face of the record, insist that such evidence was erroneously admitted in the first instance. Whether or not this evidence was proper in support of Whipple's action for damages is not presented by the record, and for this very sufficient reason that question is not considered.

The injunction bond upon which this action was brought was conditioned that the plaintiff Pollock would pay all damages which the defendant Whipple might sustain by reason of the injunction, if it should finally be decided that the injunction ought not to have been granted. The motion to dissolve the injunction, or, in the alternative, for better and additional security, it seems from the averments of the petition, was filed July 13, 1889, and a dissolution of the injunction was denied August 3, 1889. There was, however, an order requiring additional and better security on the bond, and this part of the order was complied with by the filing of the bond sued on. On the trial there was, over proper objections, introduced evidence of the attorney's fees and other outlays in presenting this motion at Ponca. Plaintiff in error requested the court to instruct the jury as follows: "You are instructed in making your verdict in this cause to disregard the evidence as to money paid for attorney's fees and expenses at Ponca in attempting to obtain a dis-

solution of the injunction in question in this suit. The plaintiff, having failed to procure a dissolution of the injunction, is not entitled to recover for his expenses in making such attempt." This instruction was refused, to which ruling there was a proper exception. It may be possible that this motion was the one of which there was a renewal on March 15, 1892, but this was nearly three years after the unsuccessful presentation of the motion with respect to which the expenses were incurred. Not only was this true, but the sureties on the bond sued upon became such after, and in compliance with, the order made contemporaneously with that refusing to dissolve the injunction. The instruction should have been given, and for the error in refusing it the judgment of the district court is reversed.

REVERSED AND REMANDED.

MATHIAS WEICH ET AL. V. JAMES MILLIKEN.

FILED DECEMBER 8, 1898. No. 8438.

Replevin: APPEAL FROM COUNTY COURT: PLEADINGS IN DISTRICT COURT: AMENDMENTS. Where a party, having a special ownership of, or interest in, personal property, replevied it in a county court upon allegations of a right of present possession based upon alleged general ownership, and the proofs upon the trial in that court, without objection to relevancy, disclosed the nature of plaintiff's real interest, *held* erroneous in the district court, after appeal, to refuse to permit the filing of an amended petition showing the true nature of the ownership or special interest of plaintiff. Following *Swain v. Savage*, 55 Neb. 687.

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

C. Hollenbeck and *E. F. Gray*, for plaintiffs in error.

J. E. Frick and *George L. Loomis*, *contra.*

RYAN, C.

In their affidavit and bill of particulars in the county court of Dodge county plaintiffs alleged that they were the owners of certain property and entitled to the immediate possession thereof. There were also averments that the property was not taken in execution, etc., as required by statute; but, as no question arises on these, they need not be further set out or described. There was a judgment for the defendant, and plaintiffs appealed to the district court, wherein they filed a petition containing the same averments as had been made in the county court. To this petition there was filed an answer in denial. When the time arrived for the trial of this case in the district court, but before a jury had been called, impaneled, or sworn, plaintiffs filed and presented a motion asking leave to amend their petition by changing the allegation of general ownership to an allegation of special ownership and interest in the property replevied, and in the amended petition tendered with the said motion it was alleged that the special ownership and interest of plaintiffs in said property was that on or about August 15, 1889, John H. Godel was appointed guardian of certain minors, and plaintiffs became sureties on his bond, and that the said Godel, to indemnify plaintiffs as his said sureties, executed and delivered to plaintiffs an absolute bill of sale of the property in controversy; that said property was wrongfully detained by James Milliken and was not taken on execution or upon any order or judgment against plaintiffs, etc. There was at the close of the amended petition tendered by the motion a prayer for the possession of the property in controversy and for damages for the wrongful detention thereof. The motion was overruled, to which ruling plaintiffs excepted. On the trial the district court, consistently with its view of the law as evidenced by its denial of the right of amendment, instructed the jury to find for the defendant, and this was accordingly done. For the re-

versal of the judgment rendered upon the verdict adverse to them plaintiffs have prosecuted these error proceedings.

In the county court the action was instituted as one for the possession of certain personal property. By his affidavit one of the attorneys for plaintiffs made an uncontradicted showing in the district court that proof of the facts entitling plaintiffs to a special interest in the replevied property had been made in the county without objection to its relevancy. It must therefore be accepted as true that not only was the issue one as to the right of possession alone, but that in the county court the defendant was fully advised of the nature of the special ownership or interest upon which plaintiffs based their right of possession. The question litigated in the county court was, therefore, the right of possession, and in the district court the motion was for leave to show this right, predicated upon an ownership or interest more restricted than had been pleaded in the county court, though its nature had been disclosed, without objection, by the proofs.

The case of *Swain v. Savage*, 55 Neb. 687 was commenced in the county court of Gage county. The appraisal disclosed such value of the property replevied that the issues were triable during a regular term of said court. A judgment having been rendered, an appeal was taken to the district court, wherein a petition and affidavit were filed, followed by an answer and a reply. After the filing of an amended petition, affidavit, answer, and reply, the defendant filed a motion to quash the writ of replevin which had been issued by the county judge, and to be allowed to prove the value of the property taken under said writ and for judgment for such value and costs. The ground of the motion was that the county judge had no jurisdiction to issue the writ, because no sufficient affidavit or petition had been filed prior to the issue of the writ. This motion was sustained by the district court. The defect in the affidavit

and petition in the county court, thus challenged, were averments in general terms by plaintiff of his special ownership of the subject-matter of the action, and that the right of ownership was by virtue of the ownership of a chattel mortgage therein described and that plaintiff was entitled to the immediate possession of said property. In the opinion filed as above stated the insufficiency of the petition in its statements of facts with relation to plaintiff's special ownership to meet the requirements of section 182, Code of Civil Procedure, was not questioned, but it was held that the amendment of the petition and affidavit in the district court had met the objections urged to the original petition and answer; that such amendment was proper in the district court and cured the defects complained of, and that, therefore, there was error in sustaining the motion of the defendant, and the judgment of the district court was therefore reversed. The case just summarized is decisive of the one now under consideration, and accordingly, herein, the judgment of the district court is reversed.

REVERSED AND REMANDED.

HIRAM C. LYDICK ET AL. V. JOHN F. GILL ET AL.

FILED DECEMBER 8, 1898. No. 8430.

Review: CONFLICTING EVIDENCE. Questions of fact determined upon fairly conflicting evidence by a jury will not be re-examined in error proceedings in the supreme court.

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

H. E. Carter, for plaintiffs in error.

Jesse T. Davis, *S. H. Cochran*, and *F. S. Howell*, *contra*.

RYAN, C.

This was an action of ejectment brought by plaintiffs in error in the district court of Burt county. Originally, John F. Gill was the defendant. During the pendency of the action, however, David Deaver, who had meantime purchased the interest of Gill, was, by stipulation, substituted as defendant. There are combated in argument the rights of Deaver as a purchaser in good faith, but it is unnecessary to consider this question, for the district court, in its instructions, followed the theory for which plaintiffs are now contending. The subject-matter of the controversy was a strip of land formed by accretion along the Missouri river adjacent to lots 1, 2, 3, and 5 in section 13, township 21 north, range 11 east, 6th principal meridian. In effect the court instructed the jury that plaintiffs were the owners of this accretion and entitled to the possession thereof, unless the acts of estoppel pleaded by defendant had been established by a preponderance of the evidence, and in this connection the elements of an estoppel were fully stated. In general terms, the facts upon which defendant relied as sufficient to show an estoppel were that the property was claimed by John F. Gill, between whom and plaintiffs there existed a controversy as to who had the better right; that defendant entered into negotiations with Gill for the purchase of his interest, and that this fact was known to plaintiffs; that plaintiffs encouraged him to buy the interest of Gill, and one of plaintiffs, to enable the defendant to make a payment on such purchase, became his surety at the bank to the amount of $1,500, of which amount, with the knowledge and acquiescence of said plaintiff, $1,000 was paid to Gill in consideration of his conveyance of his interest to defendant; that defendant, after his purchase, made valuable and lasting improvements on the property, with the knowledge and assent of plaintiffs, and that he would not have purchased or improved said property if he had not by plain-

tiffs been encouraged so to do. If the evidence sustained the contention of defendant, his defense of an estoppel was established under the rule laid down in *Gillespie v. Sawyer*, 15 Neb. 536. Plaintiffs met the question of estoppel by a denial of the facts alleged by defendant, and there was evidence which would justify a jury in finding for either party. Under such circumstances the verdict of a jury will not be disturbed upon error proceedings in this court.

It is insisted, however, that there was error in the admission of evidence with respect to certain matters; for instance, some of the acquiescence upon which defendant relied in his acquisition of title was the sole act or utterance of Hiram C. Lydick, one of plaintiffs, the other plaintiff, Jonathan Lydick, being absent. There was testimony, however, to the effect that Jonathan Lydick had previously said to defendant that Hiram was acting for him, and that whatever arrangement defendant would make with Hiram would be satisfactory to Jonathan. Moreover, there was testimony to the effect that Jonathan actually knew that defendant was engaged in making improvements upon the property and made no objection to his adverse rights thereby asserted. The estoppel pleaded, in its nature, depended largely upon the existence of facts logically to be inferred from the conduct and language of plaintiffs, and it was therefore unavoidable that much of the testimony should be indirect in its nature; for instance, there was testimony that it was at different times stated by Jonathan that Hiram was the sole manager of all the property in which both were interested. It would be unprofitable to describe these matters of complaint in detail, and it must suffice to say that while the circumstances sought to be established did not directly bear upon the superior right of either claimant to the land in controversy, there was none which did not, indirectly, tend to throw light upon the issues to be determined by the jury. The questions to be determined were for the most part questions of

fact, and these were submitted to the jury under instructions as to which counsel have failed to point out any objection. The judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

HERMAN BAACKE ET AL. V. ANTON DREDLA, ADMINISTRATOR.

FILED DECEMBER 8, 1898. No. 8495.

1. **Administration of Estates:** APPEAL FROM COUNTY COURT: JURISDICTION OF DISTRICT COURT. An appeal from an allowance of a claim against an estate in the county court later than the time fixed by statute after such allowance confers no jurisdiction on the district court to reconsider such allowance.

2. ———: ———: ———. An error proceeding from a county court to a district court vests the latter with no jurisdiction to inquire whether there was error in the county court, in the absence of a petition in error.

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

Boehmer & Rummons, for plaintiffs in error.

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

RYAN, C.

In the county court of Lancaster county Herman Baacke filed his claim against the estate of Carl Baacke on April 14, 1894, and it was allowed in full June 29, 1894. The claim of Elizabeth Klepper and others against the said estate was filed and allowed contemporaneously with that just described. On October 17, 1894, the administrator of said estate filed his motion in said court for the vacation of the allowance of the aforesaid claims, on the alleged grounds that said administrator had no notice or knowledge of the filing or

allowance of said claims until within a short time before filing said motion and had supposed the hearing would be on September 29, 1894, as he had been informed by the county judge. This motion in reference to each claim was denied on December 10, 1894. A transcript showing the above proceedings was filed January 5, 1895, in the district court of said county. On March 11, 1895, the claimants filed a motion to dismiss the appeal of the administrator, among other grounds, for the reason that the appeal had not been taken in due time and because no petition in error had been filed. This motion was overruled and the claimants duly excepted. There were further proceedings which finally resulted in the reversal of the order denying the motion of the administrator, and the reversal of the judgment of allowance of said claims in the county court and the correctness of this action of the district court is assailed by a petition in error of the claimants.

It is provided by section 233, chapter 23, and section 43, chapter 20, Compiled Statutes, that an appeal from the allowance or disallowance of a claim shall be taken within a fixed time from the date of the order of allowance or disallowance. Clearly the administrator was too late to secure a review in the district court by appeal.

It is provided by section 580, Code of Civil Procedure, that a judgment rendered or final order made by a probate court may be reversed, vacated, or modified by the district court. The proceedings to obtain such reversal, vacation, or modification, it is provided by section 584, Code of Civil Procedure, shall be by petition in error. In this case there was not filed in the district court a petition in error; hence the district court was without jurisdiction to treat the case as properly presenting for review the question whether or not the county court had improperly denied the motion to set aside the allowance of the claims called in question by the administrator. The judgment of the district court was therefore erroneous in any view which can be taken of the nature of

the proceedings by which a review was sought in that court, and its judgment is reversed.

REVERSED AND REMANDED.

NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION OF NEW YORK V. JASON O. KEENEY ET AL.

FILED DECEMBER 8, 1898. No. 8522.

1. **Foreign Building and Loan Associations:** INTEREST: STATUTES. In an action of foreclosure by a foreign building and loan association the rate of interest which it may contract for, and which it may collect, is not regulated by chapter 14, Session Laws 1891, for that chapter, by its terms, is solely applicable to domestic building and loan associations.

2. ———: ———. In an action of foreclosure brought by a building and loan association incorporated under the laws of a state other than Nebraska, the rights of plaintiffs with respect to interest are governed by chapter 44, Compiled Statutes; and if, for the use of the money sought to be collected, the proofs, upon proper issues, show that more than ten per cent interest per annum has been contracted for or received under any pretense whatever, the penalties prescribed by said chapter 44 for contracting for or receiving usury should be enforced.

APPEAL by both parties from the district court of Harlan county. Heard below before BEALL, J. *Reversed.*

C. M. Miller, for plaintiff.

John Everson, contra.

RYAN, C.

In the district court of Harlan county plaintiff filed its petition for the foreclosure of a certain mortgage made to it by Jason O. Keeney and his wife, Mary E. Keeney. The bond secured by the mortgage referred to was made by Jason O. Keeney to plaintiff on June 18, 1890. The conditions of this bond were that it should be void if Jason O. Keeney paid, or caused to be paid, to plaintiff the sum of $500, with interest at the rate of six

per cent per annum, together with a monthly premium of $2.50 for eight years, or until the maturity of five shares of plaintiff held by Keeney if they matured within said eight years, and in addition thereto, $3 for monthly dues on said shares, and, also, all fines which plaintiff might meantime impose upon said Keeney for default in his payment of interest, premium, or dues. There was by the terms of the bond allowed a certain time within which payment of interest, premium, or dues might be made after the maturity of each, and upon failure within such fixed time to make the payment contemplated plaintiff was entitled to foreclose its said mortgage. It was alleged in the petition that plaintiff had been compelled to pay taxes on the mortgaged premises and that defendants had failed to make payments of interest, etc., and had failed to reimburse plaintiff the amount it had paid in discharge of tax liens. There were answers, in one of which the right of plaintiff to do business in this state was called in question, but as the loan in this case was made before the statute was enacted which permitted corporations of the class to which plaintiff belongs to do business only upon obtaining certain permission, we shall not enter upon a discussion of that question. In another answer was a plea of usury, the nature of which shall be hereinafter described. There was a decree for less than plaintiff's demand, but in excess of what defendants concede was correct, and both parties have appealed.

George R. Sutherland, secretary of plaintiff, testified that plaintiff was, during the transactions under consideration, and still continues to be, a corporation created under the laws of the state of New York; that Jason O. Keeney became the holder of stock of that corporation upon his written application of date February 7, 1890, which application was approved by the executive committee of plaintiff May 15, 1890; that on June 18, 1890, plaintiff made a loan to Jason O. Keeney of $500, which amount was paid to him in checks of said plaintiff. This

witness, after describing the manner in which business was ordinarily transacted between plaintiff and parties who borrowed money of it, stated that Keeney paid dues on his certificate at the rate of $3 per month from and including February, 1890, to and including April, 1894, amounting to $153; that the interest had been paid from June 18, 1890 to May 1, 1894, amounting to $112.75; and also that Keeney had paid, or caused to be paid, $2.50 per month from June 18, 1890 to April 1, 1894, amounting to $113.50. In all there was paid, as he testified, $375.25. This witness also testified that because of defaults of Keeney in making other payments his stock, which had been pledged as collateral security, had been declared forfeited, and thereby that in accordance with the terms on which he had pledged his stock Keeney was entitled to, and had been credited, its so-called withdrawal value of $70.75, interest and premium, and $82.95 applied on the principal. Neither this witness, nor any other, explained why, originally, two checks were made for the amount loaned to Keeney. By a reference to the checks themselves we find that one was for $13.50. The other was for the difference between that sum and $500. The small check was by its payee, Keeney, indorsed to plaintiff. In a receipt signed by Keeney this check was described as "1 ck. for 5 mos. & 12 days. Pr., $13.50." In argument it is spoken of as part of the premium, and we so understand it. The application for a certificate of stock was, it seems, to qualify Keeney to obtain a loan, and hence this part of the premium should, we think, be treated the same as premiums paid after the making of the bond and mortgage. The payments made by Keeney for the use of $500 were then as follows:

Between February, 1890, and April, 1894, dues on certificates	$153 00
Interest from June 18, 1890, to May 1, 1894	112 75
Premium from June 18, 1890, to April 1, 1894	113 50
In all these payments amounted to	$379 25

To ascertain what interest had been paid until April

1, 1894, there should be deducted one month's interest on $500, at six per cent, which is $2.50. This deduction from the gross sum leaves $376.75 as the amount paid by, or on behalf of, Keeney, on account of his loan of $500 previous to April 1, 1894. The interest on $500 between June 18, 1890, and April 1, 1894, at ten per cent per annum amounts to $153.92; therefore, if $376.75, the amount of the sums paid, is to be treated as payment simply for the use of $500 during this time, there has been paid $222.83 in excess of what should have been paid at the rate of ten per cent per annum. The basis of plaintiff's action was a bond secured by the mortgage sought to be foreclosed. The petition was solely for a foreclosure and contained no averment foreign to that purpose. The allegations with reference to the issue of stock certificates were made to show how, by the cancellation of said stock, the defendant became entitled to a credit by plaintiff on the bond which had been given by Keeney. It might be possible, if the petition had contained averments showing that by virtue of the ownership of certain shares of stock Jason O. Keeney's interests and liabilities as a stockholder should be ascertained, declared, and enforced in an equitable action, that the district court should have ordered such an accounting; but there was an entire absence of averments on which such relief could be predicated. The petition discloses that Jason O. Keeney had been a stockholder, had been so far in default of the performance of his undertakings that the corporation had the right to elect, and, in fact, had elected, to declare his rights as a stockholder to have ceased. It was alleged in the petition that this entitled Keeney to a certain credit, which had been given him by plaintiff, and there was uncontradicted evidence to sustain these propositions. As this credit was but the aggregate sum of $153.70 which had actually been paid, we shall place it under the head of actual payments and not otherwise credit it because of the cancellation of the shares of stock.

Plaintiff, during all the transactions involved in the history of this case, has been, and still is, a foreign corporation. The provisions of chapter 14, Session Laws 1891 (Compiled Statutes, ch. 16, secs. 148*a*-148*r*) are therefore inapplicable, and whether or not the contract was usurious must be determined by the provisions of chapter 44, Compiled Statutes. In the first section of this chapter the rate of interest is, in effect, limited to ten per cent per annum on any loan or forbearance of money, and it is provided by the fifth section of said chapter that if in any action on a contract for the loan of money proof be made that illegal interest has been directly or indirectly contracted for, taken, or reserved, the plaintiff shall only recover the principal, without interest, and defendant shall recover costs. We cannot see any escape from the conclusion that there has been disclosed in this case a contract for a rate of interest in excess of ten per cent per annum. It is not necessary to further elaborate our views, for they may be gathered from an examination of the following cases: *Richards v. Kountze*, 4 Neb. 200; *Lincoln Building & Savings Ass'n v. Graham*, 7 Neb. 173; *Randall v. National Building, Loan & Protective Union*, 42 Neb. 809; *Livingston Loan & Building Ass'n v. Drummond*, 49 Neb. 201. The plaintiff is therefore entitled to recover upon his bond the sum of $500, less the sum of $376.75, without interest, and to recover such further sums as were paid in the discharge of tax liens, with seven per cent interest per annum thereon from the time of such payments, but plaintiff is not entitled to costs. Plaintiff's appeal is disposed of by the foregoing general discussion and announcement of our conclusions. On the appeal of the defendants the judgment of the district court is reversed and the cause remanded with directions to enter a decree of foreclosure for the amounts already indicated as being the measure of plaintiff's right of recovery.

REVERSED AND REMANDED.

PARLIN, ORENDORF & MARTIN COMPANY V. GEORGE F. ALBRECHT.

FILED DECEMBER 8, 1898. No. 8500.

Review: CONFLICTING EVIDENCE. Questions of fact determined by a jury on fairly conflicting evidence will not be inquired into in error proceedings in the supreme court.

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

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

M. H. Fleming and *W. H. Morris, contra.*

RYAN, C.

In this case there was a verdict in the district court of Saline county in favor of the defendant in error in the sum of $464.05. There was entered a voluntary remittitur of $78.35, and thereupon there was a judgment for the balance.

On April 18, 1894, John C. Fetzer was the special agent of Parlin, Orendorf & Martin Company of Omaha, and as such agent was on that day at Crete for the purpose of selling on foreclosure certain goods on which the firm of Albrecht & Beck had given a chattel mortgage to said Parlin, Orendorf & Martin Company. Fred Albrecht was a member of the firm of Albrecht & Beck, and George F. Albrecht was his father. On the day named the father met Mr. Fetzer in Crete and paid off the indebtedness of the firm of which his son was a member, whereby the father became entitled to certain collateral securities held by Parlin, Orendorf & Martin Company. George F. Albrecht in this action testified that Mr. Fetzer represented to him that the amount necessary to settle the indebtedness of Albrecht & Beck to Parlin, Orendorf & Martin Company was over $1,100.

At the time the settlement above referred to was made there was paid to W. H. Morris, as attorney for the Moline Plow Company, a creditor of the firm of Albrecht & Beck, the sum of $210. George F. Albrecht testified that he himself paid this, and Mr. Morris corroborated his testimony. Mr. Fetzer, and perhaps another person, testified that Fetzer paid this $210 out of the money he received from George F. Albrecht. Evidently the jury accepted as true the version of this transaction as given by Albrecht and Morris, and it results that Parlin, Orendorf & Martin Company became liable for the sum of $210, the amount represented as being due in excess of the amount really due from the firm of Albrecht & Beck.

Another item in dispute was the face value of collateral notes to which George F. Albrecht became entitled by his settlement with plaintiff in error. This face value was about $142.18. Mr. Fetzer sold these notes on the same day he settled with George F. Albrecht, and the jury properly found that his principal was chargeable with their value. The aggregate amount of $210 and $142.18 is $352.18, which, with the interest thereon proper to be reckoned, made up the sum for which judgment was rendered.

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

AFFIRMED.

G. T. BASTEDO V. BOYD COUNTY.

FILED DECEMBER 8, 1898. No. 8517.

Counties: FEES OF COUNTY CLERK: NUMERICAL INDEX. In the absence of a contract to the contrary, the first county clerk of a newly organized county, who compiles a numerical index therefor, is entitled to a compensation of fifteen cents for each necessary entry made in compiling such index, to be paid by such county.

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

A. S. Churchill, for plaintiff in error.

Frank W. Boggs and *H. M. Uttley, contra.*

RAGAN, C.

Boyd county was organized by act of the legislature in 1891. (See Session Laws 1891, ch. 20.) George T. Bastedo was in November of said year elected the first county clerk of said Boyd county, and qualified and entered upon the discharge of his duties as such officer. A part of the territory embraced in Boyd county was prior to its organization attached to or a part of Holt county. Bastedo procured from the proper officer of Holt county transcripts of all deeds, mortgages, and judgments which were liens upon the lands detached from Holt and attached to Boyd county, and caused these transcripts to be properly entered in the records of the new county of Boyd. For the performance of these services Boyd county paid him. Bastedo also made a numerical index, in which he entered the transcripts taken from Holt county, and in this numerical index made 2,751 entries or transcripts, and filed a claim against Boyd county for fifteen cents for each one of the entries in the numerical index, amounting to the sum of $412.65. The county board of Boyd county disallowed this claim and Bastedo appealed to the district court, which rendered a judgment denying Bastedo's claim. To review this judgment he prosecutes here a petition in error.

We are at a loss to understand upon what theory the judgment of the district court is based. By section 17 of an act of the legislature which went into force on September 1, 1879 (see Session Laws 1879, p. 358), the first county clerk of any new county was required to procure and record in books prepared for that purpose transcripts of all deeds, mortgages, leases, etc., affecting lands in the new county which were of record in the old

county from which the territory of the new was detached, and by the same act the first clerk of the new county was also directed to prepare a proper numerical index of the lands and lots in said new county in the same manner as county clerks are by law directed to prepare and keep such index. This act allowed the new clerk such compensation for procuring and recording in his office the transcripts of the records of the old county as his services were reasonably worth, but made no provision for his receiving any compensation for preparing the numerical index of the new county. By section 1 of an act of the legislature approved March 2, 1881 (see Session Laws 1881, p. 221, ch. 41), the clerk of the new county was allowed a compensation of fifteen cents, or such other sum not exceeding fifteen cents as might be agreed upon by the county commissioners and the clerk, for each entry or transfer made in the numerical index. (Compiled Statutes 1897, ch. 28, sec. 14*c*.) This statute was in force when Boyd county was organized, and is in force yet. There was no contract between the county authorities of Boyd county and Bastedo as to what compensation he should receive for compiling the numerical index, and therefore for performing that service for the new county he was entitled to receive the compensation provided by the statute. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

BARBARA S. WALTON, APPELLEE, V. THOMAS WALTON, APPELLANT.

FILED DECEMBER 8, 1898. No. 8440.

1. **Divorce:** FINDINGS IN FAVOR OF WIFE: EVIDENCE. The evidence examined, and *held* to sustain the findings, both general and special, of the district court.

2. ———: CRUELTY OF HUSBAND: MISCONDUCT OF WIFE. It is a general rule that a husband's cruelty caused by the conjugal misconduct of his wife does not invest her with a cause of action for divorce.

3. ———: ———: ———. But if the husband's cruelty was disproportionate to his wife's offense, her conduct affords him no justification, and the cruelty entitles the wife to relief.

4. ———: ———: ———: QUESTION OF FACT. Whether a wife's disobedience of her husband, her misconduct, or impropriety, caused or provoked the husband's cruelty toward her is a question of fact.

5. ———: ———: ———. Whether the cruelty inflicted by a husband upon his wife because of her disobedience, impropriety, or misconduct was so far disproportionate to her offense as to be unjustifiable is a mixed question of law and fact, to be determined in any case from the particular facts and circumstances in evidence therein.

6. ———: ———: ———. No conduct on the part of a wife that does not threaten great and immediate bodily injury will justify her husband in beating or choking her.

7. ———: ———: ———. No conduct on the part of a wife, short of notorious and shameless unchastity,—if that does,—justifies her husband in calling her a "whore."

8. ———: ———. A husband who falsely, and without reasonable cause therefor, charges his wife with unchastity, accuses her on the public streets with being criminally intimate with other men, calls her vile, opprobrious, and degrading names, beats and chokes her, is guilty of extreme cruelty within the meaning of section 7, chapter 25, Compiled Statutes. (*Berdolt v. Berdolt*, 56 Neb. 792.)

9. ———: ———. Nor is the husband's offense deprived of its legal character of "extreme cruelty" because his conduct was the result of his insanely jealous temperament, actual insanity not appearing.

10. ———: ALIMONY: DETERMINATION OF AMOUNT. There is no fixed rule in this state for determining what proportion of a husband's estate should be decreed to his wife as permanent alimony. The amount should be just and equitable, due regard being had for the rights of each party, the ability of the husband, the estate of the wife, and the character and situation of the parties.

11. ———: ———: ———. In the case at bar the parties had been married six months. The wife was thirty-eight years of age and healthy. She had no one depending upon her for support. The husband was worth $24,000, no part of which the wife had con-

tributed. The marriage was dissolved because of extreme cruelty practiced by the husband toward the wife. *Held*, (1) That the decree of the district court awarding her $5,000 permanent alimony and counsel fees of $700 should be affirmed; (2) assuming extreme cruelty is misconduct within the meaning of section 23, chapter 25, Compiled Statutes, entitling a wife to permanent alimony equal in value to a dower interest in her husband's real estate, that it did not affirmatively appear from the evidence but that the permanent alimony awarded was equal to the value of such dower; (3) that the wife, by praying in her petition for a reasonable sum as permanent alimony, elected to take such reasonable sum of money in lieu of dower in her husband's lands.

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

See opinion for references to cases cited.

Lamb & Adams, for appellant.

Field & Brown, contra.

RAGAN, C.

Charles [W. C.] Griffith, from 1888 until the trial of this case in the district court, in 1896, was a married man, fifty-three years old, and a citizen and resident of the city of Lincoln, owning a residence therein in which he resided with his family. Griffith seems to have been a farmer and stock-raiser by occupation; at least during this time he owned two large farms of about 800 acres each,—one of them situate about thirteen miles from the city of Lincoln, near the village of Raymond; the other located about four and one-half miles north of the city of Lincoln, and called "Arbor," because a post office by that name was established at the house on this farm. On this latter farm were extensive buildings used in connection with the farming operations and the growing and handling of stock conducted thereon. In the management and conduct of these farms Griffith seems to have adopted in the main a system of carrying them on by means of hired help instead of leasing them. He was

frequently at these farms and frequently spent a night thereat. Griffith kept a number of men and women from time to time in his employ at the Arbor farm,—the men engaged in the cultivation of the farm and the care of the stock, and the women doing the housekeeping, washing, and cooking for the men employed. Griffith was frequently at this farm, spending as much perhaps as three days in each week there; had a room fitted up at this farm, which he occupied when he remained there over night; and when at the farm boarded with the person keeping the house. During part of this time—from 1888 until 1895—there lived in the city of Lincoln, Thomas Walton, a widower with three grown children. He was a man of considerable wealth and about fifty-seven years of age. He and Griffith were, and had been for years, well acquainted, and were good friends. During this time it does not appear that Walton was engaged in any particular line of business. He owned various pieces of real estate, collected the rents therefrom, and lived with his grown daughter, in a residence owned by him in the city of Lincoln. In 1860, near the city of Harrisburg, Pennsylvania, was born a girl to whom was given the name of Barbara Herr. Subsequently there were born to Barbara's father and mother two sons, one of whom was named Chris and the other George, and another daughter to whom was given the name of Minnie. The parents of these children were farmers, and the children were raised upon a farm in Pennsylvania, and, it appears, raised in the manner that the children of farmers in ordinary circumstances are raised. They worked upon the farm, went to the common schools, and lived with their parents until they were all grown. These children were second cousins of Griffith, who also at one time lived in Pennsylvania, and emigrated therefrom to Nebraska about 1870. He seems to have lived while in Pennsylvania in the same neighborhood as the Herrs, was well acquainted with the children and the parents, and had known the latter

since or before their marriage. Some time prior to 1886 Chris Herr came to the state of Nebraska, and went upon the Raymond farm of Griffith, and either as an employé of Griffith, or as a tenant, was in 1888 operating that farm. In July of that year Chris' sister Barbara, being then about twenty-eight years of age, came from Pennsylvania and kept house for her brother Chris, who was then a single man at this Raymond farm. During this time Barbara's brother George, also a single man, was in Griffith's employ on the Arbor farm. Barbara remained at the Raymond farm keeping house for her brother Chris until January, 1891, at which time Chris married; and in March, 1891, Barbara went to Arbor, and began keeping house for her brother George, and so continued until March 13, 1895. In June, 1891, Minnie Herr also came from Pennsylvania and made her home from that time with her sister Barbara and her brother George, at Arbor. These two girls—Minnie and Barbara—from the time they went to Arbor, did the cooking, the washing, and the housekeeping generally done by women upon farms; and during all this time there were various men in Griffith's employ at this farm who boarded at the house; and if a man in Griffith's employ at the farm was a married man, he kept his wife and family with him, and sometimes the married man and his wife lived in the house with the Herr girls and George. These girls—Minnie and Barbara—were hired and paid by their brother George for the work done for him in this housekeeping. During this time Griffith was frequently at this Arbor farm, as already stated, spending perhaps three days and nights of each week there. He had some of his laundry work done there, and for this he paid the girls. Included in the duties of housekeeping was that of taking care of all the rooms of the house occupied by the persons who lived and slept there, including the room occupied by Griffith when he was there.

In December, 1890, Thomas Walton became ac-

quainted with Barbara Herr, subsequently frequently visited and courted her, and finally, on March 13, 1895, married her. After the marriage Walton took his wife to his home in Lincoln, and the two resided there with Walton's daughter by his first wife, until September 21, 1895, when Mrs. Walton left him, and in October afterward sued him in the district court of Lancaster county for a divorce, alleging as grounds therefor that on August 12, 1895 her husband, without any provocation, used vile and opprobrious epithets toward her, calling her "a damned mean woman, a bitch, bad woman, a God damned liar, a God damned fool," and saying to her: "I do not care where in the hell you go. You have made hell ever since you were here, and I do not care where in the hell you go to. You are nothing but a whore, always have been, and always will be; and I am not going to live with a son-of-a-bitch like you. Take your duds and go;" that since August 25, 1895, her husband had refused to provide her with any money or means to provide for herself; that on July 20 her husband, without cause or provocation, accused her with having been guilty of adultery with Griffith and other persons since her marriage, accused her of being a vile woman, and called her a whore and other vile names; that on September 14, 1895, her husband caused to be published in a daily newspaper in the city of Lincoln a notice forbidding all persons from giving credit to her; that the publication of such notice was without any cause or provocation; that she had never at any time purchased any goods or contracted any debt whatever upon the credit of her husband; that her husband, unreasonably and without any cause, forbade her sister Minnie and her brother George from visiting her at her home, and on September 4 of said year notified her brother and sister and Charles Griffith in writing not to come upon his premises; that since September 8, 1895, her husband had refused to eat at the same table with her, and refused to eat food prepared by her, falsely alleging as a reason

therefor that she intended to poison him; that on September 14, 1895, her husband, without any cause or provocation, willfully and cruelly struck and beat her, and again on September 21, without cause or provocation therefor, seized and choked her, and at both of these times called her vile and opprobrious names; that this conduct on the part of the husband toward her constituted extreme cruelty, and put her continually in fear of bodily injury to such an extent that on September 21 she was compelled to and did abandon the husband's home. There were further allegations by the wife that during all of her married life she had been faithful and chaste to her husband, and had faithfully performed all of her marital duties and given him no cause or provocation for his cruel treatment.

Walton, in his answer to this petition, admitted publishing the notice forbidding persons to give his wife credit, alleging as a reason therefor that she had threatened to pledge his credit, notwithstanding he had provided her with all the necessaries of life; admitted that he had forbidden the sister and brother of his wife and Griffith to visit her at their home, and alleged as a reason therefor that they were maliciously intermeddling in the affairs of himself and wife, and attempting to alienate her affections from him; admitted that after September 13 he had refused to eat at the same table with his wife, and alleged as a reason for this conduct that he feared his wife intended to poison him. He denied generally the other charges against him, and interposed as an affirmative defense that his wife had conducted herself improperly toward him; that she became cross, morose, and abusive; called him "an old fool;" said she was ashamed of him; said she was ashamed to be seen in his society; called him "old stinginess;" said that she married him for his money; said that she had been unfaithful to him, and criminally intimate with other men, and would be so again; that on May 27, 1895, and at divers dates after that time, she had committed adultery with

Griffith and with other men to him unknown; that she threatened to strike him with a butcher-knife, threatened to put him out of the house, and to lock him out, and did on one occasion push him off the porch of his house. The prayer of his answer was that his wife's petition for a divorce might be denied, and that he might be granted a decree of divorce.

The district court found generally in favor of the wife and against the husband, and specially found that the husband had been guilty of extreme cruelty toward the wife; that on August 12, 1895, he had applied to her vile and opprobrious epithets, and accused her of being guilty of adultery; that on July 20, 1895, he had accused her, and said to her that she had been guilty of adultery with Griffith, and at said time applied to her vile and opprobrious names; that on September 8, 1895, he had charged her with having poisoned and having intended to poison him; that on September 18, 1895, he had struck and beat her, and on September 21, 1895, he had seized her and choked her; that all these acts of cruelty were without cause or provocation, and that on September 21, 1895, the wife's health, by reason of the cruelty practiced upon her by her husband, was impaired, and that on said date, without any fault on her part, she was compelled to and did abandon his home. The court further specially found that the accusations and charges of adultery made by the husband against the wife were without provocation in truth or in fact, and were made by the husband for the purpose of willfully and cruelly treating the wife. The court further specially found that each and every of the charges of adultery made against the wife by the husband were acts of extreme cruelty and were each and every one of them false and willfully and intentionally made by the husband; that the wife had at all times conducted herself toward her husband as a chaste and dutiful wife. The court further found that the husband was possessed of property of the value of $24,000 and entered a decree giving the wife a divorce as prayed for in her

petition, awarding her permanent alimony of $5,000, and counsel fees of $700. From this decree the husband appeals.

1. The bill of exceptions in this case consists of more than sixteen hundred pages, and we shall not therefore attempt even a *résumé* of the evidence, but content ourselves with saying that it amply sustains each and every of the general and special findings made by the district court.

2. A contention of the appellant is that the evidence establishes that his misconduct and cruelty toward his wife were provoked by her misconduct and impropriety, and he invokes the principle that one is not entitled in equity to be relieved from the consequences of an act which his own wrongful conduct provoked. The alleged impropriety or misconduct of which the plaintiff alleges his wife was guilty consists in several things. He claims that soon after their marriage his wife became cross and morose, called him an old fool, said she was ashamed of him, said that she married him for his money, told him that she had been unfaithful to him, that she threatened him with a butcher-knife, and pushed him outdoors. The evidence fails to establish that the wife ever threatened her husband with a butcher-knife, or pushed him outdoors, or that she ever told him that she had been unfaithful to him. The evidence does show that some time after her marriage she became morose and irritable, but the record justifies the conclusion that the appellant's conduct was responsible for such condition of his wife. She did at one time call him an old fool, but under what circumstances? In one of his abusive tirades,—in which he seems to have frequently indulged,—he so far forgot himself as to call her a whore, and she responded, "You are an old fool." The record sustains the wife's judgment. She did say to him once that she was ashamed to go out with him; but it appears that the appellant was an uncouth man in his habits and dress, and, among other things, wore trousers entirely too large for him,

and his wife suggested this fact and persuaded him to allow her to alter them to the proper size, which she did; and at one time when they were going or about to go down to the city she spoke of his uncouth appearance, and in that connection made the remark that she was ashamed of him, or ashamed to be seen on the street with him; but this was not maliciously said, and should not have been seriously considered by the appellant. There are very few married women, we opine, who have not used similar language to their husbands; and, generally, when it has been used, it was, as in this case, because the wife desired to see the husband look tidy and neat. She did not say to him that she married him for his money, but in one of his outbreaks of temper he charged her with having married him for his money, and the substance of her response was that a girl like herself would have been foolish to have married a man of his age who had no money. Again we think her judgment was correct. The wife made social calls upon ladies living in her neighborhood, and attended churches and social gatherings. The appellant complained of these things; but the record does not disclose that the neighbors she called upon were not people entirely respectable, nor that she ever went to church or to social gatherings in company with any man, returned with any man, or that she went to the churches or social gatherings for the purpose of meeting any man. But the chief charge of misconduct against the wife is the visits she made to her sister at Arbor after she knew that her husband was unreasonably, or, to use the language of his counsel, "insanely jealous of Griffith;" and that these visits to her sister were made contrary to the husband's wishes or commands. It appears that after the wife knew that her husband objected to her visits to Arbor she refrained for some weeks from going, but she did make several visits to her sister after she knew that her husband objected to her so doing. None of these visits, however, were clandestinely made, and they were all made in the day-

time. Three persons accompanied her upon one of these vistis. Upon another her cousin, Mrs. Gotschall, accompanied her, and the third time there were six persons in the party. The last visit made by her, her brother and sister were present with her all the time she was at Arbor, and nothing in this record supports, or tends to support, the theory that the wife's visits to Arbor were for the purpose of seeing Griffith. Appellant believed, or affected to believe, that Griffith and his wife at this time were criminally intimate, and upon that ground he objected to her making these visits. His argument here is that his wife owed him implicit obedience and that her violation of his commands in respect to these visits was a violation of her marriage contract.

We do not understand that a wife at all times and under all circumstances owes implicit obedience to the husband. We do not understand that a wife's contract of marriage is an indenture of servitude; and, in view of the facts in this record, while the wife's visits to Arbor may not have been prudent, and may have tended in some degree to intensify the jealousy and the cruel conduct of the appellant, still we do not think that these visits caused or provoked the cruel treatment awarded her by her husband; nor do we think that by making these visits the wife violated her marriage contract. Not one of these visits was maliciously made; not one of them was made for the purpose of seeing Griffith. At Arbor lived the sister of this wife. The two had grown up together as playmates and schoolmates, and as members of the same family. They were a thousand miles from father and mother, and it was the promptings of natural affection that induced this wife to go to Arbor to see her sister, and at one of the visits complained of the sister was sick, and the wife visited her because thereof. But assuming that the wife in calling on her neighbors, attending church and social gatherings, and visiting her sister was guilty of disobedience, the punishment inflicted upon her therefor was out of all proportion to the offense. No

conduct on the part of a wife that does not threaten great and immediate bodily injury will justify her husband in beating and choking her; and we can conceive of no conduct on the part of a wife, short of notorious and shameless infidelity,—if that does,—that justifies the husband in calling her a whore, a bitch. To understand—to appreciate—this chapter of domestic life one has only to become familiar with this record. Soon after appellant's marriage he become possessed—or they became possessed of him—of several delusions. One of these was that his wife had married him for his money, and yet he swore on this trial that no one knew anything about his financial affairs. Appellee was neither an expensive nor an extravagant wife. She kept in her employ neither seamstress nor servant. She did her own housework, including the cooking and laundry work. She spent during the six months of her married life $229 of her husband's money. Of this sum $203 went for carpets, fixtures, etc., to furnish the home. Appellant seems to have been a man of little culture or refinement, careless of his personal appearance, his dress, and the comforts of a home. He had spent much of his life in the accumulation of property, and it is probable that if he had affection for anything it was this; and when he was asked to part with some of his wealth for carpets and furniture he felt he was wronged, imagined himself being robbed, and on the road to the poorhouse. His conduct on the first day of his marriage demonstrates the relative value of money and a wife in his mind. He was married about noon at Wahoo and went at once with his wife to Omaha, where they had to remain several hours before taking the train for Lincoln. Instead of going to a hotel at Omaha, he and his wife spent the time in the waiting room of the railroad station; and when supper time came he gave her fifteen cents and told her to buy herself a lunch. We are not surprised to find that a man who held his wealth in such affection as this should entertain the next delusion, namely, that his wife intended to poison him. He

seems to have found proof sufficient to satisfy him of this in her emptying a vessel—in which he had vomited when sick—before the physician arrived, contrary to his instructions, although the wife acted from motives of cleanliness, not knowing of what crime she was suspected by her husband. A third delusion of the appellant was that his wife was an adulteress, chiefly with Griffith, but by no means limited to him. He knew when he was courting her, when he married her, that she had lived for four years at the Arbor farm as her brother's housekeeper and that Griffith was frequently there. He met Griffith there during the courtship. He saw and knew all there was to see or know, and was satisfied, pleased. In a few short weeks after his marriage, when his passions had cooled, when hope had ended in fruition, when this woman had become all his, then, realizing how fair she was, he stood astonished and surprised at his own good fortune. He remembered that he had not had her always; that he did not know every act of her life; reflected that she had met and seen and been acquainted with other and younger men; remembered that she had lived four years at Arbor, and that Griffith was frequently there; that he had been kind to her; took an interest in seeing her married and settled in a home; and then he reflected that here, at least, was opportunity! And from the depths of his imagination arose the spectre of adultery! From this time forth the wife of his bosom becomes a suspect. He construes her innocent desire to see him look neat into aversion for him. He sees in her evening calls on a neighboring lady a plan to meet a paramour. A trifle "light as air" becomes, in his diseased imagination, a crime. He sees in the smile and laugh that he should have cherished his wife's invitation to an unholy liaison. As early as July 26 a Mrs. Wagner, a Mrs. Bebout, and Frank Wagner, a young man of about twenty years of age and a son of Mrs. Wagner,—neighbors of the Waltons,—and Mrs. Walton went in a two-seated carriage into the country, called upon several

people, and were gone until late in the afternoon. It appears that Frank Wagner drove the team and occupied the front seat with Mrs. Walton, the two older ladies sitting in the back seat. When appellee returned to her home her husband seems to have been in one of his jealous moods, and he coldly, cruelly, and deliberately asked her, "Did Frank bang you to-day?" Nor did appellant content himself with making personal accusations to his wife of her infidelity, but in a public street of the city of Lincoln, in front of a hotel, in the presence of various men, publicly and cruelly stated that his wife was criminally intimate, not only with Griffith, but with other men, none of whom he has ever claimed to know, or be able to identify; and this from a husband concerning a wife whom he had promised to love, honor, and protect! And yet it is argued at this bar in this case that this wife was not justified in leaving her husband's home. Home? This was not a home. It was a place of torment. She was justified in fleeing as she would from a plague or a pestilence.

We call these conclusions of the appellant delusions, because the record will justify no other nomenclature. Neither of them was a rational deduction from any fact or circumstance, or all the facts and circumstances, disclosed by this record. The theory of the appellant that his wife was an adulteress was and is a delusion. Whether produced by jealousy, a diseased mind, or a degenerate imagination, still it was a delusion. There is not in this record any evidence, express or inferential, that this wife was at any time or place guilty of any improper conduct with any man. Her reputation from the time she was a schoolgirl in Pennsylvania until the date of this trial in the district court was laid bare before the judge who tried this case. The men and women who had known her when a child, when a young lady in Pennsylvania, the men and women who were acquainted with her after she reached Nebraska, the members of her church, the people who met her at social gatherings, the people who met her

at Arbor, one and all, unite in saying that this woman's reputation for chastity was above suspicion; and though appellant employed detectives to follow and watch this wife; though he condescended, in bare feet on moonlight summer evenings when she was at a neighbor's, to watch her; condescended to creep and crawl where a nobler man would have walked or not have gone,—yet not one improper act or word upon her part with any other man was proved, nor any fact or circumstance established from which an improper intimacy upon her part with another man could be rationally inferred; and at the risk of being deemed sentimental we affirm, after a careful study and an understanding of it, that this record is but a history of a woman wronged by a husband's cruel, unreasonable, and brutal conduct. Had she been a weaker woman, she might have gone insane or committed suicide; and had she been a woman more combative by nature, she might have become to her traducer an avenging Nemesis.

Into the trial of this case the appellant introduced another theory, which is skillfully interwoven into the brief filed here. It is this: that this wife, from the time she came to Nebraska, was Griffith's mistress; that he caused her to come to this state for that purpose; that after her sister Minnie began living at Arbor, Griffith desired to substitute her as his mistress instead of the appellee, and for the purpose of effecting this exchange Griffith, the appellee, and her sister—the brother perhaps aiding, abetting, and consenting thereto—entered into a conspiracy to bring about a marriage between the appellant and the appellee; and having accomplished this, they further conspired to break up the marriage and endow the appellee with appellant's property. We have called this a theory, not a delusion; and a theory we think it is, as malicious as dangerous. It was and is merely an insinuation, both cruel and cowardly. It assailed not only the reputation of appellee and Griffith, but it struck at the reputation of the sister, and the peace and happiness of Griffith's

wife and daughter. With the delusions heretofore mentioned and this latter theory the appellant constructed a web, beautiful from an artistic standpoint as that of the spider and quite as cruel, in which to entangle and destroy the reputation and happiness of all these persons; and had the appellee's case been in the hands of less able counsel, he might have succeeded. But the theory of a conspiracy either to bring about this marriage or to destroy it has no support in the evidence in this record. It was born of cunning and malice; flourished while fed by degenerate imaginings, but perished when exposed to the light of a court of equity.

In support of the contention that the wife's disobedience of her husband provoked and thereby justified the cruelty practiced by him toward her, counsel for appellant cite the following cases: *Fulton v. Fulton*, 36 Miss. 517; *Taylor v. Taylor*, 26 N. Y. Supp. 246, 74 Hun 639; *Evans v. Evans*, 82 Ia. 462, 48 N. W. Rep. 809; *Nullmeyer v. Nullmeyer*, 49 Ill. App. 573; *Blurock v. Blurock*, 30 Pac. Rep. [Wash.] 637; *Coles v. Coles*, 32 N. J. Eq. 547. In these cases, or most of them, it was held that the wife, by her improper conduct, had caused the husband's cruelty made the basis of her petition for a divorce, and that therefore she was not entitled to relief. A review of two of these cases must suffice, as they are representatives of all.

In *Evans v. Evans*, 48 N. W. Rep. [Ia.] 809, the wife sought a divorce from her husband because of his "inhuman treatment." It appeared that he had falsely accused her of unchastity. No physical violence was shown. It appears that the wife had permitted other men than her husband to scuffle with her, to kiss her, to put their arms around her, and to take other liberties with her of a like nature; that the husband knew this, and it aroused his jealousy and made him angry. The district court found that this conduct of the wife caused and provoked the indecent language and the false accusations of unchastity made by the husband against the wife, and denied her a divorce, and its judgment was affirmed.

Another case is *Reed v. Reed*, 4 Nev. 396. In that case the wife sought a divorce from her husband on the ground of extreme cruelty practiced toward her, which consisted in his beating and choking her; but it appeared that this conduct on the part of the husband was provoked and caused by a physical assault or attack made upon the husband by the wife with a spade, and the court below held that the wife's conduct had provoked the cruelty which she made the basis of her claim for divorce, and denied her relief, and this judgment was by the supreme court of the state affirmed.

But the facts in the two cases noticed, and in the other cases cited by the appellant, are very different from the facts of the case at bar. Here the record discloses no improper intimacy on the part of the wife with other men, her husband knowing which made him jealous and caused him to assail his wife with the lewd and virulent epithets and charges which he did. There is no pretense here that the husband beat and choked the wife because of a physical attack made on him by her. While it is true that when it appears that the husband's cruelty is the natural and probable consequence of the misconduct of the wife, she cannot make such cruelty the basis of a divorce, still this is only a general rule, and if it appears that the husband's misconduct was wholly unjustified by the wife's provocation, and his cruelty out of proportion to her offense, she may be granted a divorce because of his cruelty. (1 Bishop, Marriage & Divorce secs. 1641, 1644.)

The supreme court of Minnesota, in *Segelbaum v. Segelbaum*, 39 N. W. Rep. [Minn.] 492, states the rule thus: "Provocation which is disproportionate to the wrongs and injuries suffered is insufficient to sustain a plea of justification."

The supreme court of Texas, in *Jones v. Jones*, 60 Tex. 457, discussing the question under consideration, said: "Recrimination is a valid defense when the recriminatory fact is of a like character with the act of the defendant

for which the divorce is sought, or when the difference between the offense of the plaintiff and that of the defendant is merely slight in degree of guilt; but some allowance must be made for human frailty, and the plaintiff must not be required to be without fault in order to obtain a divorce for the defendant's great wrong." To the same effect are *Griffin v. Griffin*, 8 B. Mon. [Ky.] 120; *Mayhugh v. Mayhugh*, 7 B. Mon. [Ky.] 429; *Shores v. Shores*, 23 Ind. 546.

Wheeler v. Wheeler, 53 Ia. 511, is strikingly in point here. The court said: "The excuse offered by the defendant is that he disliked to have his wife associate with the Lanes. * * * [Lane is the man accused of adultery with his, Wheeler's, wife.] There is no evidence to show that the defendant had any grounds for his fancied or real opposition to the Lanes. But admitting that in such a matter he must judge for himself, this gave him no right to call his wife vile names and abuse her and accuse her of want of chastity. It is said that because the plaintiff persisted in associating with the Lanes when the defendant objected to her so doing, she by her own conduct brought about the difficulty of which she now complains. * * * We are unable to find from the evidence that the foregoing proposition of fact is true. * * A man who persistently calls his wife a 'whore' * * * is fast preparing himself to resort to harsher measures to degrade her. Conceding it to be true that plaintiff may have been indiscreet, there is no evidence tending to show that she was unchaste. She therefore must be regarded as a virtuous woman and imbued with the feelings of such."

Whether a wife's disobedience of her husband, or her misconduct, or impropriety, was the cause or provocation of the husband's cruelty towards her, is a question of fact; and in this case the district court has found that the cruelty practiced toward her by her husband was not induced by the wife's disobedience or impropriety, and the evidence abundantly sustains the finding. Whether

the punishment inflicted by a husband upon his wife or his harsh treatment of her because of her disobedience, impropriety, or misconduct was so far disproportionate to her offense as to be unjustifiable is a mixed question of law and fact, to be determined in any case from the particular facts and circumstances in evidence therein; and in the case at bar, if it be conceded that the disobedience of this wife or her misconduct or impropriety caused and provoked the harsh treatment inflicted upon her by her husband, still the punishment inflicted by him was out of all proportion to her offense and affords him no justification.

3. Another contention of the appellant is that, considering the situation and relation of the parties, the husband's misconduct and cruelty toward his wife was not extreme cruelty within the meaning of section 7, chapter 25, Compiled Statutes, which provides: "A divorce from the bonds of matrimony * * * may be decreed for the cause of extreme cruelty, whether practiced by using personal violence, or any other means." The "situation of the parties" was a young wife thirty-five years of age; a husband fifty-seven, unreasonably, insanely jealous, jealous without cause or provocation, and when in a rage induced and caused by his unfortunate jealous disposition, he falsely, and without reasonable cause therefor, charges this wife with unchastity, accuses her on the public streets with being criminally intimate with other men, calls her the most vile, opprobrious, and degrading names known to the English language, and crowns the cruel treatment by beating and choking her. We think that, "considering the situation and relation of these parties," the husband's conduct was not only cruelty, but extreme cruelty within the meaning of our statute. In support of his contention appellant's counsel cite us to the following cases: *Beckley v. Beckley*, 31 Pac. Rep. [Ore.] 470; *Reed v. Reed*, 4 Nev. 396; *Shaw v. Shaw*, 17 Conn. 189; *Coulthard v. Coulthard*, 60 N. W. Rep. [Ia.] 213; *Felton v. Felton*, 62 N. W. Rep. [Ia.] 677; *Boon v.*

Boon, 12 Ore. 440; *Kennedy v. Kennedy*, 73 N. Y. 369; *Beach v. Beach*, 46 Pac. Rep. [Okla.] 514; *Harper v. Harper*, 29 Mo. 301; *O'Connor v. O'Connor*, 13 S. E. Rep. [N. Car.] 887; *Van Glahn v. Van Glahn*, 46 Ill. 135.

We have already referred to *Reed v. Reed*. But in that case, while the court denied the wife a divorce because the evidence established that she had provoked the cruelty of which she complained, still the court said: "There may be extreme cruelty without the slightest violence. The happiness of a life may be destroyed by a course of conduct which could furnish no ground for apprehending bodily harm or injury. * * * It is evident that much must be left to the discretion of the court and jury in determining whether certain acts, or course of conduct, amount to extreme cruelty, for it is manifest from the nature of things that acts which would be extreme cruelty under certain circumstances would not be so under others; and so, too, a course of conduct toward one person might be deemed extreme cruelty which towards another would not be so considered by any one."

In the case of *Shaw v. Shaw*, *supra*, the husband had vilely abused the wife, had charged her with adultery, and, against her wishes and remonstrances, had unreasonably exercised his authority in regard to her attending church and visiting her relatives and friends, and persisted in endangering her life by excessive intercourse, and the court said: "If this was cruelty, it was such cruelty as 'can be borne.' The unfortunate victim is to be pitied, but the law furnishes no remedy." The case is an authority for the contention that the conduct of the husband in this case toward his wife was not extreme cruelty. But we confidently say that no such a rule of law as announced by the court in the *Shaw Case* exists west of the Alleghany mountains.

Perhaps it may be also said that *Van Glahn v. Van Glahn*, *supra*, also sustains counsel's contention. But the other cases are not authority for the proposition in support of which they are cited, the facts in this case and our statute considered.

On the other hand, we think the authorities establish that a false charge of adultery made by a husband against his wife, and calling her vile, opprobrious, and indecent names, even if he forbears choking and beating her, may constitute extreme cruelty. (*Lee v. Lee*, 28 Pac. Rep. [Wash.] 355; *Wagner v. Wagner*, 30 N. W. Rep. [Minn.] 766; *Farnham v. Farnhan*, 73 Ill. 497; *Jones v. Jones*, 60 Tex. 457; *Cooper v. Cooper*, 44 N. W. Rep. [Mich.] 381; *Boeck v. Boeck*, 16 Neb. 196; *Vocacce v. Vocacce*, 16 Neb. 453; *Brotherton v. Brotherton*, 12 Neb. 75; *Powers v. Powers*, 20 Neb. 529; *Heist v. Heist*, 48 Neb. 794; *Waltermire v. Waltermire*, 17 N. E. Rep. [N. Y.] 739; *Gibbs v. Gibls*, 18 Kan. 419; *Black v. Black*, 30 N. J. Eq. 215.)

In *Graft v. Graft*, 76 Ind. 136, the court said: "A husband could hardly, by any other means, cause a sensitive wife more mental pain, torment, vexation, affliction, grief, and misery than to falsely charge her with the crime of adultery, and slanderously report the same around among her neighbors; and in doing so he would certainly be guilty of great unkindness, and want of tenderness toward her. A greater violation of the marital vow to protect and defend the reputation, as well as the person, of a wife the husband could not commit than to wantonly traduce and vilify her character."

In *Smith v. Smith*, 40 N. J. Eq. 566, the court said: "A charge of incest made by a husband against his wife, persisted in without cause, attended with slight acts of violence, jealous watchings, suspicious conduct, and reasonable apprehension of bodily harm is good ground for judicial separation by a divorce from bed and board. It is not a good defense to such complaint that the husband appears to be under an insane delusion where there is not general insanity."

4. A final contention of the appellant is that the alimony awarded the wife in this case by the district court is excessive. We do not think it is. The only doubt in our minds with reference to the correctness of the decree as to alimony is whether it should not have been made

larger; and we are earnestly pressed by counsel for the appellee to modify the decree in reference to alimony and increase the amount. In support of this contention it is said that when a marriage is dissolved by reason of the misconduct of the husband the wife is, by section 23, chapter 25, Compiled Statutes, declared to be entitled to dower in his lands in the same manner as if he were dead, and that treating the wife with extreme cruelty is misconduct within the meaning of this statute, and therefore the wife was entitled to an amount of permanent alimony which would equal the value of her dower interest in her husband's real estate. Conceding that extreme cruelty is misconduct within the meaning of this statute, and that the wife by reason thereof was entitled, upon the dissolution of the marriage, to permanent alimony equal in value to her dower interest in her husband's lands, still we do not think that we can modify the district court's decree in reference to the permanent alimony awarded the wife. In the first place the wife's prayer in her petition was for permanent alimony, and not that she might be, upon the dissolution of the marriage, awarded a dower interest in her husband's lands; and she did not complain in the district court, nor does she here, that she was not given a dower interest. She must therefore be deemed to have assented to accept a sum of money equal in value to the dower as permanent alimony and in lieu thereof. (*Tatro v. Tatro*, 18 Neb. 395.) Again we cannot say from the evidence in this record but that the $5,000 of permanent alimony awarded the wife is equal in value to what a dower interest in the lands of the husband would have been. There is no fixed rule in this state for determining what portion of a husband's estate should be decreed to his wife as alimony. The amount should be just and equitable, due regard being had for the rights of each party, the ability of the husband, the estate of the wife, and the character and situation of the parties. (*Cochran v. Cochran*, 42 Neb. 612; *Heist v. Heist*, 48 Neb. 794.) We think

the decree of the district court complies with this rule. The wife is young and healthy. She has no child or children to support, and she did not contribute to the accumulation of the husband's property. The decree of the district court is in all things

AFFIRMED.

NORVAL, J., offered no opinion.

CITY OF OMAHA V ANDREW FLOOD.

FILED DECEMBER 8, 1898. No. 8499.

1. **Nuisance.** The essential ingredient of a nuisance is its unlawful or wrongful character.

2. ———: OBSTRUCTION OF STREET. The unlawful obstruction of a public street is a nuisance, but that which is authorized by competent legal authority does not in law constitute a nuisance.

3. ———: IMPROVEMENT OF STREET. When the authorities of a municipal corporation, invested by the legislature with authority so to do, construct an improvement in a public street, such improvement is not a nuisance, though it damage adjacent property, interfere with the owner's enjoyment thereof, and be negligently constructed.

4. **Improvement of Street:** DAMAGES TO ADJACENT PROPERTY: LIABILITY OF CITY. Where property fronting on a public street is damaged by the method or manner adopted by the authorities of a municipal corporation in permanently grading such street, the corporation is liable to the owner of such property for such damages.

5. ———: ———: ———. In such case the owner's measure of damages is the depreciation in value of his property caused by the construction and permanent maintenance of the grade.

6. ———: ———: ———: EVIDENCE. And for the purpose of arriving at the amount of such depreciation the fact that the grade, as constructed and maintained, obstructs, and will continue to obstruct, the owner's passage between his property and the street, decreases the rental value of his property, and interferes with his enjoyment and possession thereof, and every other fact and circumstance that would depreciate the market value of the property in the mind of a good-faith intending purchaser thereof, are proper elements for consideration,

7. ———: ———: LIMITATION OF ACTION. In such case the owner's cause of action accrues on the completion of the grade and is barred in four years thereafter.

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

W. J. Connell, for plaintiff in error.

F. W. Fitch, contra.

RAGAN, C.

Sixth street is one of the public thoroughfares of the city of Omaha, and extends north and south. It is crossed at right angles by Pine street. These streets are each 100 feet in width. On the southeast corner of their intersection lies block 38 of Credit Foncier Addition, and in the northwest corner of this block are lots 3 and 4 thereof, the property of Andrew Flood. These streets intersect on the crest of a hill or bluff. The authorities of the city of Omaha duly caused the two streets to be graded, and in so doing made a cut in each of said streets in front of Flood's property 66 feet deep. The city, however, in grading these streets did not grade them to their full width of 100 feet, but graded only a width of 60 feet in each street, thus leaving an embankment on the north and west of Flood's property 20 feet wide. More than four years after the completion of this grade Flood brought suit in the district court of Douglas county against the city of Omaha, setting forth, in substance, the foregoing facts and alleging that the strips of earth left by the city ungraded between his property and the graded street interfered with his unobstructed passage between his lots and the graded streets; that such strips constituted a continuing nuisance; that prior to the grading his property had a rental value of $200 per year; that since the grading of the streets, and by reason of the manner in which they were graded, the rental value of the property had been decreased fifty per cent. Flood in his

petition further alleged that by reason of the city's grading the said streets in the manner it did, he himself had been unable to grade his lots or bring them to grade or to use the streets adjacent to his property, to his damage in the sum of $7,000. The city in its answer admitted the grading of the streets as alleged by Flood, and among other defenses interposed the statute of limitations. Flood had a judgment, to review which the city has filed here a petition in error.

It stands admitted by the record that these streets, as laid out and platted, were each 100 feet in width; that the city caused them to be graded to the width of only 60 feet, thus leaving a strip of earth or an embankment 20 feet wide on each side of each street between the graded portion thereof and the lot line of the abutting owner; that the city authorities of said city were by law invested with the power to grade these streets in the manner they did; that the work of grading was not negligently done, unless the partial grading of the street was negligence; and that Flood has sustained no injury or damage as the result of this grading, except such as resulted from its being a partial instead of a complete grading of the streets. Without following the specific assignments of error we proceed at once to the merits of the controversy.

1. The district court instructed the jury as follows: "A city has no right to obstruct its streets by itself or agents so as to deprive the property holder of free access to and from their lots abutting on the same. If it permits the use of a street to be in any manner obstructed, it must see that the approach is so constructed as not to produce injury to adjacent property holders. If you believe from the evidence that damage to the plaintiff has been occasioned by the alleged obstruction complained of, and that the same has operated as an injury to the use and occupation of plaintiff's premises and has caused a loss of rents, or his comfortable enjoyment thereof has been lessened, then you are instructed to find

from the evidence to what extent an injury has been occasioned thereby. * * * The embankments complained of in this case, if they have worked any hurt, injury, damage, or inconvenience to the plaintiff, constitute a continuing nuisance, and the statute of limitations is not a bar to plaintiff's right to recover in this suit such damages as the jury shall find from the evidence he has sustained within four years next previous to the date when this suit was brought." The court refused to instruct the jury as follows: "You are instructed that the city was under no obligation to grade the property lying between plaintiff's lots and the streets of the city of Omaha, * * * and no such duty is enjoined upon the city by the charter of metropolitan cities, or by law; and that said earth standing upon said property lying between the street of the city of Omaha and the premises of plaintiff was not in law, as applicable to the evidence in this case, a nuisance. As the undisputed proof in this case shows that the grading in controversy was done more than four years prior to the commencement of this action, all claims for damages by reason of such grading are fully and completely barred by the statute of limitations at the time of the commencement of this action. You are instructed that unless the banks of earth * * * adjoining Sixth * * * and * * * Pine streets were nuisances, no recovery whatever can be had in this action. As to whether these strips, or either of them, was a nuisance, it was proper for you to consider whether the ground comprising these strips was left in its original condition; and if it was, and by no act of the city it was changed from its original condition, the said banks would not be a nuisance such as would give the plaintiff a right of recovery by reason of allowing them to remain in their original condition."

We have quoted these instructions for the purpose of showing the theory upon which this case was tried in the court below. It will be observed that the theory of Flood was—and the district court adopted it—that these un-

graded portions of the street obstructed Flood's passage between his property and the graded portion of the streets, disturbed him in the enjoyment of his property, depreciated its rental value, and that therefore the ungraded portions of the street constituted a continuing nuisance. We think this theory was wrong. The city authorities were clothed with the amplest jurisdiction as to its streets, were not only invested by law with the control and management of its streets, but were expressly authorized to open, to extend, to widen, to narrow, to grade, to improve and keep in repair the streets to any width they might deem best for the interests of the city. Suppose the city authorities, instead of causing a cut to be made at the intersection of these streets, had constructed tunnels there. Then, doubtless, these tunnels would have obstructed Flood's passage between the property and the tunnels quite as much as the cuts do; but would the courts have been authorized to say that these tunnels constitute a nuisance? We think not. Suppose Flood's property, instead of being on the crest of the hill, should have been located in a depression between two hills and the city authorities had, in the streets on which his property abutted, caused to be erected a fill or had built viaducts and these had obstructed Flood's passage between the traveled streets and his property, and caused him a loss of rents. Would it follow that this viaduct or this fill would therefore be a nuisance? We think not. The basis of every nuisance is its unlawful or wrongful character.

The trouble with Flood's theory and that of the district court is they assume that because the partial grading of the street as done by the city authorities caused Flood's damage and an injury, therefore it was a nuisance. It by no means follows that because of the manner in which a street is graded or any other public improvement is made, damaging an abutting property owner, such public improvement or street grading is a nuisance. The grading may be done or the public im-

provement may be erected in a negligent manner, and yet it would not follow that it was a nuisance, and that the courts had a right to abate it. Here the improvement complained of as a nuisance was neither wrongfully nor unlawfully made. It was made by authority of law, and the manner of its making was one committed to the discretion of the city authorities; and if we concede that, by the improvement as made, Flood was disturbed in the possession of his property and suffered a loss of rents and that the improvement was negligently made, still it was not a nuisance. A nuisance is something wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights; and since the very definition assumes the existence of wrong, those things which may be annoying or damaging, but for which no one is in fault, are not to be deemed nuisances, though all the ordinary consequences of nuisance flow from them. (Cooley, Torts p. *566.) Of course the unauthorized or unlawful obstruction of a public street is a nuisance, but that which is authorized by competent legal authority cannot in law constitute a nuisance. (*Davis v. Mayor*, 14 N. Y. 506.) In *Garrett v. Lake Roland E. R. Co.*, 29 Atl. Rep. [Md.] 830, it was held that the location of an abutment in a public street to be used as an approach to an elevated railway, when authorized by the ordinances of a city, was not a nuisance. The supreme court of the United States in *Transportation Co. v. Chicago*, 99 U. S. 635, laid down the broad proposition: "That which the law authorizes cannot be a nuisance, such as to give a common-law right of action."

In support of his contention that the portions of the street left ungraded by the city in front of his client's property constitute a nuisance counsel for Flood have cited us to numerous cases. One of these cases is *Brakken v. Minneapolis & S. P. R. Co.*, 11 N. W Rep. [Minn.] 124. But that case holds, and holds only, that the owner of lots abutting on a public street has such a special interest in the street as to entitle him to main-

tain a private suit for damages against a party who wrongfully obstructs the street in front of his property. The street in front of the plaintiff's property in that case had been obstructed and the plaintiff's property damaged by the construction of a railroad in the street. It does not appear whether the railroad was constructed in the street in pursuance of authority granted by the city council which had control of the street, but the case rests upon the principle that the railroad was wrongfully in the street. If the railroad had been constructed in that street without permission of the city authorities who had control of the street, then the railroad company was a trespasser, the railroad was wrongfully in the street, and it was a nuisance.

Another case cited is *Stack v. City of East St. Louis*, 85 Ill. 377. In that case the city of East St. Louis authorized a bridge company, which owned a bridge across the Mississippi river at East St. Louis, to construct an approach to its bridge in one of the public streets of the city in front of Stack's property. The bridge approach obstructed Stack's passage between his property and the street in which the approach was constructed. The rental value of the property was diminished by the noise and confusion incident to persons traveling over the approach, and the court held that the city of East St. Louis was liable to Stack for the damages which his property had sustained by reason of the construction and maintenance in the street in front of his premises of this bridge approach. Whether the approach to the bridge was a nuisance was a point not mentioned in the case. The decision of the court was based upon the proposition that the bridge approach was not one of the purposes for which the street was originally granted; that the use of the street for a bridge approach was a purpose foreign to the grant. In other words, that the bridge approach was a burden additional to those for which the street was granted by the original owner of the soil.

Another case is *Davis v. Mayor*, 14 N. Y. 506. In that

case Sharp and others procured permission from the city authorities of the city of New York to construct a railroad in Broadway, one of the principal streets of said city. Davis brought a suit to enjoin Sharp and his associates from constructing this railroad, on the grounds that the laws of the state of New York had not conferred any authority upon the city authorities of the city of New York to permit its streets to be used for the purpose of building and operating therein a railroad, and that the improvement, if erected, would be a nuisance, and the court sustained Davis' contention. The distinction between that case and the one at bar is obvious. There the railroad in the street would obstruct it, and its presence there would be unlawful and unauthorized. Here the embankments which it is alleged obstruct the street, and which it is alleged constitute a nuisance, are not there unlawfully; and to paraphrase the language of Denio, C. J., in the *Davis Case:* If the embankments are lawfully in the streets, then it is impossible they should constitute a nuisance, as that is an offense which cannot be predicated on the lawful exercise of authority upon a subject to which it is applicable.

Another case cited is *Omaha & R. V. R. Co. v. Standen,* 22 Neb. 343. In that case the railroad company had constructed a bridge across the Platte river and in so doing had constructed it so low that when the river was high and the ice flowing the bridge arrested the ice and caused the water to flow over the lands of adjoining proprietors and damage them, and it was held that for these damages the railway company was responsible. But this case does not decide that the bridge which was the subject of complaint was a nuisance, but the railway company which constructed it was held liable upon the principle that one must so use his property as not to unnecessarily and negligently injure another. The liability of the railway company was put upon the ground of its negligence, and not upon the grounds that its bridge was unlawful or unauthorized, or a nuisance. Other cases resting upon

the same principle as the *Standen Case* are: *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb. 526; *City of Beatrice v. Leary*, 45 Neb. 149; *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Neb. 698.

A further review of cases* cited by counsel for Flood in support of his contention that these embankments constitute a nuisance would be unprofitable. Suffice it to say that they do not contradict the proposition that when the authorities of a municipal corporation invested by the legislature with authority so to do construct an improvement in a public street, such improvement is not a nuisance, though the improvement damage adjacent proprietors and interfere with the owners' enjoyment thereof and be negligently constructed.

2. Another theory of counsel for Flood, and adopted by the district court, was that the manner in which the city graded the intersection of these streets,—that is by grading sixty feet thereof and leaving a twenty-foot strip on each side ungraded,—was negligence. For the purpose of this case we assume, but we do not decide, that the manner in which the city graded the intersection of these streets was a negligent one; that the leaving untouched and ungraded of twenty feet of the soil, as it originally existed, on each side of the street was negligence, and as the result of that negligence Flood's property was depreciated in value, the rental value of his property depreciated, and his passage between his prop-

**City of Pekin v. Brereton*, 67 Ill. 477; *Nevins v. City of Peoria*, 41 Ill. 502; *Park v. Chicago & S. W. R. Co.*, 43 Ia. 636; *Blesch v. Chicago & N. R. Co.*, 43 Wis. 183; *Carl v. Sheboygan & F. D. L. R. Co.*, 1 N. W. Rep. [Wis.] 295; *Wilder v. De Cou*, 26 Minn. 10; *Lackland v. North Missouri R. Co.*, 31 Mo. 181; *Byrne v. Minneapolis & S. L. R. Co.*, 36 N. W. Rep. [Minn.] 339; *Emmons v. Minneapolis & S. L. R. Co.*, 36 N. W. Rep. [Minn.] 340; *Francis v. Schoellkopf*, 53 N. Y. 152; *Hopkins v. Western P. R. Co.*, 50 Cal. 190; *Frith v. Dubuque & C. D. & M. R. Co.*, 45 Ia. 406; *Wetmore v. Tracy*, 14 Wend. [N. Y.] 252; *State v. Atkinson*, 24 Vt. 448; *State v. Woodward*, 23 Vt. 92; *Smith v. Putnam*, 62 N. H. 369; *Nelson v. Godfrey*, 12 Ill. 20; *Harper v. City of Milwaukee*, 30 Wis. 365; *Kobs v. City of Minneapolis*, 22 Minn. 159; *Shepherd v. Willis*, 19 O. 142; *Thayer v. Brooks*, 17 O. 489; *Palmer v. City of Lincoln*, 5 Neb. 144; *Davis v. Mayor*, 14 N. Y. 507; *Laflin & Rand Powder Co. v. Tearney*, 131 Ill. 322.

erty and the graded streets obstructed; but when did these damages accrue? We think when the grading was completed. At that time his cause of action accrued, and then, or at any time within four years thereafter, he might have sued the city for such injuries; and the measure of his damages would have been the difference in value of his property as it existed before the grades and cuts were made and as it existed afterwards, and in estimating and determining this difference in value the facts that the grades as made obstructed his passage between his property and the streets and decreased the rental value of his property would have been competent considerations. A prudent intending purchaser of this property, after this grade was completed, would have perhaps given less for the property because of the manner in which the city had graded these streets. The damages, then, sustained by Flood by reason of the manner in which these cuts were made were all embraced within the damages awarded to him, if such award was made, by reason of his property having been damaged for public use. If no such award was made, and he brought suit and obtained a judgment against the city for the damages, then the damages claimed in this action were embraced within the judgment rendered in such suit. In other words, the damages which he claims here accrued more than four years before he brought this action. (*Omaha & R. V. R. Co. v. Moschel*, 38 Neb. 281; *Omaha & S. R. Co. v. Todd*, 39 Neb. 818.) In *Chicago, B. & Q. R. Co. v. O'Connor*, 42 Neb. 90, the railway company constructed its road in a public street in front of O'Connor's property, and operated its trains thereon, and erected in said street a coal-house, and hoisting apparatus, and side tracks for use in connection therewith. More than four years after these obstructions were placed in the street O'Connor sued the railway company for damages, alleging that the running of engines over its tracks injured the walls, foundations, and plastering of his house; that the ringing of bells and sounding of

whistles, the noise from escaping steam, and the smoke, dust, and soot arising from operating the engines and unloading of coal at the coal-house rendered the occupancy of his premises uncomfortable, and depreciated its rental value; and it was held that O'Connor's cause of action accrued at the time these obstructions were permanently placed in the street, and that these facts of which O'Connor complained, and every other fact and circumstance that would have injured the market value of the property in the mind of a good-faith intending purchaser thereof, would have all been proper elements for consideration in determining the damages which O'Connor's property had sustained by reason of the careful construction and proper operation of the railway and coal-house in the street. The embankments left by the city in grading the intersection of the streets in controversy were not temporary obstructions. Their presence in the street was owing to the method adopted by the city authorities in grading these streets. They were permanent, and whatever damages Flood sustained by reason thereof accrued when they were completed. The judgment of the district court is contrary to law and it is reversed and the cause remanded.

REVERSED AND REMANDED.

CITY OF OMAHA V. ANDREW FLOOD.

FILED DECEMBER 8, 1898. No. 8506.

Nuisance: IMPROVEMENT OF STREET: DAMAGES. On the authority of *City of Omaha v. Flood*, 57 Neb. 124, the judgment of the district court in this case is reversed.

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

W. J. Connell, for plaintiff in error.

F. W. Fitch, contra.

RAGAN, C.

The facts in this case are the same as those in *City of Omaha v. Flood*, 57 Neb. 124, and upon the authority of that case the judgment of the district court in this is

REVERSED.

HENRY OERTER V. STATE OF NEBRASKA.

FILED DECEMBER 8, 1898. No. 10130.

1. **Crimes:** ACCESSORIES: STATUTES. The effect of section 1 of the Criminal Code is to make the aiding, abetting, or procuring of another to commit a felony a substantive and independent crime.

2. ———: ———: INFORMATION. On an information charging one as principal with having committed a felony the prisoner cannot be convicted as an accessory.

3. **Gaming:** ACCESSORIES: INFORMATION. The prisoner was indicted for setting up and keeping gaming tables and gambling devices. The district court instructed the jury that if they found that he set up or kept the gaming tables and devices or "aided and abetted another so to do," they should find him guilty. *Held* erroneous.

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

I. J. Dunn, for plaintiff in error.

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

RAGAN, C.

In the district court of Douglas county Henry Oerter was convicted of the crime of having set up and kept

for gain certain gaming tables and gambling devices contrary to the provisions of section 215 of the Criminal Code. He brings the judgment pronounced upon that conviction here for review.

Of the errors assigned we notice only one. On the trial the district court instructed the jury: "The material allegations in the information which the state must prove beyond a reasonable doubt before you will be justified in returning a verdict against the defendant are that * * * the defendant Henry Oerter, either alone or knowingly aiding, assisting, or abetting another, did unlawfully and feloniously set up, or did unlawfully and feloniously keep, for the purpose of gain certain gaming tables and gambling devices named in the information. If you believe that the state has proved the above material allegations as above stated beyond a reasonable doubt, then, and in such case, you should find the defendant guilty of the crime charged." Section 1 of our Criminal Code provides that any person who shall aid, abet, or procure any other person to commit a felony shall, on conviction thereof, be punished in the same manner and to the same extent as the person who actually committed the felony could be punished. The effect of this legislation is to make the aiding, abetting, or procuring of another to commit a felony a substantive and independent crime. The plaintiff in error was not charged as an accessory before the fact, but as principal. He was not charged in the indictment with aiding and abetting another to set up or keep gaming tables or gambling devices, but with having committed that crime himself. By the instruction just quoted the court in effect told the jury that, if the evidence warranted, they might find the plaintiff in error guilty of aiding and abetting another to commit the crime for which the prisoner stood indicted. This was error. The prisoner was indicted for one crime. He could not be lawfully convicted of another and different crime for which he was not indicted. (*Hill v. State*, 42 Neb. 503; *Dixon v. State*,

46 Neb. 298; *Walrath v. State*, 8 Neb. 80; *Noland v. State*, 19 O. 131.) The judgment of the district court is

REVERSED.

ATKINSON & DOTY V. MAY'S ESTATE.

FILED DECEMBER 8, 1898. No. 8496.

Contest of Will: ATTORNEY'S FEES: LIABILITY OF ESTATE. The estate of a decedent is not liable to an attorney for services rendered by him for and at the request of a legatee under decedent's will in a contest thereof.

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

John L. Doty, for plaintiffs in error:

Expenses of litigation in attempting to support a will should be allowed against the estate; and attorneys' fees should be included. (*Meeker v. Meeker*, 37 N. W. Rep. [Ia.] 773; *Moore v. Alden*, 80 Me. 301; *Mathis v. Pitman*, 32 Neb. 191; *Glen v. Fisher*, 10 Am. Dec. [N. Y.] 310.)

Reese & Gilkeson, contra:

Plaintiffs' claim was properly disallowed. (*Lusk v. Patterson*, 30 Pac. Rep. [Colo.] 253.)

RAGAN, C.

Nancy Jennie May died in Lancaster county, leaving a paper purporting to be her last will and testament, in and by which she bequeathed $1,000 to the "African Mission under Bishop Taylor's Jurisdiction." This paper was presented to the county court of said county for probate, and its probate resisted. Bishop Taylor, or some one acting for him, employed Messrs. Atkinson & Doty, attorneys and counsellors at law of the Lancaster county bar, to assist in the litigation which ensued over the contest of this will. The county court admitted the

will to probate and the contestants appealed to the district court, where a judgment was rendered denying the will probate. Subsequently the county court appointed an administrator for the estate of Nancy Jennie May, and Atkinson & Doty filed in the county court a claim against the May estate for the services which they had rendered in the will contest proceedings. The county court disallowed the claim and Atkinson & Doty appealed to the district court, which also rendered a judgment disallowing their claim, and they have filed a petition in error here to review this judgment of the district court.

The judgment of the district court was right. The estate of a decedent is not liable to an attorney for services rendered by him for and at the request of a legatee named in the decedent's will in a contest thereof. The judgment of the district court is

AFFIRMED.

UNION STOCK-YARDS COMPANY V. EDWARD GOODWIN.

FILED DECEMBER 8, 1898. No. 8489.

1. **Master and Servant:** INSPECTION OF APPLIANCES. A person or corporation using the cars or appliances of another person or corporation, as to its employés, uses such cars or appliances charged with the same duty as to inspection as if they were his or its own.

2. ———: ———: RISKS OF EMPLOYMENT. An employé who, under the instructions of his master, uses the car or appliance in his master's possession belonging to some other person or corporation thereby assumes only the same risk that he would if the car or appliance belonged to his employer.

3. ———: ———. The undisputed facts as to the condition of a defective car brake stated, and *held* that the jury was justified in inferring therefrom that a reasonably careful inspection of the brake by a competent inspector would have revealed its defective condition, although the defect was of so latent a character as not to be discernible at a glance by one inexperienced in brake construction or inspection.

4. **Evidence:** INFERENCES. A jury has the right to draw rational, reasonable, and logical inferences from facts proved or admitted.

5. ———: IRRELEVANCY: JUDGMENT. A judgment lacks evidence to support it which rests solely on testimony irrelevant under the issues made by the pleadings.

6. **Master and Servant:** RULE OR CUSTOM: RISKS OF EMPLOYMENT: PLEADING. That an employé knew of a rule or custom of his employer, by which his business was conducted, but nevertheless continued in his service, and thereby assumed the risk of injury from a defective appliance furnished him for use, is affirmative matter of defense and must be pleaded.

7. ———: DEFECTIVE APPLIANCES: RISKS OF EMPLOYMENT. A brakeman who goes upon a car to set a brake thereof, knowing that the car has not been inspected, does not for that reason assume the risk of the brake being defective, he not knowing that the brake is out of order, the defect not being obvious, and it not being his duty to inspect cars or brakes, or to handle cars known or supposed to be defective.

8. ———: ———: ———. An employé assumes the risk arising from defective appliances used, or to be used by him, or from the manner in which a business in which he is to take part is conducted, when such risks are known to him or are apparent and obvious to persons of his experience and understanding. *Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 556, followed.

9. ———: ———: ———. No defect being obvious, an employé has the right to assume that a tool or appliance furnished him by his employer is reasonably safe and fit for the purposes for which he is required to use it.

10. ———: INSPECTION OF APPLIANCES: NEGLIGENCE. To inspect a car brake may require more than a simple glance at it. Such a test must be applied as would probably reveal a defect if one existed; and the neglect of a car inspector to make such a test is evidence of negligence.

11. **Evidence:** CUSTOM: BOOK OF RULES: REBUTTAL. Certain rulings of the trial court on the admission of rebuttal evidence examined and sustained.

12. **Master and Servant:** INJURY TO EMPLOYÉ: CONTRIBUTORY NEGLIGENCE: HARMLESS ERROR. An instruction that "contributory negligence is based upon, and presupposes, the negligence of the defendant, and cannot exist without some negligence on defendant's part," criticised, but, in view of the issues, *held* not prejudicial, if erroneous.

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

I. R. Andrews and *Frank T. Ransom*, for plaintiff in error.

James P. English, contra.

RAGAN, C.

The Union Stock-Yards Company is a state corporation. It owns and operates at the city of South Omaha, in connection with its business of lotting, feeding, and caring for stock in transit, a system of railroads connecting its yards with various packing-houses located at that place, and which railroads connect the packing-houses and yards with the terminals of the various railways centering at that point. The switching and transferring of cars from the railway termini to the stock-yards and packing-houses is carried on by the stock-yards company with its own engines, crews, and over its own tracks. On April 10, 1895, the stock-yards company had in its employ one Edward Goodwin, who was a brakeman. On this date Goodwin and the crew of which he was a member were ordered to bring from the Burlington road, or its terminus, six cars of cattle, and set the cars out at the stock-yards chute for the purpose of unloading. One of the cars in this train was a Hammond refrigerator car equipped with an ordinary hand-brake. Fitted horizontally on the top of the brake-rod or shaft, extending above the top of the car, was an iron wheel used by brakemen for the purpose of setting the brake attached to the lower end of the brake-rod by a chain. This horizontal iron wheel was fastened to the brake-rod by a nut screwed on the end of the shaft. Goodwin, while in the discharge of his duties as such brakeman, in switching out these six cars of cattle, climbed on this Hammond refrigerator car, and while the six cars were moving he attempted, as was his duty, to set the brake. The nut which should have held the horizontal wheel firmly to the brake-rod came off. The wheel came off,

and Goodwin was thrown to the ground and severely and permanently injured. The refrigerator car was not the property of the stock-yards company. The stock-yards company had not caused it to be inspected before it took it into its possession, and ordered its employés, among whom was Goodwin, to use it. The nut did not part from the brake-rod because of its being worn out, nor because of any defect in any part of the brake-rod or the nut itself. The end of the brake-rod and the nut which slipped therefrom were both perfectly sound, but the nut was too large for the brake-rod. The screw-threads in the nut did not fit the screw-threads on the brake-rod, and the opening in the nut was so large that it could be pushed down over the threads on the end of the brake-rod by one's fingers. A mere glance or casual look at the nut on the brake-rod would not disclose to one inexperienced in the construction of brakes that the brake was defective in construction and dangerous because of the size of this nut. In the district court of Douglas county Goodwin sued the stock-yards company for damages for his injury; alleged the improper construction of this brake and his ignorance of its defect; that the stock-yards company negligently neglected to have this car and brake inspected before taking it into its possession and causing him to use it; that a careful inspection of the brake and car by the inspectors of the stock-yards company would have revealed the defect in the brake; and that the neglect of the stock-yards company to so cause the brake and car to be inspected was the proximate cause of his injury. He had a judgment for $10,350, to review which the stock-yards company has filed here a petition in error.

1. As already stated, the car on which was the defective brake that caused Goodwin's injury was not the property of the stock-yards company. This fact, however, is no defense whatever for the stock-yards company in this case. A person or corporation using the cars or appliances of another person or corporation, as

to its employés, uses such cars or appliances charged with the same duties as to inspection as if the cars or appliances were its own; and the employé who, under the instructions of his master, uses a car or appliance in his master's possession belonging to some other person or corporation thereby assumes only the same risk that he would if the car or appliance belonged to his employer. (*Gottlieb v. New York, L. E. & W. R. Co.*, 100 N. Y. 462, 3 N. E. Rep. 344; *Goodrich v. New York C. & H. R. R. Co.*, 22 N. E. Rep. [N. Y.] 397; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 73; *Atchison, T. & S. F. R. Co. v. Penfold*, 45 Pac. Rep. [Kan.] 574; *Missouri P. R. Co. v. Barber*, 44 Kan. 612, 24 Pac. Rep. 969; *Atchison, T. & S. F. R. Co. v. Seeley*, 54 Kan. 21, 37 Pac. Rep. 104.)

2. A contention of the stock-yards company is that in order for Goodwin to recover he was compelled to show by a preponderance of the evidence that a reasonably careful inspection would have disclosed the defect in the brake which caused his injury, and that he failed to make such proof. We have already stated the actual condition of this brake at the time it was used by Goodwin, in what manner the brake was defective, and the latent character of this defect to a person inexperienced in the construction of brakes who simply looked or glanced at it. The argument here is that from these undisputed facts the jury were not warranted in inferring that a careful inspection of this brake and car by the inspectors of the stock-yards company would have revealed the brake's defective condition. We do not agree to the contention. On the contrary, we are persuaded that from the undisputed facts in reference to this defective brake the jury were justified in drawing the inference that a careful inspection of the brake and car would have revealed the defect. It by no means follows that because a person inexperienced in the construction of a brake, seeing this one, would not have observed the defect that an inspector inspecting this car would not by the exercise of ordinary care have discovered the de-

fect. An ordinary railway brakeman simply observing a car wheel might conclude that it was sound, while the tap of the inspector's hammer would reveal that the wheel was broken. The facts that the brake was improperly constructed, and therefore defective and dangerous, and that this defect was not apparent at a glance stood admitted. It was a reasonable and logical deduction from these admitted facts that had the brake been inspected by trained inspectors the defect would have been discovered; and such logical and reasonable deduction and inference the jury had the right to draw. (*Kilpatrick v. Richardson*, 40 Neb. 478; *Kearney Canal & Water Supply Co. v. Akeyson*, 45 Neb. 635.)

In *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645, Wymore's intestate was killed in a collision between two trains. One train was standing on a siding, and a train on the main line collided with it because the switch-key in possession of the brakeman failed to open the switch-lock; and it was held that the jury might properly infer from these facts that the railway company was guilty of negligence in sending out a brakeman equipped with a key which it was not known would properly control all the locks which he might have occasion to use. IRVINE, C., speaking for the court, said: "The evidence showed without contradiction that this key would not unlock this particular lock, and there was no evidence tending to show that any test had been made of it before the accident, or that any precautions had been taken to ascertain its safety."

In *Union Stock Yards Co. v. Conoyer*, 41 Neb. 617, Conoyer's intestate was last seen examining a train that had been made up ready to move. His body was found between the rails on the track occupied by the train. The second car from the rear was found derailed, caused by material on the track, and the train had moved some distance after the derailment, dragging the body of Conoyer's intestate with it. There was no other proof of negligence. The present chief justice speaking for the

court of this evidence said: "Constitute an array of physical facts and set of circumstances which fully warranted the trial judge in submitting the case to the jury for their determination; and finding as the jury did, they would not be called upon, at any point in the case entering into such finding, to draw any inferences which would necessarily be violative of the rule of law which prescribes that 'inferences must be drawn from facts proved;' nor do we think that the verdict rendered necessarily involved any speculation and conjecture other than reasonable and fair inferences in view of all the facts and circumstances proved on the trial as surrounding the killing."

Other instructive cases on the subject under consideration are *Spicer v. South Boston Iron Co.*, 138 Mass. 426; *Missouri P. R. Co. v. Barber*, 24 Pac. Rep. [Kan.] 969; *Missouri, K. & T. R. Co. v. Chambers*, 43 S. W. Rep. [Tex.] 1090.

3. It is next insisted that the judgment of the district court is erroneous because the evidence shows that the stock-yards company had a "well known rule," "custom and manner" of doing business, namely, that all trains in which there were cars of live stock were taken to the chute for the purpose of unloading the stock before the stock-yards company inspected the cars; and that Goodwin continued in the service of the stock-yards company with full knowledge of this rule or custom, and thereby assumed the risk of the defect which caused his injury. Assuming, without deciding, that the evidence in behalf of the stock-yards company established the existence of such well known rule and custom, and that Goodwin, with knowledge thereof, remained in the service of the company without objection, the contention is untenable, for the reason that no such defense as this was pleaded by the stock-yards company. No such an issue was made by the pleadings in the court below, and the evidence, and all the evidence, introduced which tended to show the existence of such rule or custom was irrelevant. A

judgment whose sole support is evidence which did not tend to prove or disprove any issue made by the pleadings in the case could not stand. (*McGavock v. City of Omaha*, 40 Neb. 64.)

And this disposes of another contention of the stock-yards company that the court erred in refusing to submit by its instructions this defense to the jury. What the stock-yards company did plead in the court below was that before Goodwin went upon the refrigerator car and attempted to set the brake thereon he knew that such car had not been inspected. But this is not a plea that Goodwin assumed the risk of the defect which injured him by continuing in the service of the stock-yards company and working upon its trains in pursuance of a well known rule and custom that the cars were to be unloaded before being inspected.

4. Another contention is that Goodwin knew at the time he went upon the refrigerator car and attempted to set the brake thereon that the car had not been inspected; and therefore, in attempting to set the brake on that car, he assumed the risk of its being defective. In support of counsel's contention numerous cases* are cited, one of which is *Arnold v. Delaware & Hudson Canal Co.*, 125 N. Y. 15, 25 N. E. Rep. 1064. In that case Arnold was injured while attempting to couple two cars, one of which had a broken draw-head; and the negligence charged to the company was the presence of that defect. It appeared from the evidence that the broken draw-head was obvious; and further it appeared that Arnold's duty was, as an employé of the company, to

**Hughes v. Winona & S. P. R. Co.*, 27 Minn. 137; *Green v. Cross*, 79 Tex. 130; *Beckman v. Consolidated Coal Co.*, 57 N. W. Rep. [Ia.] 889; *Schaible v. Lake Shore & M. S. R. Co.*, 56 N. W. Rep. [Mich.] 565; *Sullivan v. India Mfg. Co.*, 113 Mass. 396; *Chicago, B. & Q. R. Co. v. Mercer*, 36 Ill. App. 195; *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *St. Louis & S. R. Co. v. Britz*, 72 Ill. 257; *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Stafford v. Chicago, B. & Q. R. Co.*, 114 Ill. 244; *Simmons v. Chicago & T. R. Co.*, 110 Ill. 340; *Greenleaf v. Illinois C. R. Co.*, 29 Ia. 14; *Chicago & N. W. R. Co. v. Donahue*, 75 Ill. 106.

take out cars which were damaged or supposed to be damaged from trains and place them on track for repairs. Under these circumstances the court held that the company was not liable to Arnold for his injury. We think the holding in that case was correct and that it is justified on two grounds: (1.) The defect which caused Arnold's injury was an obvious one. That the draw-head of the car was broken was discernible from a casual glance. (2.) Arnold's business was to handle cars known or supposed to be out of repair. By engaging in this business he assumed the risk of receiving an injury from a defective car. He was bound to know or presume that the cars which he was handling were defective and to be on his guard. But the case is not in point here. It was no part of Goodwin's duty to handle defective cars. It was not his duty to inspect a car before using it. That was a duty which the stock-yards company owed its employés. (*Baltimore & P. R. Co. v. Mackey*, 157 U. S. 73.) And though Goodwin knew this car had not been inspected, he did not know that it was out of order. The defect was not obvious, and he therefore had the right to assume that the brake on this car was reasonably safe and fit for the purposes for which it was intended. (*Atchison, T. & S. F. R. Co. v. Penfold*, 45 Pac. Rep. [Kan.] 574; *Chicago, B. & Q. R. Co. v. Kellogg*, 54 Neb. 127.) Among the other cases cited by counsel in support of their contention are *Kelley v. Chicago, M. & S. P. R. Co.*, 53 Wis. 74, *Flanagan v. Chicago & N. W. R. Co.*, 45 Wis. 98, *Naylor v. Chicago & N. W. R. Co.*, 53 Wis. 661, and *Abbott v. McCadden*, 81 Wis. 563, but not one of them, we think, sustains the contention that a brakeman who goes upon a car to set a brake, knowing that the car has not been inspected, thereby assumes the risk of the brake being defective, he not knowing that the brake was out of order, the defect not being obvious, and it not being his duty to inspect cars or brakes, or to handle cars known or supposed to be defective. On the other hand, contrary to the conten-

tion of the plaintiff in error, the doctrine of this court is that "an employé assumes the risk arising from defective appliances used or to be used by him, or from the manner in which a business in which he is to take part is conducted, when such risks are known to him or are apparent and obvious to persons of his experience and understanding." (*Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 556; *Chicago, B. & Q. R. Co. v. McGinnis*, 49 Neb. 649; *Malm v. Thelin*, 47 Neb. 686; *Kearney Electric Light Co. v. Laughlin*, 45 Neb. 390; *Missouri P. R. Co. v. Baxter*, 42 Neb. 793.)

5. The next contention is that the court erred in permitting Goodwin to introduce in evidence a book known as the "Code of Rules" adopted by the Master Car Builders' Association. A number of witnesses called by the stock-yards company had testified, presumably as experts, that in their opinion a careful inspection of this brake by duly qualified car inspectors would not have revealed its defective condition. Each of these witnesses on cross-examination said in substance that what he meant by a reasonably careful inspection was such an inspection and examination as was required by this "Code of Rules." The code was identified by the witnesses as being the one issued by the Master Car Builders' Asociation, and the one in force in the month of April, 1895, in the state of Nebraska, and the one under which the inspectors of cars operated, and by which they were governed. When Goodwin came to put in his rebuttal testimony he offered in evidence this "Code of Rules." It is first insisted by counsel for the stock-yards company that the court erred in permitting the book to go in evidence because counsel had not had an opportunity to cross-examine his witnesses with reference to the contents of the book. We confess we do not see the force of this objection. When the book was offered in evidence the case had not closed, and we do not know from the record why counsel for the stock-yards company did not recall their witnesses who had iden-

tified the book and ask them such questions as to its contents as they desired. Counsel say that their witnesses who had identified this book had left the witness stand at the time this book was offered in evidence. This of course is true, but it does not necessarily follow from that that they could not have recalled them. The very fact that counsel for Goodwin, while cross-examining the stock-yards company's witnesses, had them identify this book was sufficient notice to counsel for the stock-yards company that Goodwin would probably use this book in evidence on rebuttal.

A second contention is that the book itself was incompetent testimony. We do not think it was. The principal issue litigated on the trial was whether a careful inspection would have revealed the brake's defective condition, and the stock-yards company was permitted to bring experts upon the stand and have them testify that in their opinion a careful inspection of this brake according to the Code of Rules of the Master Car Builders' Association would not have revealed its defective condition. Now the book complained of is entitled "A Code of Rules Governing the Condition of and Repairs to Freight Cars," etc., and under the head of "Brakes in Bad Order" the very first rule is that a brake shall be considered in bad order unless the brake wheel is secured to the shaft with a properly fitted nut. This code of rules then tended to show that it was the duty of an inspector, when inspecting a brake, to ascertain if the nut was properly fitted to the brake-shaft. In other words, it tended to rebut the expert testimony of the stock-yards company's witnesses that a careful inspection of the brake would not have revealed its defect. But this evidence went further. One, if not more expert witnesses, had been permitted to testify for the stock-yards company that a reasonably careful inspection of this brake by a car inspector consisted in the inspector looking at and observing the wheel and the nut, but that such an inspection did not require the inspector

to take hold of the wheel for the purpose of ascertaining if it would come off. If an inspector is to comply with the Code of Rules, then he is to ascertain by inspection whether the brake-wheel is secured to the brake-shaft with a properly fitted nut. Within the meaning of this rule to inspect a brake means more than to simply look at it. An inspector may not be required to take hold of a wheel and try to pull it off; but to inspect it he must know for a certainty whether the wheel is securely fastened to the brake-shaft, and for ascertaining that fact he must use such methods or appliances as will produce an effective test, whether the appliance be his hand, a monkey-wrench, or some other equally efficacious instrument. We think this testimony was perfectly competent.

6. On the trial the district court on its own motion gave to the jury among others the following instruction: "Contributory negligence is based upon and presupposes the negligence of the defendant, and cannot exist without some negligence on defendant's part. In determining whether or not plaintiff was guilty of contributory negligence, you must take into consideration all of the facts and circumstances in the case as detailed by the evidence, and if from all the evidence you find that the plaintiff did not exercise usual and ordinary care, when by the exercise of ordinary and usual care he might have avoided the injury complained of, then, if you so find, he would be guilty of contributory negligence, and he could not recover." The criticism of this instruction is that by it the court told the jury in effect that the stock-yards company admitted it had been guilty of negligence. It stood admitted by the pleadings that the stock-yards company had not caused this car to be inspected before ordering its employés to use it. The neglect to inspect this car was evidence of negligence on the part of the stock-yards company. One of the defenses interposed by the stock-yards company to Goodwin's action was that his injury was the result of his

own negligence, or his contributory negligence. Technically then the instruction did not misinform the jury as to the status of the issues in the case. We doubt very much the propriety of ever giving such an instruction as this, but we are persuaded that the stock-yards company was not prejudiced by the giving of this instruction, if it be conceded erroneous. We find no error in the record and the judgment of the district court is

AFFIRMED.

BARTLETT Y. YODER ET AL. V. GEORGE D. HAWORTH ET AL.

FILED DECEMBER 8, 1898. No. 8396.

1. **Sales:** CONSTRUCTION OF CONTRACT. The contract between the parties set out in the opinion, and *held* not one of conditional sale, nor one of agency, but an unconditional contract of bargain and sale.

2. ——: ——. *Osborne v. Plano Mfg. Co.*, 51 Neb. 502, and *National Cordage Co. v. Sims*, 44 Neb. 148, distinguished. *Mack v. Drummond Tobacco Co.*, 48 Neb. 397, followed.

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

George B. France, for plaintiffs in error.

Gilbert Bros., *contra.*

RAGAN, C.

This is an action of replevin brought in the district court of York county by George D. Haworth against Bartlett Y. Yoder and others. At the conclusion of the evidence the jury, in obedience to an instruction of the court, returned a verdict in favor of Haworth. To review the judgment entered upon this verdict Yoder has filed here a petition in error.

1. During the years 1893 and 1894 one Burr was en-

gaged in the business of selling agricultural implements in the city of York, Nebraska, and in said years acquired from Haworth under a written contract, hereinafter to be noticed, the possession of a lot of agricultural implements. In July, 1895, Burr was indebted to Kingman & Co. and to the Gale Manufacturing Company in a large sum of money. In satisfaction, or part satisfaction, of this indebtedness Burr sold and delivered to Kingman & Co. and to the Gale Manufacturing Company the property in controversy in this action, being property which he had acquired from Haworth under his contract with him hereinafter to be noticed. Haworth, claiming to be the owner of the property sold and transferred by Burr to Kingman & Co. and to the Gale Manufacturing Company, brought this action of replevin therefor against Yoder, who was in possession of the property as the agent of Kingman & Co. and of the Gale Manufacturing Company. The contract between Burr and Haworth under and by virtue of which Burr came into possession of the property sold to Kingman & Co. and to the Gale Manufacturing Company was and is in the words and figures following:

"YORK, NEB., Jan. 11, 1893.

"*Messrs. Haworth & Sons, Decatur, Ill.:*

"Please manufacture and deliver on board cars at Council Bluffs and ship to our address on or before the 15th day of March, 1893, the following bill of check rowers, to be sold on commission for your account, and subject to the following conditions, viz.:

No.	Width of Drop.	Remarks.	Price.	Total Amt.	Name of Kind.
25 planter.....	3/8	Wide wheels....	$24.00		Planter Ck. R.
25 Haworth steel .	"	" "	10.00		
10 Brown steel ...	3/8				
20 coils wire	3/8 10				
10 " "	" 20				
4 " "	" 40				
10 " "	3/8 20				
10 " "	" 10				
4 " "	" 40				

"If all is paid cash July 1, the net price of planters to be $23.50, C. rowers $9.50 each, and ten per cent off on extras.

"1st. All machines shall be received and immediately put in good store, free of expense to you, and we be your agent for all goods furnished us for sale on your account.

"2d. The freight and storage shall be paid by us and the amount shall form no part of any expense to be paid by you. All machines shall be forwarded in accordance with your orders, only collecting on such forwarded machines the freight and drayage paid on same, and I will carry insurance at my expense in such an amount as will cover loss by fire, lightning, or tornado.

"3d. All machines shall be sold for cash, or good farmers' notes taken in Haworth & Sons' name, payable not later than September first next, with ten per cent interest from day of sale; and all such notes shall be indorsed and the payment guarantied by ———, and given to you as collateral on my note, which we will give you for the amount of my account unpaid July 1, 1893.

"4th. All notes shall be taken upon blanks furnished by you, with all the blank spaces fully filled in with ink.

"5th. All money and notes shall be forwarded to you immediately, either by mail or express, and a receipt taken therefor, none of which shall be converted to our use till complete settlement is made.

"6th. All extra orders for machines shall be upon the same terms and conditions as above, and will only be ordered upon valid orders taken by us.

"7th. All extras shall be sold for cash, and the amount immediately remitted to you as our employer, less thirty per cent from the extra list price for rope, wire, reels, and castings.

"8th. We further agree to see that all planters and check rowers sold by us are properly connected and operated as per directions when started to work, and be governed by the instructions.

"9th. A final settlement shall be made for all machines and extras ordered, on or before June 1, 1893.

"10th. We further agree that should we neglect or fail to sell all of said planters and check rowers by the first day of July, 1893, to store in good order, free of charge, all planters and check rowers unsold, subject to your order.

"Yours truly, BURR & CO.
"HAWORTH & SONS."

"Exhibit A. T. E. K., Rep."

The district court proceeded upon the theory that this contract was one of agency merely, existing between Burr and Haworth; that by virtue and because of the contract the title to the property furnished Burr thereunder never passed to him but remained in Haworth. We think this conclusion of the learned district judge wrong. This is not a conditional contract of sale such as was construed in *Osborn v. Plano Mfg. Co.*, 51 Neb. 502; nor is it a contract of agency such as was construed in *National Cordage Co. v. Sims*, 44 Neb. 148, but it is an absolute and unconditional contract of sale such as was construed in *Mack v. Drummond Tobacco Co.*, 48 Neb. 397. In the latter case the contract between the parties provided that Mack was thereby appointed the agent of the manufacturing company to sell its tobacco at such prices as it might direct. Mack was to be paid a certain commission on all sales made if he sold the tobacco furnished him at the price fixed by the tobacco company; and if he sold it for a less price, he was to have no commission. By the contract Mack was required to guaranty the payment of all tobacco shipped him by the manufacturer. Mack was to execute and deliver his notes due in sixty days for the tobacco furnished him by the manufacturer, and it was held that the contract was not one of agency for the sale of the manufacturer's goods by Mack, but a contract of sale, and that the tobacco furnished Mack under the contract, upon its delivery to him, became his property. The contract in-

volved in this action does provide that Burr shall sell goods furnished him by Haworth on commission and for Haworth's account. But this clause of the contract does not so dominate and control the other provisions thereof as to make it a contract of agency. By the contract Haworth was to manufacture the goods ordered by Burr and deliver them on board the cars at Council Bluffs and ship them to Burr's address before a certain date. The price which Burr was to pay for the goods was fixed in the contract. Burr was to pay the freight on the goods. He was to sell the goods for cash or take good farmers' notes therefor, and the notes were to be taken payable to Haworth and guarantied by Burr, and delivered to Haworth. Now were these farmers' notes so taken, guarantied, and delivered by Burr to Haworth to be Haworth's notes? Not at all. But they were to be held by Haworth as collateral security for Burr's notes given to Haworth for the goods delivered. Burr was to make the settlement with Haworth on or before June 1, 1893, and by July 1 of said year was to give his note to Burr for the value of all goods received from Haworth; and to secure the payment of this note Haworth was to hold the farmers' notes which Burr had taken. Furthermore, when Burr sold any goods for cash or took farmers' notes, he was to remit these notes and cash to Haworth, the cash to be credited on Burr's indebtedness and the notes to be held as collateral security therefor. Again, the contract provided that if Burr paid for all the goods received by him by July 1, then the net price of the planters furnished him, instead of being $24, was to be $23.50, and the price of the check rowers, instead of being $10 each, was to be $9.50, and he was to have a discount of ten per cent on the price of all extras furnished. By the last clause of the contract it was provided that Burr would store the goods on hand unsold on July 1, subject to Haworth's order. This was simply a promise on the part of Burr that the property unsold on July 1, 1893, should be held by Burr

as security for what he owed. Our conclusion is that the contract between Haworth and Burr was an absolute contract of sale; and that whatever property was delivered to Burr in pursuance of that contract became his property. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

CHARLES S. HESSER V. SYLVESTER JOHNSON.

FILED DECEMBER 8, 1898. No. 8512.

1. **Error Proceedings:** TIME JURISDICTION ATTACHES: PROCEDURE. The jurisdiction of this court in proceedings in error attaches upon the filing of a petition in error and transcript of the judgment, within the statutory time, and the issuing and service of process. If the transcript be so incomplete as not to affirmatively disclose error, the proper order is affirmance, and not dismissal.

2. **Jurisdiction:** DISMISSAL: REVIEW. When it clearly appears from the record that a case was dismissed for want of jurisdiction, that question will be examined, notwithstanding the record would on the merits sustain a general finding for defendant.

3. ———: COUNTY COURT: BREACH OF COVENANT. A county court has jurisdiction, within the statutory limit of amount, in actions to recover damages for breach of covenant against incumbrances. *Campbell v. McClure*, 45 Neb. 608, followed.

4. ———: ———: ———. The fact that the land is situated in a state where such covenant runs with the land does not affect the question of jurisdiction, although the nature of the covenant is controlled by the *lex loci rei sitæ*.

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

Harlan & Taylor, for plaintiff in error.

T. E. Bennett and *George B. France*, *contra.*

IRVINE, C.

Hesser sued Johnson in the county court of York county on a covenant against incumbrances, a lien for taxes being alleged as a breach. The land conveyed was in Colorado. The plaintiff had judgment in the county court, but in the district court there was a dismissal. The petition in error of plaintiff raises the question of the propriety of the ruling of the district court holding that the county court had been without jurisdiction to entertain the action, and that consequently the district court obtained no jurisdiction by appeal. The transcript of the plaintiff in error is attacked, and a dismissal of the proceedings in error is sought on the ground that the transcript filed is so imperfect as not to properly disclose the proceedings below. It is not claimed that the transcript is incorrect, but that it is incomplete. That is no ground for dismissal, provided there is a duly authenticated transcript of the judgment. In such case jurisdiction attaches, and the proper order is an affirmance on the merits, unless enough of the record is brought up to affirmatively disclose error. (*Galley v. Knapp*, 14 Neb. 262; *Moore v. Waterman*, 40 Neb. 498; *Stull v. Cass County*, 51 Neb. 760; *Moss v. Robertson*, 56 Neb. 774.) The defendant in error has brought up an additional transcript containing those matters which it is asserted the plaintiff in error improperly omitted.

It is objected that in order to show that the judgment below went on the ground of want of jurisdiction it is necessary to appeal to special findings, and that these were not entered until long after a judgment on a general finding for defendant. It is further claimed that if the special findings, which were, on the merits, on the whole favorable to the plaintiff, be disregarded, the evidence supports the previous general finding for the defendant. The answer to this is that the judgment is expressly one of dismissal without prejudice, which could not be entered without error except on the issue

as to jurisdiction. As to the remainder of the argument, it is clear that if the defendant improperly prevailed on the question of jurisdiction, the judgment of dismissal without prejudice was nevertheless erroneous, because it precluded the plaintiff from a trial of the merits. The question of jurisdiction stands *in limine*, and must be met before we can properly consider the merits. The theory of the defendant was that the land being situate in Colorado, the law of that state must govern as to the nature of the covenant sued on; that by that law such a covenant runs with the land; that therefore the action brought in question the title to real estate and was beyond the jurisdiction of the county court. That theory is supported, under jurisdictional provisions similar to our own, by *Foote v. Burnet*, 10 O. 333. We cannot, however, with due regard to our own decisions, follow that case. The constitution, article 6, section 16, denies jurisdiction to county courts "in actions in which title to real estate is sought to be recovered, or may be drawn in question." The statute fixing the jurisdiction of such courts withholds it "in any matter in which the title or boundaries of land may be in dispute." (Compiled Statutes, ch. 20, sec. 2.) In *Mushrush v. Devereaux*, 20 Neb. 49, it was held that county courts and justices of the peace have jurisdiction, within the limits of amount, in actions to recover back a deposit, or money paid upon an agreement for the sale of land, where the defendant fails to perform his agreement to convey the same. *Campbell v. McClure*, 45 Neb. 608, is undistinguishable from the present case, except from the fact that the land there conveyed was in this state, and the covenant was personal only. It was held that a justice of the peace had jurisdiction, and that the action did not draw in question the title. The distinction here urged does not affect the question. The cases cited show that the language of the constitution does not exclude jurisdiction merely because to settle personal rights it becomes necessary to inquire into some fact concerning the title

to land. The only difference between a personal covenant and one running with the land is that the latter inures to the benefit of subsequent holders, by virtue of their succession to the title. In either case the remedy is a personal one; it does not affect the title. In either case, if the covenant be against incumbrances, it is necessary to ascertain whether an incumbrance exists, and so to inquire into the state of the title; but this no more in one case than in the other. *Riley v. Burroughs*, 41 Neb. 296, relied on by defendant in error, merely holds that as to the nature of such covenants the *lex loci rei sitæ* controls. It does not reach the question here presented, beyond establishing that premise of the argument.

REVERSED AND REMANDED.

ANNIE J. NORVAL V. JACOB ZINSMASTER.

FILED DECEMBER 8, 1898. No. 10346.

1. **Custody of Children:** RIGHTS OF PARENTS. The statute and the demands of nature commit the custody of young children to their parents rather than to strangers, and the court may not deprive the parent of such custody unless it be shown that such parent is unfit to perform the duties imposed by the relation or has forfeited the right.

2. ———: ———. The right of a parent to the custody of a child is not lost beyond recall by an act of relinquishment performed under circumstances of temporary caprice or discouragement.

3. ———: ———: DIVORCE: HABEAS CORPUS. When a decree of divorce has settled the custody of children in one of the parents, the court should not, in habeas corpus proceedings, in effect give them into the custody of the other, by committing them to the care of strangers with whom that other makes his home.

ERROR from the district court of Johnson county. Tried below before STULL, J. *Reversed.*

W. W. Giffen and *W. H. Jennings*, for plaintiff in error.

Tracey & Wild, contra.

IRVINE, C.

Annie J. Norval sued out a writ of habeas corpus against Jacob Zinsmaster, alleging the unlawful restraint by him of the applicant's two minor children. The district court, after a trial, awarded the custody of the children to the respondent, their paternal grandfather. From this order the applicant prosecutes error. The assignments of error reduce themselves to a question of the sufficiency of the evidence.

There is little real controversy as to the facts. The children are two girls, aged respectively eight and five, the offspring of a marriage between the applicant and George Zinsmaster, son of the respondent. In February, 1897, the applicant was awarded a decree of divorce on the grounds of drunkenness and extreme cruelty, and given the custody of the children. A little more than six months thereafter the applicant intermarried with Walter Norval. The former husband was opposed to this step, and filed an application in the divorce case for a modification of the decree so as to award him the custody of the children. This application does not seem to have been brought to hearing; but apparently influenced thereby Mrs. Norval wrote to a son-in-law of respondent suggesting that the latter take the children. The letter not receiving an immediate response she addressed the respondent directly as follows: "I thought it best I should write to you about the girls. We have gotten word that George [the father] is working in an underhanded way to get them, and rather than have any fuss and go to law about them I will be willing for them to have their home with you. He can provide for them as much as he likes, but never have control over them to take them away in some other home, and that they can come and see me in vacation, providing they will stay there contented and happy. Now let me know right away if this is satisfactory and I will bring them down. They have a good home here and will always

have, but to save trouble I would rather let them go there." The defendant in error, a German who could not write English, directed his adult maiden daughter to write Mrs. Norval that he would take the children if she would relinquish all claim upon them. The daughter wrote Mrs. Norval to bring the children to Cook, which seems to be the nearest railway station, but omitted to state the condition. The girls were sent to Cook about October 17, 1897, and were there met by their father, who took them to the home of the elder Zinsmasters. This proceeding was begun February 23, 1898.

No serious attempt is made to prove that either claimant is an unfit person to have the custody of the children. All the proof tends to show that the mother and the grandparents are estimable persons, exhibiting a deep affection for the children, and willing to provide for them to the extent of their respective means. Mrs. Norval resides with her husband in a small house at Avoca, Cass county. Norval is a section-hand on a railroad and derives his income chiefly from his wages as such. The grandparents own a farm of 240 acres near Tecumseh, and reside thereon. At each point good school facilities are convenient. The testimony of strangers as to the situation in either household is enlightened by that of the two little girls themselves, the innocent subject-matter of the controversy. Each testifies, with apparent candor and freedom and with manifest intelligence, that she has received uniformly kind treatment in each place, and that her wants have been supplied and gratified. The elder does not know which place she would prefer to live; the younger at one time says she wants to go home with grandma, in another that she does not care. The only objection made by the mother to the custody of the grandfather, and based on the welfare of the children, is that their father resides there and is an habitual drunkard. The only objection based on similar grounds made to their mother's custody is that Norval's income is quite limited and that he is addicted to drink. The

proof on the last point only tends to establish that on several occasions within six years, and on none since his marriage, he has been intoxicated. He is shown to be industrious and to devote his means to the support of the household. The result of the evidence is that both mother and grandparents are in themselves fit to maintain and rear the children. The stepfather is a poor man, but industrious. At times he has been intoxicated. As against this it is established that such is the frequent if not usual condition of the father, who resides with the grandparents, and who, by reason of his relationship, would probably be at least as closely associated with the children, should they remain, as would the stepfather, should the mother regain the custody. An attempt is made to show that the father does not live with the grandparents; but this attempt merely results in disclosing that he is without means of livelihood, apparently vagabondish in his habits, and stays at his father's home when he is not roaming among places which on the witness stand he refuses to divulge. The plaintiff in error asserts that her claim to the children is founded on the law of God. Without trespassing on the domain of theology, it must be conceded that it is based on a law which nature asserts and the statutes recognize. Section 6, chapter 34, Compiled Statutes, provides: "The father and mother are the natural guardians of their minor children, and are equally entitled to their custody, and to care for their education, being themselves competent to transact their own business and not otherwise unsuitable." We are aware that this court has several times asserted that in such controversies as the present the order should be made with sole reference to the best interests of the child. But this has been broad language applied to special cases. The court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide. The statute declares and nature demands that the right shall be in the parent, unless the parent be affirma-

tively unfit. The statute does not make the judges the guardians of all the children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would be soon changed, by revolution if necessary. In *Sturtevant v. State*, 15 Neb. 459, the child was only a few months old, and the custody was taken from the father because he was unable personally to discharge duties which the custody imposed. *Giles v. Giles*, 30 Neb. 624, was a controversy between father and mother, where the natural rights were equal. *State v. Schroeder*, 37 Neb. 571, and *Schroeder v. State*, 41 Neb. 745, presented a case of affirmative unfitness of the father and of abandonment of the child.

We are not unmindful that the letter of Mrs. Norval, already quoted, indicates an intention, at the time it was written, of surrendering the children to their grandparents; but parentage in its full import is not to be so lightly surrendered. If, relying on the letter, the grandfather had maintained the children for a considerable period, using extensively of his means and energies, and forming deeply-seated ties of affection growing out of the association, such facts might be of controlling force. But, regarded as a contract, the letter is indefinite, and the motive of writing it was plainly to avoid the jeopardy of an attack by the father on the mother's rights. The children had remained but a few months, and the grandparents had not expended largely of their time or means on the faith of their continued control of the children. The right to custody of children implies a correlative duty of the very highest obligation. It cannot be divested or forfeited beyond recall by a letter written in a moment of caprice or discouragement. It is also to be observed that, under the circumstances, to award the custody to the grandfather is in effect to take the children from their mother and place them in constant asso-

ciation with their father, and so submit them to his moral control and direction, and this in conflict with the terms of the decree of divorce. This will not be done. (*Eckhard v. Eckhard*, 29 Neb. 457.) The right of the parent is not lightly to be set aside, and it should not be done where unfitness is not affirmatively shown, or a forfeiture clearly established.

REVERSED AND REMANDED.

ROSS GAMBLE ET AL. V. BUFFALO COUNTY.

FILED DECEMBER 8, 1898. No. 8502.

District Judge: AUTHORITY IN VACATION. A district judge is without authority to render in vacation a money judgment. Consent of parties will not confer such authority.

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

E. C. Calkins and *H. V. Calkins*, for plaintiffs in error.

Fred A. Nye, and *Norris Brown*, *contra.*

IRVINE, C.

This was an action on two official bonds of a former treasurer of Buffalo county. The principal did not answer. There was a trial of issues joined on the answer of the sureties and a judgment in form entered for the plaintiff. The sureties bring the case here for review.

It appears from the record, and is conceded in the briefs, that the supposed judgment was entered at a time when the district court was not in session; in other words, it was the act of the judge in chambers and not of the court. The case being a simple action of a legal nature, and the judgment being for the recovery of money, and not of such a nature as the law permits the judge to render in chambers, the attempted judgment

was *coram non judice*, and void. (*Hodgin v. Whitcomb*, 51 Neb. 617.)

It is argued that the defendants consented to the entry of judgment in vacation. No such consent appears in the record. The entry which it is contended supports that assertion is the entry recording the trial and submission, and contains this: "Decision of this cause to be rendered in vacation." This indicates an order of the court rather than a stipulation of the parties. Moreover, had there been consent it would be immaterial. The defect is of jurisdiction of the subject-matter,—want of authority in the judge to make the order. Such authority cannot be supplied by consent.

REVERSED AND REMANDED.

CHARLES H. MORRILL, RECEIVER, APPELLEE, V. LIZZIE C. SKINNER, APPELLANT, ET AL.

FILED DECEMBER 8, 1898. No. 8433.

1. **Homestead:** HUSBAND'S ABANDONMENT OF WIFE. Homestead rights cannot be divested by the act of the husband alone. Therefore the wife's right of homestead is not defeated, where she remains in occupancy, and the husband abandons her and lives elsewhere.

2. **Mortgages:** FORM. As a mortgage in this state conveys no estate, but merely creates a lien, an instrument properly executed, describing the parties, the land, and the debt, and evidencing an intention to charge the debt as a lien upon the land, is sufficient to constitute a mortgage. Words of conveyance, being inoperative, are unnecessary.

3. ———: WIFE'S ASSUMPTION OF DEBT. Evidence examined, and *held* to show that at the time of a divorce land was conveyed by the husband to the wife in consideration of her assuming, as a charge thereon, a debt which he had attempted ineffectually to mortgage the land to secure.

4. **Promise for Third Person's Benefit:** ACTION. Where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though not a party to the consideration.

5. ———: CONSIDERATION FOR MORTGAGE. Therefore, the promise of one to assume a debt of another in consideration of a conveyance of land by that other to the promisor will support a note and mortgage made by the promisor to the creditor in fulfillment of the promise.

6. ———: ———. Where one makes his own note payable at a future time in discharge of the past due note of a third person, the release of the third person and extension of time of payment form a sufficient consideration to support the new note and a mortgage made to secure it.

7. **Creditors' Bill.** In the absence of special circumstances rendering a levy of execution inadequate, a judgment creditor cannot invoke the aid of equity to subject the land of the debtor to the payment of the judgment.

8. ———: MORTGAGE FORECLOSURE: PRIOR LIENS: REDEMPTION. Therefore, when made defendant in a foreclosure case for the purpose of adjusting priorities and establishing his right, a judgment creditor has no right to a decree ordering the land to be sold unless redemption be made from the judgment as well as the prior liens.

9. **Homestead:** JUDICIAL SALE: DISTRIBUTION OF PROCEEDS. When a homestead is sold to satisfy a mortgage thereon, the owner is entitled to have the amount of his homestead exemption set off to him from the surplus proceeds of sale after satisfying the debt which was a lien on the homestead interest, and before the application of any part of the proceeds to the satisfaction of debts against which the homestead exemption might be claimed.

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

The opinion contains a statement of the case.

A. G. Wolfenbarger and *Thomas Darnall*, for appellant:

The instrument, purporting to be a mortgage on the homestead, executed by George B. Skinner alone, is void, created no lien, and cannot be enforced. (Compiled Statutes, ch. 36, sec. 4; *Larson v. Butts*, 22 Neb. 370; *Aultman v. Jenkins*, 19 Neb. 209; *Betts v. Sims*, 25 Neb. 166; *Phillips v. Bishop*, 31 Neb. 853; *Violet v. Rose*, 39 Neb. 660; *Swift v. Dewey*, 20 Neb. 107; *Whitlock v. Gosson*, 35 Neb. 829; *Cowgell v. Warrington*, 66 Ia. 666; *Clarke v. Koenig*, 36 Neb. 572; *Weitzner v. Thingstad*, 56 N. W. Rep. [Minn.] 817;

Barton v. Drake, 21 Minn. 299; *Yost v. Devault*, 9 Ia. 60; *Phillips v. Stauch*, 20 Mich. 360; *Ring v. Burt*, 17 Mich. 465.)

There has been no abandonment by Lizzie C. Skinner of the premises, and her right to homestead continues. (*Stanley v. Snyder*, 43 Ark. 429; *Doyle v. Coburn*, 6 Allen [Mass.] 71; *Zapp v. Strohmeyer*, 13 S. W. Rep. [Tex.] 9; *Blum v. Gaines*, 57 Tex. 119; *Woods v. Davis*, 34 Ia. 264.)

Mrs. Skinner's agreement cannot operate as a ratification of the original transaction. There can be no ratification of a void deed. (*Tullock v. Webster County*, 46 Neb. 211; *Pearsoll v. Chapin*, 8 Wright [Pa.] 915; *McIntosh v. Lee*, 57 Ia. 356.)

Two separate deeds of mortgage on a homestead, executed to the same grantee, one by the husband and the other by the wife, at different times, are insufficient as a waiver of their homestead rights. (Compiled Statutes, ch. 36, sec. 4; *Howell v. McCrie*, 14 Pac. Rep. [Kan.] 26; *Jenkins v. Simmons*, 15 Pac. Rep. [Kan.] 522; *Poole v. Gerrard*, 6 Cal. 71; *Taylor v. Hargous*, 4 Cal. 268; *Duncan v. Moore*, 7 So. Rep. [Miss.] 221; *Dickinson v. McLane*, 57 N. H. 31; *Wilson v. Mills*, 22 Atl. Rep. [N. H.] 455; *Ott v. Sprague*, 27 Kan. 620; *Wallace v. Travelers Ins. Co.*, 38 Pac. Rep. [Kan.] 489.)

Mrs. Skinner is not estopped, by her agreement, to claim her homestead. (Bigelow, Estoppel [5th ed.] 349; *Powell v. Patison*, 100 Cal. 236; *Lingonner v. Ambler*, 44 Neb. 316; *State v. Carson*, 27 Neb. 501; *O'Malley v. Ruddy*, 48 N. W. Rep. [Wis.] 116.)

Flansburg & Williams, contra:

The mortgage is a valid lien at least upon the amount in excess of the homestead interest, subject only to dower. (*Despain v. Wagner*, 45 N. E. Rep. [Ill.] 129; *Henkel v. Bohenke*, 26 S. W. Rep. [Tex.] 645; *Hicks & Miller Tea Co. v. Mack*, 19 Neb. 339; *Mayfield v. Maasden*, 59 Ia. 517.)

The execution of a new note and mortgage upon a new

and further consideration by Lizzie C. Skinner, after she had become fee simple owner of the premises by warranty deed from George B. Skinner, who was no longer her husband, is binding upon her, and an action to foreclose the mortgage may be maintained.

Lizzie C. Skinner, by her acts and admissions, is estopped from claiming any defense to this note and agreement.

Ricketts & Wilson, also for appellee.

IRVINE, C.

In 1891 George B. Skinner, being indebted to the Nebraska Commercial Bank in the sum of $1,900, evidenced by note, executed to one Kilburn, as trustee, a mortgage to secure the debt, upon lot 2, in block 26, in the city of Lincoln. His wife did not join. The note and mortgage were afterwards assigned to the Nebraska Savings Bank, which in 1893 failed. This suit was brought by Morrill, the receiver of the latter bank, to foreclose the security. In 1892 the property had been conveyed by Skinner to Lizzie Skinner, his former wife, who shortly before the conveyance had obtained a decree of divorce. From a decree of foreclosure Mrs. Skinner appeals.

The plaintiff alleged that the property had been conveyed to Mrs. Skinner in pursuance of an adjustment of property rights accompanying the divorce, and that in consideration of the conveyance Mrs. Skinner had assumed the mortgage debt, executed her own note to the savings bank in renewal of that of Skinner, and executed a written agreement expressly charging the land with the mortgage. The instrument is set out as an exhibit to the petition. Two defenses were interposed. The first was that her note and agreement were obtained at a time when, by reason of mental and physical distress, she was incapable of transacting business, and by means of threats. This defense is not now insisted on. The other defense was that the property then was, and for

many years had been, defendant's homestead; that the mortgage made by Skinner, not having been executed by both husband and wife, was void; that the subsequent agreement had no new consideration to support it, and was ineffectual, either in itself or as a ratification of the void instrument.

While the briefs make some question as to whether the proof established the homestead character of the property, we think that issue is open to little doubt. From 1872 until shortly before the execution of the mortgage the Skinners had occupied the property as their home. It seems that Skinner had then recently abandoned his wife and was living alone in another part of town. This fact did not divest the property of its homestead character. Whether the title to a homestead be in husband or in wife, the act of one alone cannot divest it. The other has a vested interest therein, which cannot be defeated by creditors, by the conveyance of the one holding the legal title, and *a fortiori*, by the acts of that one short of a conveyance.

Section 4, chapter 36, Compiled Statutes, provides that "the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." The appellant contends that this statute demands for the incumbrance of a homestead the joint execution and acknowledgment of the instrument; that Skinner's mortgage, being therefore void in its inception, could not gain vitality by a subsequent instrument executed by the wife alone. Further, that a void instrument may not be validated by raising an estoppel *in pais*. We assume, without deciding, the correctness of these propositions. It follows from such assumption that the plaintiff can base no rights on the original mortgage. However, after the divorce, Skinner's note being then overdue, Mrs. Skinner made a new note to the savings bank for $2,600. This sum represented the amount of Skinner's note with interest, and

also apparently taxes and tax liens which the bank had paid or purchased. She then executed the agreement pleaded, which is as follows:

"Upon the consideration of a settlement made to me in lieu of alimony by my former husband, George B. Skinner, in which settlement he gives me all of his right and title in and to lot numbered 2, in block numbered 26 of the original plat of the city of Lincoln, Nebraska, the same having been and still being used as a homestead by myself, his right in the same being subject to a mortgage deed given by him to James Kilburn, trustee for the Nebraska Commercial Bank, to secure a note for $1,900, due November 26, 1891, payable to the Nebraska Commercial Bank, and signed by George B. Skinner, said trust deed was filed in the office of the register of deeds of Lancaster county, Nebraska, on the 20th day of September, 1892, on page 602 of book 86 of mortgages.

"Now, therefore, I, Lizzie C. Skinner, do hereby assume and agree to pay said incumbrance out of my own estate, according to the tenor and effect of said mortgage and of one certain promissory note for $2,600, dated February 28, 1893, and due in three years from date, payable to the order of the Nebraska Savings Bank, assignee of the Nebraska Commercial Bank, and signed by myself, the same being a renewal of said note secured by the said mortgage deed and being for the same debt, with interest, and taxes for which said property is liable and which was paid by the Nebraska Commercial Bank, added. Said mortgage deed to become absolute and liable to be foreclosed at the option of the Nebraska Savings Bank, assignee of the Nebraska Commercial Bank, upon default of payment of either interest or principal when due, and I hereby waive all my right of homestead or dower or any other right I might have had by not signing said original mortgage deed.

"Signed this 7th day of March, 1893.

"LIZZIE C. SKINNER."

This instrument was witnessed, acknowledged, and re-

corded, and, so far as the record discloses, no rights of third persons intervened between the original mortgage and this. While the latter instrument is not in the form of a mortgage, it has its essential characteristics. It has proper parties named, describes the land and the debt, and evinces clearly an intention to charge the land with a lien as security for the debt. This is the sole operation of a mortgage in this state. A mortgage does not here convey any estate. It merely creates a lien. As words of conveyance are inoperative they are not essential. The marriage relation formerly subsisting between Mr. and Mrs. Skinner had then been dissolved. The former had no interest in the land, and it was not essential that he should join. Therefore, notwithstanding the assumptions upon which the discussion has proceeded, we find no difficulty in determining that there was a mortgage by virtue of the instrument of March 7, 1893, and taking effect from that time.

It is argued that there was no consideration to support the agreement of 1893 as an original contract. The property settlement pleaded in the petition is not itself in evidence, but there is some evidence relating thereto. The instrument of 1893 recites that it is made in consideration of a settlement in lieu of alimony, in which Skinner gave to Mrs. Skinner his right to the property, which right was subject to the Kilburn mortgage. Whether this recital goes far enough to bind Mrs. Skinner, by estoppel by deed, to the facts pleaded by plaintiff, we need not inquire. The recital is certainly evidence tending to show that the agreement between the Skinners was that she should take the property charged with this particular debt. The fact that she afterwards expressly assumed the debt and made her own obligation therefor instead of that of her husband, furthers the proof. In addition to this there is the testimony of Mr. Stull, a banker in Lincoln, to whom the savings bank had offered the Skinner paper for sale with certain other securities. Mr. Stull testifies that he had heard of Mrs. Skinner's do-

mestic troubles, and therefore when the paper was offered to him, he in the course of his investigations interviewed Mrs. Skinner, asking if she had any objections to offer against it or to his buying it. She said there was an agreement between her and her husband that it would be paid. Mrs. Skinner contradicts a portion of Mr. Stull's testimony, but not its essence. The settlement itself, or rather the evidence thereof, would presumably be in the possession or under the control of Mrs. Skinner. The indirect evidence thus tended strongly to support plaintiff's theory of its nature, and if that theory was incorrect the defendant might readily have refuted it. This she did not do. We must therefore accept plaintiff's theory as established. In the foregoing facts there is ample proof of a consideration for the mortgage of 1893, treated as an original instrument. In the first place, as between Skinner and Mrs. Skinner, the conveyance of the property was a consideration supporting her promise to assume the debt charged thereon. Her promise to Skinner for the benefit of the bank may be enforced by the latter. (*Shamp v. Meyer*, 20 Neb. 223; *Sample v. Hale*, 34 Neb. 220; *Barnett v. Pratt*, 37 Neb. 349; *Doll v. Crume*, 41 Neb. 655; *Hare v. Murphy*, 45 Neb. 809.) Moreover, when Mrs. Skinner gave her own note at the time she made the mortgage of March, 1893, a consideration passed directly from the bank. It thereby released Skinner from liability for the debt and extended the time of payment for three years. As to plaintiff's mortgage, the decree of the district court was right and is affirmed.

One Thomas Bailey was a defendant and filed an answer and cross-petition, in which he alleged the recovery of a judgment against both Skinner and Mrs. Skinner in the circuit court of the United States, and that a transcript had been in 1894 filed in the office of the clerk of the district court of Lancaster county. Mrs. Skinner answered this pleading, admitting the recovery of the judgment as alleged, but asserting that the property was at the time the debt was incurred, and continually to the

present, her homestead and as such exempt from the lien of the judgment. There was no reply to this answer and the affirmative matter averred therein must, as against Bailey, be taken as true. The decree, entered in this respect we think inadvertently, is so framed that after establishing the judgment as a lien junior to the mortgage, it directs a sale of the land unless Mrs. Skinner, within twenty days, pay both the mortgage debt and the judgment. It makes no reservation of her homestead exemption. Here is a double error. A judgment creditor, in the absence of special circumstances not here existing, does not require and cannot have the aid of a court of equity to subject the land of the debtor to the payment of the debt. He may levy execution thereon. Indeed, a judgment lien is not, strictly speaking, a lien at all. It is neither *jus in re* nor *jus ad rem*. It confers merely the right to levy on the land to the exclusion of subsequent claims. (*Metz v. State Bank of Brownville*, 7 Neb. 165.) The object of bringing the judgment creditor into a foreclosure case is to adjust priorities, and if his lien be found junior, to permit him to avail himself of the surplus proceeds of sale, after extinguishing the senior liens. By being so brought in he obtains no right to proceed independently and have the land sold for his own benefit. A redemption from the mortgage would set the matter at large and relegate him to his execution and levy.

Finally, the estate of homestead is to be determined, not from the fee simple value of the land, but from the value of the claimant's interest therein. So, if the property be incumbered, and be sold to satisfy such incumbrance, there must from the surplus be first set aside to the debtor the homestead exemption of $2,000, before the fund will be available to the satisfaction of debts which were not liens as against the homestead exemption. (*Hoy v. Anderson*, 39 Neb. 386; *Corey v. Plummer*, 48 Neb. 481; *Prugh v. Portsmouth Savings Bank*, 48 Neb. 414.) The decree must be modified so as to permit redemption by payment of the mortgage debt and costs

alone, and so that, in case of sale to satisfy the mortgage, there shall be first paid to Mrs. Skinner, out of the surplus, the sum of $2,000, the remainder, if any, to be applied to the payment of the Bailey judgment.

JUDGMENT ACCORDINGLY.

CHARLES C. ANDREWS V. STEELE CITY BANK ET AL.

FILED DECEMBER 8, 1898. No. 8486.

1. **Appointment of Receiver:** COLLATERAL ATTACK. When a court of competent jurisdiction has appointed a receiver in an action where such appointment is authorized, the authority of such receiver is not open to collateral attack.

2. **Action Against Corporation:** INTERVENTION BY RECEIVER: PARTIES. A receiver of a corporation, appointed after the commencement of a suit against the corporation, may intervene in such action to defend the rights of the corporation.

3. **Insolvent State Bank:** POSSESSION BY EXAMINER: ATTACHMENT. Under the present banking law (Compiled Statutes, ch. 8), when an examiner, under authority of the banking board, has taken possession of the assets of an insolvent bank, such assets are not subject to attachment at the suit of a creditor of the bank while possession is so retained.

ERROR from the district court of Jefferson county. Tried below before STULL, J. *Affirmed.*

John C. Hartigan, for plaintiff in error.

E. H. Hinshaw, contra.

IRVINE, C.

Charles C. Andrews brought an action against the Steele City Bank, Charles B. Rice, and Vena Rice, alleging that he was a depositor in the bank, which had become insolvent and was placed in the custody of the state banking board, that the Rices, who were husband and wife, were the sole stockholders of the bank, and had

given a bond to pay the debts of the bank and had taken possession of its assets. Judgment was prayed for $1,000. Plaintiff also sued out a writ of attachment, alleging every statutory ground except that the debt was fraudulently contracted. The attachment was levied on certain property, both personal and real. Thereafter Henry W. Challis obtained leave to intervene, alleging that he had become the receiver of the bank. He filed an answer and also moved to discharge the attachment. This motion was sustained, and from the order discharging the attachment plaintiff prosecutes proceedings in error.

An attack is made on the validity of Challis' appointment as receiver, and upon his right to intervene. It appears that the banking board, pursuant to the proviso of section 35 of the banking act (Compiled Statutes, ch. 8), authorized the stockholders to take possession of the bank and its assets on giving a bond to settle the liabilities; that a bond was tendered and approved; that thereafter the board undertook to rescind its action and directed the attorney general to apply for a receiver. Such application was made and Challis appointed. It is argued that the board, after approving the bond, had no authority to rescind its action; but if this be so, it would affect only the propriety of the appointment and not its validity. The appointment was made by a court of competent jurisdiction, and in an action where the power to appoint existed. That is sufficient to protect the receiver's authority from collateral attack. We have no doubt of the receiver's right to become a party. The bank was sued before his appointment. He became by operation of law its transferee. By section 45 of the Code of Civil Procedure, where a transfer of interest occurs otherwise than by death, marriage, or disability, the action may either proceed in the name of the original party or the successor in interest may be substituted. By section 50*a* any person who claims an interest in the success of either party may become a party by intervention. The

receiver had an interest in the success of the bank, and he had a right to come in to defend that interest. (*Arnold v. Weimer*, 40 Neb. 216.) From the briefs it would seem that the plaintiff considers that dissolution of the attachment was sought simply on the ground that the attached property belonged to the bank and was attached as the property of Rice. The record does not support that theory. The ownership of the property was only incidentally involved, and the ruling on the motion does not necessarily adjudicate that question. The attachment was asked and issued against all defendants. There is nothing in affidavit, writ, or return to indicate that the property was seized as that of one defendant rather than the other. While the evidence shows that Rice had formerly held the legal title to at least a portion of the property, it also shows that he held it as trustee for the bank. Certainly the receiver had a right to resist the attachment in so far as the bank's title was attacked.

The plaintiff insists that when the banking board approved the bond the bank became the property of the obligors, as did all its assets, and so subject to attachment; that Rice had absconded; that before leaving he had conveyed the attached property to persons named as trustees for creditors; that this was a prohibited general assignment and was consequently fraudulent. It is apparent that the decision of the district court did not involve a decision of these issues, but went upon the ground that the property was not subject to attachment. The evidence, while on some points conflicting, tends to show that the Rices' bond was approved November 11, 1895, but that they straightway refused to take possession of the assets. The attachment was levied November 16. November 18 the board undertook to rescind its action and applied for a receiver. Prior to November 11 an examiner, by direction of the board, had taken possession of the bank and all its assets. He did not surrender possession to Rice, but retained possession for the board until the receiver qualified, when

he delivered possession to him. Under the former banking act it was held that the assets of an insolvent bank were subject to attachment while in the hands of the banking board and before a receiver was appointed or the sheriff placed in custody. (*Arnold v. Weimer*, 40 Neb. 216.) After the decision of that case, and before the present arose, a new law went into effect (Compiled Statutes, ch. 8), section 24 of which gives authority to an examiner, when ordered by the board, to take possession of a bank, and "to hold and retain possession of all money, rights, credits, assets, and property of any description belonging to such bank, as against any *mesne* or final process issued by any court against such bank, corporation, partnership, firm, or individual whose property has been taken possession of by such examiner, until the state banking board can receive and act on the report made by the examiner of said bank, and have a receiver appointed, as provided in section 35 of this act." By this provision, when an examiner, duly authorized, takes possession the assets pass into the custody of the state and are no longer subject to attachment. Whether the bond became obligatory upon approval, whether the bank's assets thereby passed to the obligors, whether such result could be defeated by the obligors' refusing to take possession or by a subsequent rescission by the board of its approval of the bond, are questions which may perhaps arise on the trial of the main case, but do not affect the present motion. The property was in fact in the possession of the examiner and under the protection of the statute. Although perhaps that possession ought to have terminated, it had not in fact done so. It could not be disregarded.

AFFIRMED.

JOHN F. COAD ET AL. V. ELLEN T. BARRY.

FILED DECEMBER 8, 1898. No. 8437.

Bill of Exceptions: AUTHENTICATION: REVIEW. A document attached to a transcript and purporting to be a bill of exceptions cannot be considered unless it be authenticated as such according to the requirement of the statute, by the certificate of the clerk of the district court.

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

Martin Langdon, for plaintiffs in error.

T. J. Mahoney, Mahoney & Smyth, and *Chas. W. Haller, contra.*

IRVINE, C.

The assignments of error in this case, at least so far as attention is called thereto in the briefs, relate to the sufficiency of the evidence, rulings on the admission thereof, and to the giving and refusal of instructions with regard to which their applicability to the evidence is a material factor. All these questions demand for their consideration an examination of the evidence. The document following the transcript and purporting to be a bill of exceptions is not authenticated by the clerk's certificate, and must therefore be disregarded.

AFFIRMED.

JOSEPH H. MILLARD, APPELLEE, V. GEORGE H. PARSELL ET AL., APPELLANTS.

FILED DECEMBER 8, 1898. No. 8467.

1. **Creditors' Bill:** EQUITABLE ESTATE. When the legal estates of a judgment debtor have been exhausted, a petition in the nature of a creditors' bill will lie in order to subject to payment of the judgment land in which his estate is equitable only and which could not be reached on execution, or, if reached, could not be sold to advantage because of the clouded condition of the title.

2. ———: FINDING FOR PLAINTIFF: EVIDENCE. Evidence examined, and *held* to sustain a finding for the plaintiff in a creditor's suit.

3. ———: DEFICIENCY JUDGMENT: DEFENSE. Matters which, if available at all, might have been urged in defense to an application for a deficiency judgment cannot be urged in defense of a creditor's suit to enforce such judgment.

4. **Final Order:** LIABILITY OF GUARANTOR. An order that after exhausting the remedy against the principal debtor the creditor may apply for and obtain a judgment against a guarantor of collection is not final, and therefore not appealable.

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

W. H. De France, Silas Cobb, Otis H. Ballou, John H. Ames, A. E. Harvey, Meikle & Gaines, and *Henry A. Drumm,* for appellants.

L. F. Crofoot, contra.

IRVINE, C.

In 1887 Dr. George H. Parsell was the owner of lot 3, in block 78, in the city of Omaha, and June 11 of that year he made to O. H. and E. G. Ballou his note for $13,125, secured by mortgage on said lot. In 1889 the Ballous sold the note and mortgage to J. H. Millard, who is throughout the proceedings described as trustee, the nature of the trust not being disclosed and being immaterial. The Ballous at the same time guarantied the col-

lection of the note. In 1890 Dr. Parsell conveyed the property to E. B. Chapman. In 1891 Millard began foreclosure proceedings, which resulted in a sale of the property and a judgment against Dr. Parsell for a deficiency of about $2,800. Certain other property of Dr. Parsell having been sold on execution for a nominal sum the present case was begun.

The petition is multifarious, but its principal object was to subject to the satisfaction of the judgment a tract of eighty acres in Douglas county, which had been by Chapman conveyed to Mrs. Parsell at the time lot 3 was conveyed to Chapman, and which Mrs. Parsell had afterwards conveyed to Horatio Fowkes. The petition charges that the conveyance of this land from Chapman to Mrs. Parsell was for the purpose of defrauding Dr. Parsell's creditors, also that the consideration was the conveyance of lot 3 to Chapman, and moved entirely from Dr. Parsell, who became the equitable owner of the eighty-acre tract. It was further alleged that the conveyance to Fowkes was colorable only and made to defraud Dr. Parsell's creditors. Certain other instruments are incidentally attacked, but they are so connected with those mentioned that all must stand or fall together, and it is useless to complicate the opinion by specific reference thereto. Issue having been joined on these averments, the court found that the conveyance of the land to Mrs. Parsell was not made for the purpose of defrauding creditors, but that it was made in trust for Dr. Parsell, and that he was the equitable owner. The court further found that the conveyance from Mrs. Parsell to Fowkes was made for the purpose of defrauding Dr. Parsell's creditors, and that Fowkes knew of such purpose. The plaintiff therefore had a decree. Mrs. Parsell having died, her heirs were parties, and they, together with Dr. Parsell and Fowkes, appeal.

Without reviewing the evidence in detail it is sufficient to say that it supports the finding that the consideration for the transfer of the property to Mrs. Parsell was the

conveyance of lot 3 to Chapman; that there was at least a resulting trust to Dr. Parsell, and that the land was in equity his. It is contended that a creditors' bill will not lie on this ground—that a fraudulent intent must be shown, which here did not exist. But counsel overlook the rule that equitable as well as legal estates are subject to the payment of debts, and that when the estate is equitable only, and a sale on execution would pass no title, or a title so clouded as to discourage bids, a petition in the nature of a bill in equity is the appropriate, and often the necessary, procedure. (*Hoagland v. Wilson*, 15 Neb. 320; *Sweet v. Craig*, 15 Neb. 349; *Brownell v. Stoddard*, 42 Neb. 177.) The foregoing cases were complicated with issues of fraud, but the principle is recognized in each. (See, too, *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*, 55 Neb. 86.)

Counsel further contend that the petition was framed on the theory of a fraudulent conveyance and does not call for relief on the other ground; but if all the allegations of fraud be rejected, there still remain sufficient averments to charge an equitable estate in accordance with the proof.

The finding of fraud in the transfer to Fowkes presents a more doubtful question. The day after lot 3 was appraised for the purpose of the foreclosure sale the Parsells executed a deed, leaving blank the space for designating the grantee, and describing the eighty-acre tract and another lot in Omaha, which will be called, as it is termed in the briefs, the Sunnyside lot. The appraisement mentioned had been at a sum less than the mortgage debt, so that the probability of a deficiency judgment was then evident. This deed was given to Mr. Potter, a brother-in-law of Mrs. Parsell and a real estate broker. He was to negotiate a sale, and apparently to complete the deed and deliver it in pursuance of such sale as he should make. A few weeks thereafter there was received by Mr. Cobb, a son-in-law of the Parsells, a letter from Potter from New York, containing a bank draft

for $4,350 as part of the consideration of the sale of the land to Fowkes. The remainder of the consideration was made up by Fowkes' assumption of a mortgage on the Sunnyside lot, and by a mortgage made by him to Dr. Parsell for $1,150 on both tracts. There was also a lease from Fowkes to Dr. Parsell whereby Dr. Parsell was to remain in possession of the land until the rent reserved should pay the mortgage. Mr. Cobb testifies that he gave the draft to Mrs. Parsell, who presented it to her daughter, Mrs. Cobb. The latter handed it to Cobb, who cashed it and invested the proceeds for Mrs. Cobb's benefit. When inquiry was made as to the manner of investment, further investigation was closed by an objection by Fowkes' attorney that the matter was privileged, Cobb acting as attorney for his wife and for Mrs. Parsell. When we consider the fact that the deed was made in blank and the negotiations with Potter took place as soon as a deficiency judgment became imminent, the fact that through the Cobbs it might have been shown what became of the money; that Parsell was to remain in possession of the land; that none of the witnesses had ever seen Fowkes or heard of him except in this transaction; that Potter, a relative of the Parsells, who must have known if the transaction was genuine, was not called as a witness or his absence accounted for; that Fowkes himself, while he appeared by attorney, did not testify; that he made the purchase after brief negotiations and apparently without seeing the land; that all the active participants, unless it be Fowkes, were relatives of the Parsells; when we consider these facts we must conclude that the finding of the district court has sufficient support.

The peculiar fact that this is an attempt by the mortgagee, after fully availing himself of his security, to reach for a deficiency property obtained only in exchange for the equity of redemption in the mortgaged land, and which would not be available if the transaction attacked had not occurred, may relieve the transaction from criti-

cism on ethical grounds, but it does not affect its legal aspect.

Complicated with the main case there is the contention that a house, which substantially enhanced the value of the mortgaged premises, was removed before the foreclosure, but after Chapman acquired the property. It is asserted that Millard permitted the removal and is thereby estopped from asserting his judgment, or at least that credit should be given thereon for the amount which the lot suffered in value by the removal of the house. In the first place the proof shows that Millard not only did not consent to this waste, but that he endeavored to prevent it, but obtained an injunction only after the removal had been effected. In the second place, all this occurred prior to the judgment. If the facts were of any avail it was as a defense to the application for judgment. Thereby appellants were concluded. Such facts certainly constitute no defense to a creditors' bill.

The Ballous were parties to the suit, and against them a judgment was sought on their guaranty of collection. This constituted multifariousness in the petition, but no objection was made on that ground. The court did not give judgment against the Ballous, but ordered that should there still remain a deficiency after subjecting the land in controversy to the payment of the Parsell judgment, plaintiff might then apply for and obtain judgment against the Ballous. The Ballous undertake to appeal from this part of the decree, but their appeal is premature. The two causes of action are entirely distinct, and the decree, so far as it affects the Ballous, is not final. There is no judgment against them yet; *non constat* that there will ever be. If there should be, they may then have it reviewed.

The appeal of the Ballous is dismissed, without an adjudication of the correctness of the decree so far as it affects them. In other respects the decree of the district court is affirmed.

JUDGMENT ACCORDINGLY.

WILLIAM R. JACKSON ET AL. V. STATE OF NEBRASKA, EX REL. THOMAS J. MAJORS.

FILED DECEMBER 22, 1898. No. 9847.

Mandamus: SCHOOLS: REINSTATEMENT OF PUPIL. An action of mandamus will lie and may be maintained to reinstate a pupil in a school, if the action of the officer or officers by which the party was refused admission to or continuance in the school was an arbitrary or capricious exercise of authority.

ERROR from the district court of Nemaha county. Tried below before STULL, J. *Affirmed.*

C. J. Smyth, Attorney General, and *W. H. Kelligar,* for plaintiffs in error.

G. W. Cornell and *S. P. Davidson, contra.*

HARRISON, C. J.

Thomas J. Majors, the defendant in error, relator in the trial court, made application for the issuance of a writ of mandamus to compel the respondents in the action to reinstate and continue the son of relator, Thomas A. Majors, as a pupil of the State Normal School at Peru, and to permit him to attend the school, and enjoy all the rights, privileges, and advantages of a pupil thereof. An alternative writ was issued, and respondents filed an answer or a return to said writ. As a result of a hearing of the issues a peremptory writ was allowed, and respondents present the cause to this court by petition in error.

The objection was made at the commencement of the trial to the introduction of any evidence on the grounds of insufficiency in statements of the petition and alternative writ, and that it was overruled is of the alleged errors urged. It is true, as argued, that some of the allegations of the pleadings referred to partake of the nature of conclusions, but it may, we think, be fairly

said that in the main they are more in the nature of statements of ultimate facts, and if not wholly unobjectionable, must be held allowable as against an attack delayed until the stage of proceedings this was. This State Normal School was located and established at Peru by an act of the legislature which was approved June 20, 1867. It was stated in the act that the school shall be for the exclusive purpose of the "instruction of persons, both male and female, in the arts of teaching, and in all the various branches that pertain to a good common school education; also, to give instruction in the mechanic arts, and in the arts of husbandry and agricultural chemistry, in the fundamental laws of the United States, and what regards the rights and duties of citizens." It was further provided that the school should be under the direction of a board of education of seven members, five to be appointed by the governor, the state treasurer and state superintendent of public instruction to be members by virtue of their offices. The board was empowered to appoint a principal and assistant principal to take charge of the school, to appoint teachers and officers required, and to prescribe such rules and regulations for the admission of pupils as it deemed necessary and proper. It was also required that any applicant for admission should undergo an examination, the manner of which should be prescribed by the board, and if it appeared that the applicant was not of good moral character or would not make an "apt and good teacher," he or she should be rejected. It was further set forth that applicants for admission might be required to sign a declaration of intention to follow teaching in the "primary schools" of the state as a business, or might be admitted without signing any such declaration on terms to be prescribed by the board. In 1871 an act supplemental of the act of 1867 was enacted, in which it was stated in regard to the admission of pupils: "In the admission of pupils, preference shall be given first as is provided in the act to which this is supplemental;

secondly, to citizens of Nebraska, and their children; thirdly, to the citizens of other states; and the board may determine upon what terms citizens of other states may be admitted." (Session Laws 1871, p. 97, sec. 6.) In 1881 an act was passed which in terms repealed the act of 1867 and the supplemental act, and provided for a governing board for the school, which as to membership and the manner of their appointments, etc., did not differ materially, if at all, from the prior act. It was therein prescribed that the secretary of the board keep an exact and detailed account of the doings of the board; also that the principal of the school should be its chief executive officer and be responsible to the board for the control and management of the school; that "The board in their regulations, and the principal in his supervision and government of the school, shall exercise a watchful guardianship over the morals of the pupils, but no religious or sectarian test shall be applied in the selection of teachers, and none shall be adopted in the school." (Session Laws 1881, p. 374, ch. 78, subd. 13, sec. 9.) In section 13 of the act it was stated: "Students, when entering the school for the first time, shall pay a matriculation fee of five dollars." This it appeared had been paid by young Majors at some time during his attendance as a pupil of the normal school, which attendance had continued during about ten years. In section 16 of subdivision 13 of the act of 1881 it was provided: "The board shall make such rules and regulations for the admission of pupils to the school as may seem to be best for the interest of the school and not inconsistent with the purpose for which the school has been established."

Of the making or adoption of any specific rules and regulations in regard to admission the evidence was very unsatisfactory. There was, if any, a very incomplete record of any action by the board in this respect. It is, however, contended that the following, which are extracts from a catalogue of the school, under the heading therein of "General Information," and subheadings, "Ad-

mission" and "Continuance in School": "As the State Normal School is not primarily an institution for the education of children or people in general, but a professional school for the special instruction and training of teachers, and as its course of study, being arranged with special reference to this end, cannot be accomplished in a fragmentary way with any advantage to the student, but with great disadvantage to the school, all applicants admitted in accordance with the regulations of the board of education must give satisfactory evidence of fitness in preparation and in character for the vocation to which they aspire." "Continuance in school will depend on diligence in study and good conduct. All students are expected to be punctual, prompt, neat, accurate, thorough, earnest, truthful, and teachable, for such only can become satisfactory pupils and successful teachers. Continued idleness or decided immorality on the part of a student will insure his speedy expulsion. Nor will any student be retained who, during the regular school term, shall take lessons or instructions elsewhere or engage in any other business which, in the opinion of the faculty, is incompatible with his prompt attendance at school or his careful preparation for his prescribed school duties, nor whose character and general influence are not for the good of the school,"—had been prepared and presented to and adopted by the board as rules on the subjects treated in them. Whether it was proved that these were of duly adopted rules and regulations or not, it did appear that in the admission of pupils there was somewhat of the routine observed of which the foregoing alleged rules were to a considerable, if not to a full, extent elemental.

It was disclosed that the son of relator made application at the opening of the school during the fall of 1897 for admission or continuance as a pupil, and had been by the faculty refused or rejected. Of this action there was the following communication to the father as notice thereof:

"STATE NORMAL AND TRAINING SCHOOL,

"PERU, NEBRASKA, Sept. 6, 1897.

Hon. T. J. Majors, Peru, Neb.—DEAR SIR: Your son, Thomas Majors, Jr., having applied for admission to the State Normal School, the faculty, after consideration of the interests of the school, deem it best to refuse the same. This action is taken without reference to his guilt or innocence in matters with which his name has been connected.

"Fraternally, J. A. BEATTIE."

This action was, on consideration by the board, the father of the applicant and an attorney in his behalf being present during a portion of the time of its deliberations thereupon, approved; but no reason other than it was for the best interests of the school was ever given as the basis for the action taken.

It is now strenuously insisted that the decision of the faculty or of the board, or both in combination, cannot be assailed in an action of mandamus; that there was that in it which gave it the character of an adjudication; that there was elemental of it an exercise of discretion, and to entertain this action of mandamus was to review the decision; also open to the objection that it was an attempt by mandamus to control a judicial discretion. That these things will not be done by mandamus is well established generally, and thoroughly so in this state; but it may be said that there was the power here in the person or body who or which made the order of refusal, —to avoid the effect of which was the motive of this suit, and we will say here that we cannot consider the action of the board as in any sense a review or hearing on appeal from the action of the faculty or principal,— to exercise a discretion in the admission of pupils; or it might become a mere ministerial or administrative act, with nothing of the judicial in it, where the application, both in form and substance, was in all things correct and unquestionable, and the admission would consist in naught but the registration of the pupil and signifying

to him his acceptance, and a refusal would be an entire disregard or ignoring of the application, and the arbitrary exercise of power. It may be likened unto the authority which may be exercised by an officer in the approval or non-approval of a required bond or undertaking. The right of examination, and of passing on the financial sufficiency of the instrument, and the sureties thereon, may be or exist, and in it there may be somewhat of the exercise of a discretion,—a judicial weighing of the matter, if you please; yet in some instances, where the form and substance of the bond are without question, it has been said mandamus will lie to secure an approval. (*McLeod v. Scott*, 26 Pac. Rep. [Ore.] 1061; *Potter v. Village of Homer*, 59 Mich. 8, 26 N. W. Rep. 208; *Amperse v. City of Kalamazoo*, 59 Mich. 78; *State v. Lafayette County Court*, 41 Mo. 221; *Ex parte Candee*, 48 Ala. 386; *In re Prospect Brewing Co.*, 17 Atl. Rep. [Pa.] 1090.) There have been at least three cases decided by this court, in each of which there was a question very similar to the one in the case at bar, and the jurisdiction of the court and the control by writ of mandamus, although not directly discussed, or of the points presented, were directly involved. In one the issuance of the writ was upheld, and in each of the others there was a tacit recognition at least of the right to the action. A suspended pupil was reinstated in school rights and privileges by writ of mandamus in *State v. School District*, 31 Neb. 552. The other two to which we have just referred are *Bourne v. State*, 35 Neb. 1, and *Board of Education v. Moses*, 51 Neb. 288. See, generally, on the propositions involved, *State v. White*, 82 Ind. 278; *State v. Lafayette County Court*, 41 Mo. 221; *Perkins v. Board of Directors*, 56 Ia. 477; Spelling, Extraordinary Relief, p. 1135, sec. 1384. The same propositions or principles have been recognized in two cases in relation to certificates of nominations to office, and the duty of an officer to whom they were, pursuant to law, certified, to place the names of the parties shown to have been nominated, or cause them to be

placed on ballots, and whether mandamus would lie to control or direct the ultimate performance of the duty, and in each of which the questions were raised and discussed. (See *State v. Piper*, 50 Neb. 25; *State v. Smith*, 57 Neb. 41.) In the following cases the questions were not raised in any, but involved in all of them: *State v Allen*, 43 Neb. 651; *Woods v. State*, 44 Neb. 430; *State v. Clark*, 56 Neb. 584; *State v. Moore*, 46 Neb. 590.

There was herein alleged the deprivation of a valuable right for which the damages could not be estimated with any accuracy or certainty, and for the wrong committed there was no adequate remedy at law. This record discloses no reason for the refusal to allow the relator's son to continue in the school as a pupil. A reason may have existed, but it was not shown. So far as this record discloses there was an arbitrary exercise of power or authority on the part of the faculty; a rejection of the pupil because the parties willed it should be so; no exercise of judgment or discretion in the matter, but a mere operation or putting into effect a desire. Under the circumstances and facts shown, the issuance of the writ was proper.

AFFIRMED.

A. A. JACKSON, ADMINISTRATOR, APPELLANT, V. JASON L. PHILLIPS, APPELLEE.

FILED DECEMBER 22, 1898. No. 8539.

1. **Real Estate:** CONVEYANCES: CONSTRUCTION. "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance, of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." (Compiled Statutes 1897, ch. 73, sec. 53.)

2. ———: ———: ———. Contract upon which this action is predicated determined to be an executory contract for the sale of real estate, and not a lease.

3. **Vendor and Vendee:** FORECLOSURE OF CONTRACT. If default is made in conditions relative to payment of the consideration contained in an executory contract for the sale of real estate, the vendor may treat the contract as a mortgage and enforce it by foreclosure. (*Hendrix v. Barker*, 49 Neb. 369.)

4. **Foreign Administrators:** ACTIONS. An executor or administrator appointed in another state may maintain an action or suit in this state. (*Cox v. Yeazel*, 49 Neb. 343; Compiled Statutes 1897, ch. 23, sec. 337.)

5. **Executors:** PROBATE NOTICE. Objections to sufficiency of a probate notice *held* without force in this action, as it could not affect proceedings upon which, through such objections to it, an attack was sought to be made.

7. **Administrators:** CITATION: ATTACK: PARTIES. The citation or notice of hearing of application for letters of administration cannot be successfully attacked collaterally by one not interested in the estate or in a suit by the administrator against him.

8. **Vendor and Vendee:** ENFORCEMENT OF CONTRACT: HOMESTEAD. An executory contract for the sale of real estate is valid and may be enforced as a security for the payment of the unpaid purchase-money, although not signed by the wife of the purchaser, and the real estate was bought for and immediately occupied as a homestead. (*Prout v. Burke*, 51 Neb. 24.)

9. ———: ———. *Held*, That the evidence warranted findings and decree for the appellant, plaintiff below. Judgment for the defendant vacated, and the cause remanded with directions for decree for plaintiff.

APPEAL from the district court of Johnson county. Heard below before STULL, J. *Reversed.*

S. P. Davidson, for appellant.

L. C. Chapman, contra.

HARRISON, C. J.

In this case the appellant alleges for his cause of action the existence of an executory contract for the sale of real estate to which the deceased person, of whose estate he was the administrator, during his lifetime, became a party, and to which the appellee was also a party; that there had been a failure on the part of the appellee to perform his agreements evidenced by said instrument.

The relief asked was a foreclosure as of a mortgage. The appellee in his answer pleaded occupancy of the premises involved in the suit with his family as a home and its consequent homestead character, and the lack of the signature of his wife to the contract upon which the action was predicated; also alleged that the contract declared upon in the petition was a lease, which also contained an agreement on the part of the lessor to sell the leased property to the lessee at a date subsequent to the making of the lease, and that the contract, by reason of the non-fulfillment of some of its conditions, had become ineffective or without further force. There was for the appellant a reply, which was a general denial. The judgment of the court was for the defendant in the action, and the plaintiff has appealed.

The first question presented is relative to the character to be given to the agreement which is the basis of the suit, and in doing this we must give effect to the requirements of section 53, chapter 73, Compiled Statutes 1897, which reads as follows: "In the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." (*Hervey v. Rhode Island Locomotive Works*, 93 U. S. 664.) The instrument in suit has some direct earmarks of a lease. It contains some terms and expressions which would, taken literally, stamp it as a lease; but when its substance is examined critically, the apparent character of the instrument is destroyed. The arrangement of the consideration in reference to the payment by installments being $60 for each of the four years succeeding the time of the execution of the contract, and $660 at the expiration of the fifth year, the $60 payments being each the one year's interest at ten per cent per annum on the $600, which it seems more than probable

was a principal sum of the consideration for the contract between the parties, furnishes a strong indication of a sale. There is a further strong indication of a sale in the feature of the agreement in relation to a conveyance of the property to the contractee by the contractor on full payment of all sums stated in the contract, as evidenced by the notes. All things considered, we are forced to conclude that the instrument declared upon in the petition was an executory contract for the sale of land. If so, the appellant might, as one of the remedies afforded on default of the other party in the performance of the essential conditions of payment of the consideration, enforce collection in a suit of foreclosure. (*Hendrix v. Barker*, 49 Neb. 369.)

The argument that the appellant could not sue for the reason that his appointment as administrator of the estate of the deceased party to the contract, whom he claimed to represent, was not sufficiently shown, in that the evidence introduced in this connection disclosed no sufficient petition or no petition in application for such appointment in this state, is without force for the reason that the present suit was by the appellant according to the pleading and proof under his appointment by the proper court of the state of California, where such party died, and where the appellant was duly appointed administrator with the will annexed of the estate of the deceased. The will was admitted to probate in this state, but there was nothing shown of any proceedings for the appointment of an administrator, but an administrator or executor appointed in another state may commence and prosecute an action in the courts of this state. (Compiled Statutes 1897, ch. 23, sec. 337; *Cox v. Yeasel*, 49 Neb. 343.)

Objection is made that the notice of the hearing in the county court in this state lacked in what it is asserted was an essential particular. To this it must be answered that the notice introduced in this case did not purport to be of the appointment of an administrator, but of the

projected admission of the will to probate; and further, the question of the sufficiency of a notice of this nature, or of the hearing of application for letters of administration, could not be raised by one not interested in the estate in this collateral action. (Crosswell, Executors & Administrators, p. 140, sec. 252, and cases cited in note 6.)

The question of the homestead right and the lack of the signature of the wife of appellee to the contract cannot enter into this controversy. If the appellee was with his family occupying the property sought to be affected herein at the time of the contract in suit, it was without any title, or at least the evidence before us does not disclose any or by what right such occupancy was of existence, and a homestead right would not arise and attach to the title or interest acquired by appellee under the contract as against the enforcement of the consideration by which the title or interest was so acquired. (*Prout v. Burke*, 51 Neb. 24, and citations therein.)

There was testimony to the effect that the notes which had been given in the transaction which formed the basis of this action were destroyed by the payee. If this was true, the appellee could be accorded no benefit of such act in this suit, for the reason that there was no issue presented by the pleadings under which such defense was available. There was evidence which called for a finding and decree for the appellant as to the amounts of the payments provided for in the notes described in the contract, but of the taxes alleged to have been paid by him there was no proof. It follows from the conclusions reached that the judgment of the district court was wrong. It is therefore reversed and remanded to the district court for the entry there of a decree for the aggregate amount of the notes described in the contract, together with the interest thereon.

REVERSED AND REMANDED.

JOHN GAY ET AL., APPELLEES, V. E. P. REYNOLDS ET AL., APPELLANTS.

FILED DECEMBER 22, 1898. No. 8551.

1. **Bill of Exceptions:** AUTHENTICATION: REVIEW. A bill of exceptions will not be examined in this court if not authenticated by the certificate of the clerk of the trial district court.

2. ———: REVIEW. If there is no bill of exceptions, questions of fact, or the sufficiency of the evidence to sustain the findings of the court, cannot be considered.

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

E. N. Kauffman, for appellants.

A. D. McCandless, contra.

HARRISON, C. J.

In an appeal in this action the question urged is in relation to the sufficiency of the evidence to sustain the findings upon which the judgment or decree was predicated. To determine the force of the arguments would necessitate the examination of the evidence adduced in the trial court. The document in the record which purports to be the bill of exceptions, and to contain the evidence, lacks the authentication of the clerk of the district court, and will not be examined. (*Hazelet v. Holt County,* 51 Neb. 724; *Andres v. Kridler,* 47 Neb. 585.)

Questions of fact will not be considered in this court if there is no bill of exceptions. (*Everingham v. Harris,* 51 Neb. 627.) It follows that the judgment must be

AFFIRMED.

INDIANA KNAPP V. CHICAGO, KANSAS & NEBRASKA RAILROAD COMPANY ET AL.

FILED DECEMBER 22, 1898. No. 8535.

1. **Instructions:** EVIDENCE: ISSUES. An instruction by which the jury was informed that unless the plaintiff had established designated issues by a preponderance of the evidence she could not recover, and which in its statements ignored and excluded from the consideration of the jury a material issue in the case, relative to which there was much pertinent evidence, and of which it could not be said that a finding for defendants was the only one which the evidence would sustain, is prejudicially erroneous.

2. ——: ——: ——. The error of giving such an instruction was not cured by other instructions on the subject of which in it there was an omission of notice or statement.

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

L. M. Pemberton, for plaintiff in error.

Alfred Hazlett and *W. F. Evans, contra.*

HARRISON, C. J.

The petition of the plaintiff filed herein declared upon an alleged contract between the Chicago, Kansas & Nebraska Railroad Company and herself which was in the following terms:

"This agreement, made and entered into this —— day of ——, A. D. 188—, by and between Indiana Knapp, of the town of Beatrice, county of Gage and state of Nebraska, of the first part, and the Chicago, Kansas & Nebraska Railroad Company, in the state of Nebraska, of the second part, witnesseth: That the said party of the second part covenants and agrees to and with the said party of the first part to build and maintain a certain crossing, not less than twelve feet wide, nor less than six feet high, under the tracks of the said Chicago, Kansas & Nebraska Railroad Company's railroad, and com-

plete said crossing on or before January 1, 1887, upon the S. W. quarter of section 31, town 4, range 8. And the said party of the first part covenants and agrees to and with the said party of the second part for the same as follows, viz.: To accept the award of the commissioners appointed to assess the damages for the right of way over the south half of section 31, town 4, range 8 east, and to allow the removal of earth from a strip of land 300 feet, along the right of way, and 50 feet wide, commencing at the point where said railroad right of way enters said land on the east, said excavation to slope to the south and to be free of water holes and drainage from or through the right of way or adjoining land.

"And for the true and faithful performance of all and every of the covenants and agreements above mentioned, the parties to these presents bind themselves each unto the other in the penal sum of one thousand dollars as liquidated damages, to be paid by the failing party.

"In witness whereof, the parties to these presents have hereunto set their hands, the day and year last above written.

INDIANA KNAPP.
"S. H. GILSON,
"*Division Engineer, C. K. & N. Ry.*

"Signed, sealed, and delivered in the presence of
"J. C. FLETCHER."

It was further pleaded that the company constructed the passage-way under its road or track during the year 1886, and the same was maintained until the month of September, 1893, or about seven years, when it was by the Chicago, Rock Island & Pacific Railway Company, which then controlled and operated the line of railway, filled and destroyed, and the plaintiff thus deprived of its use and enjoyment and of the benefit of the contract. It was also pleaded that the first named company, and with which the contract purported to be made, transferred the line of road to the Chicago, Kansas & Nebraska Railroad Company, which transferred it to the Chicago, Rock Island & Pacific Railway Company. The

plaintiff prayed for damages in the sum of $1,000 as occasioned by the breach of the contract. For the defendant the Chicago, Kansas & Nebraska Railroad Company there was an answer, in which it admitted the construction by it of the line of railroad referred to in the petition and the acquirement by condemnation proceedings of the right of way over the property of the plaintiff, and denied the contract; also the authority of the party by whom it was signed, apparently for the company, to enter into any contract or agreement of such nature for it. It was also admitted that the transfers of the line of road pleaded in the petition had been made. For the Chicago, Rock Island & Pacific Railway Company there was filed a general denial. After a reply for the plaintiff the issues were tried, and a verdict and judgment ensued for the defendants. The plaintiff presents the cause to this court by a proceeding in error.

Of the errors assigned was that of the giving in charge to the jury an instruction numbered 8 requested for the defendants, which was as follows: "The jury are instructed that the plaintiff cannot recover in this action against the defendants, or any or either of them, on her alleged cause of action in this case without first establishing by a preponderance of the evidence that S. H. Gilson, who is alleged to have signed the contract, a copy of which is attached to plaintiff's petition, was the agent of the defendant the Chicago, Kansas & Nebraska Railroad Company, and that the making of such contract was within the general or apparent scope of his authority." This made it obligatory upon the plaintiff to show by a preponderance of the evidence that the party who ostensibly, at least, signed the contract in suit for one of the defendants was then its agent and possessed real or apparent authority to enter into the contract for the company named therein. These facts were by the instruction required to be established before the plaintiff could be accorded a verdict, and this regardless of what might be proven on other material points or branches of

the case. It is stated in the brief filed for the defendants that there are three principal questions involved in the controversy: (1.) What authority did the engineer Gilson possess? (2.) Was the making of such a contract within either the direct or apparent authority of the engineer who signed it? (3.) Was there a ratification of the contract by the defendants or either of them? A careful examination of the record discloses that the question of ratification was a material one and relative to which there was much pertinent matter introduced in evidence. It was made by the evidence on the subject a point to be, to say the least, fairly submitted to the jury, and one upon which it cannot be correctly asserted that a finding for defendants was the only one that could have been returned, and the vice of the instruction which we have quoted is in that it ignored the issue of ratification and excluded it from the consideration of the jury. It is argued for the defendants that the error in this instruction was cured by other instructions given which dealt exclusively with the subject of ratification. This could not, and did not, if true, do what is claimed for it. It could and did but constitute a conflict in the instructions. That correct instructions were given would not palliate the error in the one or rob it of its power for mischief or prejudice. (*Wasson v. Palmer*, 13 Neb. 376; *First Nat. Bank of Denver v. Lowrey*, 36 Neb. 290.) It follows that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. JOHN J. BUTLER ET UX., APPELLANTS.

FILED DECEMBER 22, 1898. No. 8558.

1. **Mortgage:** DEFAULT: ELECTION TO DECLARE DEBT DUE: WAIVER. A bond and mortgage given to secure payment of the debt stated in the former instrument provided for an election by the creditor

to declare the entire debt due and for enforcement by foreclosure if default was made in payments of interest or an installment or installments of principal as they respectively matured. Acceptance of interest due did not waive the default in payment of matured installments of principal.

2. ———: ———: ———: NOTICE. No specific notice of the election to treat the whole debt as due was necessary prior to the institution of the foreclosure suit. Its commencement was sufficient notice of said election.

3. ———: TAXES AND INSURANCE. A mortgagee is entitled to reimbursement for taxes and insurance premiums paid to preserve the security; also the interest on such payments.

4. ———: ———. A bond and mortgage provided for the payment on default thereof of the mortgagor of "taxes and assessments." *Held*, To include certain special assessments by city authorities which by law were made liens on the mortgaged property and for which it might be sold as for general, state, county, and city taxes.

5. **Identification of Instrument.** An instrument introduced in evidence determined sufficiently identified as the one in suit.

6. **Mortgages:** EXPENSES OF ABSTRACT. A stipulation in the bond and a mortgage for payment by the mortgagor of "expenses incurred in procuring and continuing abstracts of title for the purposes of the foreclosure suit" *held* ineffective and unenforceable.

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

Alfred W. Scott, for appellants.

Lambertson & Hall, contra.

HARRISON, C. J.

The appellee herein instituted the action to secure the foreclosure of a real estate mortgage, the property involved being a lot in Lavender's Addition to the city of Lincoln. The bond which evidenced the indebtedness, the payment of which it was the declared purpose of the mortgage to secure, recited the sum of $20,000 as its amount, but provided for the payment of $10,000, and for the latter sum, as due on the debt, $120 paid for insurance, a stated aggregate amount of state, county, and

city taxes, and special assessments, also $1.50 paid for extension of an abstract of title of the property, in preparation for commencement of the foreclosure, and interest on each of said sums, a recovery was prayed. The mortgagor admitted the execution of the bond and mortgage declared upon in the petition. For Mary E. Butler there was a general denial of the allegations of the petition. From a decree of foreclosure for the amounts claimed this appeal has been prosecuted.

Both bond and mortgage provided for the prompt payments of installments of interest and principal when due, also taxes and assessments, and for keeping insurance in force, and if taxes and assessments were not paid or insurance not attended to by the mortgagor at the proper times, the mortgagee should be authorized to pay all necessary sums and be entitled to reimbursement, and to collect them as of the mortgage indebtedness. And it was further provided: "But in case of the non-payment of any sum of money (either principal, interest, insurance money, taxes, or assessments) at the time or times when the same shall become due, agreeably to the terms and conditions of these presents or of the aforesaid bond, or any part thereof, then, in such case, the whole amount of said principal sum shall, at the option of the said party of the second part, its successors or assigns, be deemed to have become due and payable, without any notice, whatever (notice of such option being hereby expressly waived); and the same, together with all sums of money which may be paid by said party of the second part, its successors or assigns, for or on account of insurance, taxes, assessments, or prior liens, with interest thereon at the rate aforesaid, shall thereupon be collectible in a suit at law, or by the foreclosure of this mortgage, in the same manner as if the whole of said principal sum had been made payable at the time when any such failure in any payment shall occur as aforesaid, and the judgment or decree in the suit brought to foreclose the same shall embrace, with the said principal debt and

interest, all sums so paid for or on account of insurance, taxes, assessments, or prior liens, with interest at the rate aforesaid." In regard to the extension of the abstract there was a specific promise that the expense of it would be borne by the mortgagor. It is contended that there were no defaults on the part of the mortgagor which gave the mortgagee the right to an action at the time this was begun. There were installments of the principal due prior to the time of the commencement of the action, and under the terms of the bond and mortgage this rendered the whole sum due at the option of the holder thereof. That a payment of interest had been received after such default would not constitute a waiver of the right to enforce for the defaults in the payments on installments of principal.

It is argued that no notice of an election to declare the whole debt due was given the mortgagor by the mortgagee prior to the action, and without it the suit could not be maintained. No other notice of the election to foreclose for all the debt than the commencement of the action with a statement in the complaint of such election was necessary. (*Lowenstein v. Phelan*, 17 Neb. 429; *Coad v. Home Cattle Co.*, 32 Neb. 761; *Pope v. Hooper*, 6 Neb. 178; *Fletcher v. Daugherty*, 13 Neb. 224.)

It is urged that the bond should not have been admitted; that it did not support or was at variance with the allegations of the petition. An examination of the instrument referred to and a comparison of its recitals with the instrument declared upon in the petition as the primary evidence of the indebtedness sought to be enforced leads to the conclusion that the bond introduced in evidence is the one in suit. Its identification was sufficient, and it supported, and did not vary from, the statements in the petition.

The payment of the insurance by the appellee under certain stated conditions was provided for in the bond and mortgage. The conditions existed and the payments were made; hence the appellee was entitled to enforce

reimbursement. (*White v. Atlas Lumber Co.*, 49 Neb. 82; *Townsend v. Case Threshing-Machine Co.*, 31 Neb. 836.)

In the bond and mortgage it was provided that the mortgagee might pay "taxes and assessments" against the property if the mortgagor had failed in the payments. The mortgagee had paid for state, county, and city taxes; also some special assessments. The last, it is asserted, were not included in the provision to which we have alluded, and the mortgagee, although he had paid them, could not enforce the amount of them as a debt due to him by virtue of the terms of his mortgage or by reason of its ownership. Such assessments, under similar provisions of statutory law in reference to their inception and collection, were held included under the terms "taxes and assessments," and they are by law made liens on real estate. (*State v. Irey*, 42 Neb. 186.) It has been held by this court that in case of failure of the mortgagor to pay the taxes, the mortgagee may pay them to protect the security and recover them in the foreclosure of the mortgage. (*Southard v. Dorrington*, 10 Neb. 122; *Richardson v. Campbell*, 27 Neb. 647; *Townsend v. Case Threshing-Machine Co.*, 31 Neb. 836; *New England Loan & Trust Co. v. Robinson*, 56 Neb. 50.) The conditions had arisen and the mortgagee had met them by making the payments and was entitled to foreclose for the aggregate of the sums paid.

In the instrument sought to be enforced it was promised that the mortgagor would pay all expenses incurred in procuring and continuing abstracts of title for the purposes of the foreclosure suit, and of the sums claimed and allowed was $1.50 for extension of the abstract of title to the property preparatory to the foreclosure of the mortgage. This it is insisted should not have been made a part of the decree. At first glance it would seem that if the parties contracted for such a contingent expense, and the mortgagor to bear it, there is no valid reason why the agreement should not be enforced; but a

critical examination of the question discloses some features which are not exposed by the cursory view. Costs in such actions as this, as in all, are confined to those allowed by statute. (*Bank of Wooster v. Stevens*, 1 O. St. 233; *State v. Taylor*, 10 O. 378, cited and approved in *Dow v. Updike*, 11 Neb. 95. See to same effect *Equitable Life Assurance Society v. Hughes*, 11 L. R. A. [N. Y.] 280.) This charge is properly within the cost or expense of collection and cannot be separated from, or an appreciable distinction be made between, it and many others, such as the stationery used in notifying the debtor of his defaults, postage, attorneys' fees, etc. (*Equitable Life Assurance Society v. Hughes, supra.*) While the contract in and of itself may not be harmful when viewed in connection with the contract of debt and mortgage from which it is not divisible, it is one which is clearly obnoxious to public policy and to the rules of law governable in this state as announced in this court. (*Dow v. Updike*, 11 Neb. 95; *Hardy v. Miller*, 11 Neb. 395; *Security Co. v. Eyer*, 36 Neb. 510; *Otoe County v. Brown*, 16 Neb. 395; *Winkler v. Roeder*, 23 Neb. 706.) In *Myer v. Hart*, 40 Mich. 517, in speaking of a stipulation for payment of an attorney's fee in evidences of indebtedness, it was observed: "If the creditor can insert such a provision in a mortgage and enforce performance thereof, why not insert a clause that if the debt is not paid at maturity, for every letter he shall write his debtor demanding payment, and for every time he shall call upon his debtor to demand payment, he shall receive a definite fixed sum?" (See, also, *Bullock v. Taylor*, 39 Mich. 137; *Toole v. Stephen*, 4 Leigh [Va.] 581; *Witherspoon v. Musselman*, 14 Bush [Ky.] 214.) We conclude that the expense of extension of the abstract of title was not allowable. It follows from the conclusions reached and stated that the decree was excessive in the sum of the expense of the continuance of the abstract. It is therefore reversed and the cause remanded to the district court for the entry of a decree for all sums in-

cluded in the former one, except the amount of the fee for the abstract of title.

REVERSED AND REMANDED.

NORVAL, J., had no part in the opinion.

N. P. FEIL, APPELLANT, V. F. A. W. STACK, APPELLEE.

FILED DECEMBER 22, 1898. No. 8530.

Intoxicating Liquors: LICENSE: NOTICE OF APPLICATION. The propositions of law announced in *Feil v. Kitchen Bros. Hotel Co.*, 57 Neb. 22, affirmed.

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

E. W. Simeral, for appellant.

Hall & McCulloch, contra.

NORVAL, J.

The questions involved are identical with those determined in *Feil v. Kitchen Bros. Hotel Co.*, 57 Neb. 22, and for the reasons stated in the opinion filed therein the judgment of the district court in the present cause is

AFFIRMED.

STATE OF NEBRASKA V. ALONZO BAILEY.

FILED DECEMBER 22, 1898. No. 10386.

1. **Criminal Law:** PLEA IN ABATEMENT. A plea in abatement may be made when there is a defect in the record which is shown by facts extrinsic thereto. (Criminal Code, sec. 441.)

2. ———: ———. Matters cannot be presented by plea in abatement which are triable under a plea of not guilty.

3. **Intoxicating Liquors:** SALE TO INDIAN: PLEA IN ABATEMENT. In a prosecution for selling intoxicating liquor to an Indian, whether the person named in the information as having purchased the liquor was, or was not, an Indian cannot be raised by a plea in abatement.

EXCEPTION to a ruling of the district court for Sheridan county, WESTOVER, J., presiding. Filed under the provisions of section 515 of the Criminal Code. *Exception sustained.*

Charles E. Woods, County Attorney, for exception.

C. Patterson, contra.

NORVAL, J.

An information was filed by the county attorney of Sheridan county in the district court against Alonzo Bailey, charging him with selling intoxicating liquor to Samuel Lessert and Benjamin Lessert, otherwise known as Sam Claymore and Ben Claymore, Indians, and not citizens, in violation of section 2, chapter 37*b*, Compiled Statutes. To the information was filed a plea in abatement, averring: (1) That the parties to whom the intoxicating liquor had been sold were not Indians, and were citizens of the United States; (2) that said Samuel and Benjamin Lessert, *alias* Sam and Ben Claymore, were born in the state of Colorado, and are the sons of one Benjamin F. Lessert, a native-born citizen of the United States. The county attorney replied, denying the averments in the plea in abatement, and alleging that the father of the said Samuel and Benjamin Lessert, *alias* Sam and Ben Claymore, is a white man, and was born in the state of Missouri, and ever since has been, and now is, a citizen of the United States; that the father in 1859 married an Indian woman of the Sioux tribe, and that the persons to whom it is charged the liquor had been sold are the issue of said marriage; that the sons live with their parents on the Pine Ridge, South Da-

kota, Indian reservation, and have tribal relations with the Sioux Indians, and are under the supervision of, and draw rations from, the government of the United States. To the reply the accused interposed a general demurrer, which was sustained, the prosecution dismissed, and the defendant discharged. The county attorney excepted to the ruling, and now brings the record to this court under the provisions of section 515 of the Criminal Code.

We are asked to determine whether the persons designated in the information as the parties to whom the liquor was sold are Indians, and not citizens, within the meaning of section 2, chapter 37*b*, Compiled Statutes 1897. In our view this question is not properly presented by the record. The demurrer was to the reply interposed to the plea in abatement, and, as in civil actions, the demurrer reaches back to the first plea defective in substance. Section 441 of the Criminal Code provides: "A plea in abatement may be made when there is a defect in the record, which is shown by facts extrinsic thereto." The purpose of the plea in abatement is to challenge the action of the court to defects in the record of a criminal prosecution by averring the facts not apparent on the face of the record which render the proceedings illegal, such as that the grand jury returning the indictment was not selected in the mode provided by law, that the accused never was accorded a preliminary examination for the offense charged in the information, and other similar causes. The object or scope of the plea in abatement is not to tender issues properly triable under the plea of not guilty. The plea in abatement in this case contains no allegation of a single fact which, if true, would make the record defective or entitle the accused to be discharged without trial, but presents matters appropriate to be adjudicated upon a trial of a plea of not guilty. In a prosecution for selling intoxicating liquors to a minor would it be proper to tender by a plea in abatement an issue whether the person purchasing the liquors was a minor or an adult, or whether the sales were made by

the accused or some one else? Clearly not. Those matters might be pertinent subjects of investigation under a plea of not guilty, but would not constitute grounds for a plea in abatement. So, too, it was no cause for abating the prosecution, before trial, that the persons to whom the information averred the liquor was sold were not Indians, since it would have devolved upon the state to establish upon the trial of the issues raised by a plea of not guilty that Benjamin and Samuel Lessert were Indians to justify a conviction. The office of a plea in abatement is not to present matters for determination which can be litigated under a plea of not guilty. This is very evident, for the statute expressly provides: "The accused shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment or pleading in bar, or the general issue." (Criminal Code, sec. 444.)

In *United States v. Sanders*, Hempst. [U. S. C. C.] 483, and *United States v. Ward*, 42 Fed. Rep. 320, the question whether the person named in the indictment was an Indian or not was raised and determined under the issue formed by the plea of not guilty. Whether Benjamin and Samuel Lessert, *alias* Ben and Sam Claymore, are, or are not, Indians, the district court was not, nor are we, called upon to decide. The plea in abatement contained no fact showing a defect in the record, and was therefore insufficient in substance, and should have been overruled.

EXCEPTION SUSTAINED.

WILLIAM J. MAXWELL ET AL. V. HOME FIRE INSURANCE COMPANY OF OMAHA.

FILED DECEMBER 22, 1898. No. 8545.

1. **Mortgages:** FORECLOSURE: ACTION FOR RECOVERY OF DEBT. Under the provisions of section 847 *et seq.* of the Code of Civil Procedure, as existing prior to 1897, either an action at law for the recovery

of a debt secured by a real estate mortgage or a suit to foreclose the mortgage will lie; but both remedies cannot be pursued at the same time, unless permission is given therefor by the court.

2. ———: ———: PLEDGE: ACTION ON NOTE. Where one executes a promissory note and transfers to the payee as collateral security thereto a note then held against a third person secured by a real estate mortgage, a decree foreclosing such mortgage will not bar an action at law on the first note, since it did not evidence the debt the mortgage was previously given to secure.

3. **Action on Note:** PRINCIPAL AND SURETY: JUDGMENT. In an action upon a promissory note, when it is disclosed that one maker is the principal debtor and the other signed as surety merely, a judgment for the plaintiff should, under section 511 of the Code of Civil Procedure, state which defendant is the principal debtor and which is surety.

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

Duffie & Van Dusen, for plaintiffs in error.

W. H. De France, contra.

NORVAL, J.

This was an action by the Home Fire Insurance Company of Omaha against William J. Maxwell and John T. Clark as joint makers of a promissory note for $1,900 given March 29, 1890, and due three years thereafter, drawing eight per cent interest from date of obligation. The defendants, for answer to the petition, admit the execution of the note, and allege, in substance, that the defendant Maxwell delivered to plaintiff as collateral security to the debt a certain promissory note for $5,400 executed by one George M. O'Brien, Jr., payable to the said Maxwell, and secured by mortgage on real estate situate in Douglas county; that after the maturity thereof Maxwell commenced a suit to foreclose such mortgage, in which the Home Fire Insurance Company of Omaha intervened, and in the decree rendered therein it was awarded a first lien on the mortgaged premises for $1,913.55, being the amount at that time due upon the note in controversy herein; that said decree is still in

force and wholly unsatisfied and is a bar to the present action; and that the defendant Maxwell was the principal on the note declared on herein, and that the defendant Clark signed the same as surety. A general demurrer to the answer was interposed by the plaintiff, which the court sustained, the defendants refused to further plead, and a joint judgment was entered against both for $2,280, without designating which was principal on the note and which executed as surety. From the order denying defendants' motion for a new trial they prosecute error to this court.

The first argument of defendants below is that the taking of a decree of foreclosure in the suit on the collateral note and mortgage is a bar to the present action, by virtue of the provisions of section 847 *et seq.* of the Code of Civil Procedure, as they existed at the time when the note herein was given, this action was instituted, and the judgment under review was pronounced. Section 845 of the Code of Civil Procedure (Compiled Statutes 1895) requires that a petition to foreclose real estate mortgages shall be filed in the county where the premises are situated. The next succeeding section authorizes the court in such a suit to decree a sale of the mortgaged premises, or such part thereof as may be sufficient to pay the amount due and costs. Section 847, as it then existed, relates to the rendition of deficiency judgments in foreclosure suits for the amount remaining due and unsatisfied after sale of the mortgaged premises, in cases in which such balance is recoverable at law, and authorizes the issuance of execution to collect such deficiency judgment. Sections 848 and 849 of said Code, as then in force, follow:

"Sec. 848. After such petition shall be filed, while the same is pending, and after decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court.

"Sec. 849. If the mortgage debt be secured by the

obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the petition, and the court may decree payment of the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases."

The two sections quoted were considered and construed in connection with sections 850 and 851 of the Code of Civil Procedure, in *Meehan v. First Nat. Bank of Fairfield*, 44 Neb. 213, and in an opinion by the present chief justice it was ruled that the statute authorized either an action at law for the recovery of the debt secured by real estate mortgage or a suit to foreclose the mortgage, at the option of the owner and holder thereof; but when he chooses one remedy he must exhaust it before resorting to the other, unless permission of the court is first obtained to pursue both remedies at the same time; and that pending foreclosure suit or after decree an action at law on the obligation or evidence of debt of a person other than the mortgagor, such as an indorser of the note secured by the mortgage, cannot be prosecuted without consent of the court of equity. That this decision is sound we do not entertain the shadow of a doubt, and if this were an action at law against O'Brien to recover the amount of his mortgage debt, it is very evident the doctrine announced in the case of which mention has been made would control. Manifestly, after the entry of the foreclosure decree against O'Brien, an action at law could not be maintained to recover from him the sum due on the debt secured by the mortgage, without leave of the court, in which foreclosure was brought, to pursue that remedy, having been first procured. However, this is not an action upon the O'Brien note, but upon an obligation to which he is not in any way a party, and which was not in existence when the mortgage was given. In the foreclosure against O'Brien no deficiency judgment could have been obtained against

either Maxwell or Clark for the amount remaining unpaid of the mortgage debt after sale of the mortgaged property, so that the case at bar does not fall within the scope and object of the statute stated in *Meehan v. First Nat. Bank of Fairfield, supra*, as follows: "The purpose of these provisions is evidently to avoid the two actions being in progress at the same time, and also the double costs and expenses, and to confine the creditor as closely as may be consistent with justice to him and his demands to the one action, and more especially does this seem true of the foreclosure action in which he is allowed to first subject the mortgaged property to the payment of the debt and the further remedy of a deficiency judgment for any balance of the debt remaining unextinguished." Section 848 is so plain and free from ambiguity as to admit of but one interpretation. During the pendency of a suit to foreclose a real estate mortgage, or after the rendition of the decree therein, the legislature has by said section prohibited the maintaining of an action "at law for the recovery of the debt secured by the mortgage, or any part thereof, unless authorized by the court." There is no inhibition against the prosecution of proceedings at law to recover a debt, other than the one the mortgage at its inception was given to secure. It was never the intention of the lawmakers that the statute should apply to cases like the one at bar, else appropriate language indicative of such a purpose would have been used in framing the law. The note in suit is not the mortgage debt, and the fact that a decree of foreclosure has been taken on the note and mortgage held as collateral thereto will not defeat the present action. The note signed by Maxwell and Clark was not taken as security for the mortgage debt of O'Brien, and hence is not embraced within the provisions of said section 849, and is not an obligation or other evidence of debt of any person besides the mortgagor, within the meaning of the law.

The two New York cases cited by counsel for defend-

ants below do not in the least conflict with the views herein expressed, or the conclusion we have reached on this question, as will be disclosed by an examination of the reported decisions.

In *Suydam v. Bartle*, 9 Paige Ch. [N. Y.] 294, it appears that James P. Bartle and others executed a real estate mortgage which on its face purported to secure a bond for $40,000, although the mortgage in fact was given as security for certain drafts or bills of exchange drawn by the obligors in the bond and one Westfall, which had been accepted by the plaintiff. In a suit to foreclose the mortgage permission was asked to proceed to trial and judgment in the action at law which had already been commenced for the recovery of the mortgage debt from Westfall, who was not a party to the foreclosure, and authority to do so was given. The chancellor said: "The object of the legislature unquestionably was to relieve the mortgagor from the expense of a double litigation. And where it is evident that the complainant could have had a perfect remedy against all persons who were liable for the payment of the debt, by a decree over against them for the deficiency, if he had chosen to make them parties to his foreclosure suit, it might not be a proper exercise of discretion for the court of chancery to permit any further proceedings to be had in the action at law after the filing of the bill of foreclosure." Permission to proceed at law was granted in that case, since it was doubtful whether a deficiency judgment against Westfall would have been proper had he been a party to the bill to foreclose, the mortgaged premises not being of sufficient value to pay the entire debt. We make no criticism on the ruling in that case, but that the decision has no application here is obvious. There the action at law was predicated on the very debt secured by the mortgage, while such is not the case here.

In *Scofield v. Doscher*, 72 N. Y. 491, it is disclosed that Peter Donlan executed and delivered to plaintiff a bond secured by a real estate mortgage, and thereafter Donlan

sold a part of the premises to one John Heiden, who agreed in the deed to pay a portion of the mortgage debt. The mortgage was foreclosed, the executor of Heiden being a party defendant. After the sale under the decree a part of the debt remained unpaid and an action at law was commenced by the mortgagee against the executor of Heiden to recover a deficiency judgment upon the covenant of the testator to pay a portion of the mortgage. It was held the action was not maintainable, as permission so to proceed had not been authorized by the court. That decision is in line with the holding of this court in *Meehan v. First Nat. Bank of Fairfield*, 44 Neb. 213, and which latter case we have already distinguished from the one at bar.

The answer pleaded that Maxwell was principal and Clark was surety on the note, and the demurrer admitted the truthfulness of such averment, and yet a joint judgment was rendered against both, without it having been certified on the record which of them was the principal debtor and which the surety, as required by section 511 of the Code of Civil Procedure. This was reversible error. (*Van Etten v. Kosters*, 48 Neb. 152.)

It is urged that the objection is raised for the first time in this court. The record does not sustain this contention. In the motion for a new trial it was assigned that the judgment was contrary to law. The character of the obligations assumed by the defendant was specially pleaded in the answer, which the demurrer admitted to be true. The rendition of a judgment in opposition to admissions in the pleadings is certainly contrary to law. For the error indicated the judgment is reversed and the cause remanded with directions to the district court to enter judgment in favor of the plaintiff for the amount demanded in the petition against Maxwell as principal debtor and Clark as surety.

REVERSED AND REMANDED.

M. A. SEEDS DRY-PLATE COMPANY ET AL., APPELLEES, V. HEYN PHOTO-SUPPLY COMPANY ET AL., APPELLANTS.

FILED DECEMBER 22, 1898. No. 8543.

1. **Insolvent Corporations:** PREFERRING CREDITORS. In the absence of actual fraud an insolvent corporation may prefer one or more of its creditors to the exclusion of others.

2. ———: ———: DIRECTORS. A corporation may not prefer a debt owing to its director, secretary, and treasurer.

3. **Appointment of Receiver:** APPEAL. An order appointing a receiver is appealable in advance of the final disposition of the cause.

4. ———: ———. Section 275 of the Code of Civil Procedure, authorizing an appeal from an interlocutory order, does not preclude a review of such an order upon a general appeal after final judgment in the case in which the order was made.

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

J. C. Cowin, W. D. McHugh, C. F. Breckenridge, and *B. N. Robertson,* for appellants.

E. G. Thomas and *Cavanagh & Thomas, contra.*

NORVAL, J.

November 15, 1894, the Heyn Photo-Supply Company, a corporation organized under the laws of this state, and being hopelessly insolvent, executed and delivered chattel mortgages as follows: Regina Bendit, $1,500; Omaha National Bank, $500; American National Bank, $400; Cowin & McHugh, $700; A. M. Collins Manufacturing Company, $1,294.32; Herf & Frisch Chemical Company, $424.80; Bausch-Lamb Optical Company, $438.90; Western Collodion Company, $436.11; E. & H. T. Anthony, $871.78; American Aristotype Company, $839.87; J. H. Smith & Co., $258.30. The mortgages were given priority in the order given above. On the same day the Heyn

Photo-Supply Company also executed and delivered to Sabina Heyn, the principal stockholder, and at the same time one of the directors, and the secretary and treasurer of said corporation, an assignment of a portion of the book accounts of the concern of the face value of $6,000 to secure a debt for half that sum which the corporation owed her. Said mortgages, as well as the transfer of the book accounts, were made for the purpose of giving a preference to the mortgagees and said Sabina Heyn over the other creditors of the corporation. The mortgagees took immediate possession of the mortgaged chattels, which was all the property of the corporation, except the book accounts; and the assigned accounts were at once turned over to Sabina Heyn. The corporation immediately ceased to do business, as was the intention and purpose when the mortgages and assignment were executed. The unsecured creditors of the corporation instituted attachment proceedings and garnished the several mortgagees and Sabina Heyn. The attaching creditors thereupon commenced this suit, setting up in their petition the facts heretofore stated, and praying, in addition to general equitable relief, the appointment of a receiver to take possession of the property of the corporation, and all the book accounts and assets of every nature. On December 7, 1894, John Lewis was appointed receiver, who qualified as such, and proceeded to convert the property into money, and collect the book accounts in compliance with the order of the court. Answers were filed by the several defendants, the principal issue tendered by the pleadings being the right of an insolvent corporation to prefer creditors by executing chattel mortgages on the assets. Upon the trial the district court ruled that such preference could not be made, held the several chattel mortgages and the assignment void, and that all the creditors of the corporation were entitled to prorate in the distribution of the funds in the hands of the receiver. The mortgagees and Sabina Heyn have prosecuted an appeal. Subsequently, in pur-

suance of the stipulation of the parties, this court made an order distributing the moneys in the receiver's hands, excepting a small sum detained to cover costs, between the first four mortgagees, the aggregate amount of their claims exceeding the funds for distribution.

It is suggested in the brief of appellees that appellants are not in a position to assail the decree of the trial court, because they consented to the order of distribution entered in this court. We do not think so. The parties stipulated that such order should be without prejudice to the rights of any of the litigants, and the order thus entered, in express terms, so provides. After the rendition of the decree in the cause this court ruled that, in the absence of fraud, an insolvent corporation might prefer one or more of its creditors to the exclusion of others. (*Shaw v. Robinson*, 50 Neb. 403; *Wallachs v. Robinson*, 50 Neb. 469.) The mortgages given by the Heyn Photo-Supply Company were to secure *bona fide* debts; therefore the trial court erred in canceling the same. The several mortgagees were entitled to the proceeds arising from the sale of the mortgaged chattels in the order of the priority of the liens. As Sabina Heyn was a director, secretary, and treasurer of the Heyn Photo-Supply Company, the corporation had no right to create a preference, as it did, by assigning to her the book accounts. Such assignment was illegal and void, and the district court did not err in so adjudicating. (*Ingwersen v. Edgecombe*, 42 Neb. 740; *Tillson v. Downing*, 45 Neb. 549; *Campbell Printing Press & Mfg. Co. v. Marder*, 50 Neb. 289.)

The next argument is that no receiver should have been appointed in the case. Counsel for plaintiffs and appellees insist that this question is not properly before the court for review, for the reason the order appointing a receiver was made more than six months before the appeal was perfected by the filing of the transcript with the clerk of this court. This last contention will be noticed first. Section 275 of the Code of Civil Procedure provides, *inter alia*, "all orders appointing receivers, giv-

ing them further directions and disposing of the property, may be appealed to the supreme court in the same manner as final orders and decrees." Under the foregoing provision an interlocutory order, like the one sought to be reviewed in this cause, is appealable in advance of the final disposition of the merits of the controversy. *McCord v. Weil*, 29 Neb. 682, it is true, is opposed to this holding, but a rehearing was granted in that cause, and on the second submission the former opinion upon that question was overruled and the plain provisions of the statute were recognized and applied. (*McCord v. Weil*, 33 Neb. 869.) The right to appeal conferred by said section of the Code is not exclusive, but the remedy there given is cumulative merely. The purpose of the provision above quoted was to confer the right, which otherwise would not have existed, of reviewing an interlocutory order appointing a receiver without waiting the disposition of the cause on its merits. An appeal from a final decree makes available in the appellate court all interlocutory orders in a case to which exceptions have been taken and preserved, in the absence of a waiver thereof. The precise point was decided the same way in *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510. That was a suit to foreclose a mortgage in which an order was made appointing a receiver, and the receivership was continued until final decree. The statute of Indiana permits an appeal to be taken from such an order to the supreme court in ten days from the date thereof, even though there has been no final disposition of the cause. No appeal was prosecuted from this interlocutory order within the time fixed therefor by law, but upon the entry of the final decree an appeal to the supreme court was perfected. It was insisted there, as here, that the order appointing the receiver was not reviewable. The court held the contention unsound, saying: "We are here met by the argument of counsel for appellee, that as the orders were not appealed from within ten days, there is nothing before us for decision in

relation thereto; that the general appeal does not bring up those questions. * * * If an appeal is taken from these interlocutory orders, as such, clearly it must be within the limit of the time fixed; or if taken from such an order made after the decision of the main case, but while that case is yet in any manner pending, it must be within the limited time. But does it follow from this that if no appeal shall be taken until the appeal of the main case, the action of the court in appointing or refusing to appoint a receiver may not be examined and corrected? We think not. If the sections of the Code of 1852, *supra*, had not been enacted, there would have been no appeal from the interlocutory orders named before the appeal of the main case, or separate from that case; but it does not follow that in such appeal such orders might not have been reviewed and pronounced correct or erroneous. And so in the case of interlocutory orders in relation to receivers without the act of 1875, there was no appeal separate and apart from the main case, but it does not follow that on appeal of that case the action of the court in relation to the receiver may not be reviewed. It has never been so decided nor intimated in any case in this court that we have been able to find." The same doctrine is sustained by the cases which follow: *Jones v. Chicago & N. W. R. Co.*, 36 Ia. 68; *Palmer v. Rogers*, 70 Ia. 381; *Lesure Lumber Co. v. Mutual Fire Ins. Co.*, 70 N. W. Rep. [Ia.] 761. The facts stated in the petition were quite sufficient to authorize the appointment of a receiver in the present cause. While neither the pleadings nor proofs justified the selection of a receiver to take charge of the mortgaged chattels, they were ample to sustain the order assailed so far as it related to the collection of the outstanding book accounts. The order appointing a receiver is affirmed. The decree is reversed and one will be entered in this court conforming to this opinion.

DECREE ACCORDINGLY.

HENRY E. LEWIS, TRUSTEE, APPELLANT, V. GEORGE W. HOLDREGE, TRUSTEE, ET AL., APPELLEES, AND KENT K. HAYDEN, RECEIVER, APPELLANT.

FILED DECEMBER 22, 1898. No. 8080.

Modification of Former Judgment. This case being here on appeal, a former judgment of affirmance will be modified so as to correct an erroneous computation of the trial court.

MOTION to modify judgment rendered in *Lewis v. Holdrege*, 56 Neb. 379. *Motion sustained.*

A. S. Tibbets, Tibbets, Morey & Ferris, L. C. Burr, Colb & Harvey, and *Lamb, Adams & Scott,* for appellants.

J. W. Deweese, F. E. Bishop, and *G. M. Lambertson, contra.*

SULLIVAN, J.

By a motion asking for a modification of the decision rendered in this cause at the present term (*Lewis v. Holdrege*, 56 Neb. 379) our attention has been called to a matter which had previously escaped our notice, and is, consequently, not mentioned in the former opinion. Although no allusion was made to it in the oral argument, it is insisted in the brief of counsel for appellee that the trial court erred in allowing Mosher a credit to the extent of his one-tenth interest in the fund on deposit in the Capital National Bank at the time of its failure, instead of allowing him credit for his share of the dividends actually paid by the receiver to the trustee. The error is demonstrated by the record. After deducting the amount paid to Holdrege by the receiver, the net loss occasioned by Mosher's misconduct was $3,784.06. Included in the syndicate dividends declared prior to the judgment was the entire sum paid by the receiver to the trustee. The entire credit, therefore, to which Mosher was entitled was $1,485, which, being deducted from the

sum lost through his wrongful conduct, leaves $2,299.06 as the balance to be retained out of his interest, instead of the sum of $1,853.88 as shown by the fourth finding of the district court. The judgment will be accordingly modified.

JUDGMENT ACCORDINGLY.

JOSEPHUS D. KRUM, APPELLANT, V. LORENZO H. CHAMBERLAIN ET AL., APPELLEES.

FILED DECEMBER 22, 1898. No. 8557.

1. **Contracts.** That a binding contract may result from an offer and acceptance, it is essential that the minds of the parties meet at every point, and that nothing be left open for future arrangement.

2. ——: SPECIFIC PERFORMANCE. Specific performance of an alleged contract will not be enforced unless the court can clearly see upon what proposition the minds of the parties have met in a common intention.

3. **Vendor and Vendee:** CONTRACT: EVIDENCE. Evidence relied on to prove that negotiations for the sale of certain real property eventuated in a valid and enforceable contract, examined, and *held* insufficient for that purpose.

APPEAL from the district court of Johnson county. Heard below before BABCOCK, J. *Affirmed.*

Sutton & Madison, J. H. Broady, and *D. F. Osgood,* for appellant.

C. K. Chamberlain and *S. P. Davidson, contra.*

SULLIVAN, J.

This action was brought in the district court of Johnson county by Josephus D. Krum against Lorenzo H. Chamberlain to enforce specific performance of an alleged contract for the sale of real estate situated in the city of Tecumseh. The parties are brothers-in-law. The

plaintiff is the fee owner of the property in question and claims to have sold the same to the defendant. The evidence by which it is sought to establish the sale is contained in correspondence between the plaintiff and Charles M. Chamberlain, the son and authorized agent of the defendant. Replying to a letter written by Dr. Krum on April 8, 1892, Charles M. Chamberlain wrote as follows:

"TECUMSEH, NEB., April 11, 1892.

"DEAR UNCLE: Yours of the 8th inst. is at hand. We will accept your offer contained in the same, to take the corner lot with the house and lot adjoining on the north, for $2,000, are to have an option on the lot to the north of these at $500 additional, such option to stand for six months. We will make any arrangements that will be right about the payment. We do not consider it fair, however, to do this on the basis of what you had on foot about Judd Wright, as this was only a trade that was talked, and not a purchase at all. You may write what you think about terms, considering the transaction closed, we to make a payment and take possession at the expiration of the current term of lease to Carse, the papers to be delivered or deposited at that time.

"Yours truly, CHAS. M. CHAMBERLAIN."

The foregoing letter promptly elicited the following reply:

"SCHUYLER, COLFAX COUNTY, NEB., April 12, 1892.

"*Charles M. Chamberlain, Esq.*—DEAR NEPHEW: Yours of the 11th inst. is at hand, and contents noted. In reply would say that I gave you the terms for the property in my letter of the 8th inst., which terms in yours of the above date you have accepted. Our terms include the price of the property and the rate of interest on the amount to be left on mortgage, and the only further arrangement to be made is to fix the amount to be paid down, and the amount to be left on mortgage and the time it is to run. You can pay down $1,000 or $1,500, or

the whole amount if you choose; I wish further to say that Mr. Wright's offer was to buy the property as I have told you, and after my telling you that, I think it is very much out of the way for you to say 'this is only a trade that was talked, and not a purchase at all.' It was an offer to buy, and no trade about it. Write me at once the amount you wish to pay down, and the amount to be left on the mortgage and the time you wish it to run, so that we can make out the papers, and I will come down to Tecumseh to close the transaction next Tuesday, the 19th. Hoping you are all well, I remain yours very truly, J. D. KRUM."

To this letter there was no immediate response, and on April 20 the plaintiff wrote a postal card, saying:

"DEAR CHARLIE: I wrote to you the 12th for you to tell me at once how much you wanted to pay down—how much left on mortgage and the length of time you wanted mortgage to run, so that we could have the papers made out, and then I would come down the 19th (yesterday) and close the transaction. I wish you would answer, as I have not heard a word from you.

"J. D. KRUM."

On April 25 Charles M. Chamberlain, replying to both the letter and postal card, said:

"DEAR UNCLE: I have yours of the 12th and 20th before me. The purchase is made for father and it will be necessary to hear from him before anything is done in the nature of making any obligation. Father will make no mortgage on the property. If you wish to accept short-time paper for a portion, this might suit him; otherwise he will arrange to make full payment. I should have answered you before, but have been away from home several days. In yours of the 12th you seem to take to heart what I said about the nature of the other offer you had on this property. If it was a sale as you claim, Mr. Wright's contract must have been to pay cash.

If you were to take anything either in exchange or as payment, other than cash, then it was an exchange of property or on values and was a trade, at least. This is my understanding of the meaning of the words, and on the strength of it I wrote what I did, as I knew what you were to receive for the property, which was a second mortgage on Lincoln and Pawnee City property, and which I believe could be purchased at less than face value. If I am off on that position, then I take it all back. However, we will try to arrange the matter to suit you. Father will, however, have to have a few days to arrange after he knows how much you want. My purchase of lumber yards has made Clarence and myself hard up for the time, otherwise could loan him the money, as money is very easy, but ten per cent is more than he would want to pay, and a lower rate made by us would cause dissatisfaction on the part of the other stockholders. You will, without doubt, understand my position. Let me hear from you and I will arrange to close the account at once.

"Your nephew, CHAS. M. CHAMBERLAIN."

To this letter no reply was ever sent, and negotiations were not again resumed until the following November, when an unsuccessful effort was made to conclude the transaction. What transpired in November was shown for the purpose of aiding in the interpretation of the foregoing letters, which it is claimed evidence a contract of sale. While these matters were entirely proper to be considered, we cannot say, in view of the finding of the trial court, that any material circumstance tending to sustain the plaintiff's theory has been established by the proofs. His case stands on a construction of the correspondence. The intention of the parties is of course the decisive and controlling question. Did their minds meet upon a distinct and definite proposition so that nothing remained to be settled by treaty? That a binding contract may result from an offer and acceptance it is essential that the minds of the parties meet at every point

and that nothing be left open for future arrangement. It has been said "that an acceptance to be good must in every respect meet and correspond with the offer, neither falling within nor going beyond the terms proposed." (Knowlton's Anson, Contracts 22.) Bearing this principle in mind let us now look at the letters above set out. The letter written by Charles M. Chamberlain on April 11 certainly professes to be an acceptance of a proposition which is therein loosely set forth; but when it is considered that further arrangements concerning payment are contemplated and a further communication on that subject solicited, it is evident that the writer intended only to accept the property at the price named by the plaintiff, assuming that there would be no difficulty in the adjustment of details. That the transaction was not to be a cash sale is demonstrated by the closing sentence where it is said that a payment is to be made and possession taken "at the expiration of the current term of lease to Carse," at which time the papers were to be delivered. Manifestly the payment here referred to is a partial payment. That it was so regarded, and that the amount of the deferred payment and the time when it should mature was left open for future settlement, is shown by the plaintiff's letter written on the following day, in which he says that "the only further arrangement to be made is to fix the amount to be paid down, and the amount to be left on mortgage and the time it is to run." He also adds: "You can pay down $1,000 or $1,500, or the whole amount if you choose." In the postal card of April 20 the plaintiff asks to be informed at once how much of the purchase price is to be paid in cash and how long the obligation for the balance is to run. So at this stage of the negotiations it is perfectly clear that both parties understood that the only things definitely determined upon were the price of the property, the rate of interest on the deferred payment, and the time when the transaction should be closed. A court could not enforce specific performance

at the suit of either party, because it could not ascertain from the evidence how much of the purchase-money should be paid in cash, for what amount a mortgage should be given, nor when the security should become enforceable. The letter written by Charles M. Chamberlain on April 25 did not remove the elements of uncertainty. It informed Dr. Krum that a mortgage would not be executed, but that the purchaser would give short-time obligations, or, in case that was not satisfactory, he would arrange to pay cash. This was a counter proposition to make payment in one of two ways. It called on the plaintiff to make choice and signify his acceptance. He was required to choose between cash and short-time notes, and was informed that the transaction would be closed within a few days after he should indicate his election. He failed to accept either proposition, and consequently the minds of the parties never came together in one and the same intention. The judgment of the district court denying specific performance is right and is

AFFIRMED.

WILLIAM G. MORRISON, PLAINTIFF, V. LINCOLN SAVINGS BANK & SAFE DEPOSIT COMPANY, DEFENDANT, CARRIE B. COBB, ADMINISTRATRIX, APPELLEE, AND JOHN E. HILL, RECEIVER, APPELLANT.

FILED DECEMBER 22, 1898. No. 9514.

1. **Trustee**: INSOLVENCY: PREFERRED CREDITORS. The owner of trust property is not, merely by reason of the character of his claim, entitled to a preference over the general creditors of an insolvent trustee.

2. ——: ——: ——. A person asserting a claim for preference against an insolvent estate has the burden of showing that such estate has been increased, to some extent, by the misappropriation of trust funds or property belonging to the claimant.

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

A. S. Tibbets and *L. C. Burr*, for appellant.

Amasa Cobb, A. G. Greenlee, and *Harwood, Ames & Pettis, contra.*

SULLIVAN, J.

The Lincoln Savings Bank & Safe Deposit Company, a banking institution of the city of Lincoln, assigned to Moffett M. Cobb certain school warrants to secure an indebtedness of $6,165.68, evidenced by a certificate of deposit issued on June 3, 1895. The warrants were not actually delivered at the time of the assignment, but, by agreement between the parties, were retained by the bank as collecting agent for Cobb. The bank subsequently became insolvent and John E. Hill, having been appointed receiver, took possession of its assets and proceeded to administer the trust. Before the receiver was appointed the bank had misappropriated the warrants, and had not paid the indebtedness which they were given to secure. In April, 1896, Moffett M. Cobb died, and afterwards his legal representative presented to the district court of Lancaster county a petition alleging the facts above recited and asking that the amount of the warrants be made a preferred lien on the assets of the bank and that the receiver be directed to pay the same before making distribution among general creditors. The court granted the prayer of the petition and the receiver brings the record here for review. The theory upon which it is sought to establish a preference in favor of the administratrix is that the warrants were the property of Moffett M. Cobb and that by their unlawful diversion the owner became entitled to an equitable lien on the entire assets of the bank.

It is familiar doctrine that the owner of property may follow and reclaim it so long as it can be identified and distinguished; and that when one holding the property of another in trust commingles it with his own so that

separation and identification are no longer possible, the owner of the trust property will be given a lien for its value on the entire mass of which his property forms a part. But to entitle the owner of trust property to a preference over the general creditors of an insolvent trustee it must appear that his property, or its proceeds, went into and became a part of the fund or estate upon which it is sought to impress a trust. (*Cavin v. Gleason*, 105 N. Y. 256; *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237, 58 N. W. Rep. 383; *State v. Bank of Commerce*, 54 Neb. 725, 75 N. W. Rep. 28.) The administratrix does not deny this rule, but bases her claim for preference on the assumption that the proceeds of the warrants in question were received by the bank and went to swell its assets. The assumption is unsupported by either pleadings or proofs. That the warrants were delivered to some one not authorized to receive them is established beyond controversy; but whether they were negligently delivered to some one falsely assuming to represent the owner, or were deliberately misappropriated, is not disclosed by the record. For aught that appears to the contrary, they may have been applied to the payment of, or given as security for, an antecedent indebtedness of the bank or some of its officers. To whom they were delivered and for what purpose is a mere matter of conjecture. It is certain, however, that there is in the record before us no fact from which it can be inferred that anything of value derived from the conversion of the warrants ever went into, or formed a part of, the assets of the bank, and thus, directly or indirectly, increased the fund in the hands of the receiver for distribution. The doctrine held in some jurisdictions, that the beneficiary of a trust fund is entitled in a case of this kind to a preference over the general creditors of an insolvent without showing that such fund, or part of it, was included in the assets which came into the hands of the receiver, was expressly repudiated by this court in the case of the *State v. Bank of Commerce*, *supra*. The rule recognized in that case, and sustained

by the great weight of authority, imposes upon one asserting a claim for preference the burden of showing that the estate of the insolvent debtor has been increased to some extent by the misappropriation of trust funds or property belonging to the claimant. "The right rests," as was said in *Shields v. Thomas*, 71 Miss. 260, 14 So. Rep. 84, "upon the equitable title of the beneficiary, who, seeking to recover specific property or to fix a charge upon a mass, must trace his estate, and show that the specific thing claimed is in equity his property, or that his estate has gone into and remains in the mass he seeks to charge." From the many cases which recognize the rule here laid down we cite the following: *Merchants & Farmers Bank v. Austin*, 48 Fed. Rep. 25; *Commercial Bank v. Armstrong*, 39 Fed. Rep. 684; *Metropolitan Bank v. Campbell*, 77 Fed. Rep. 705; *Goodell v. Buck*, 67 Me. 514; *Neely v. Rood*, 54 Mich. 134; *Little v. Chadwick*, 151 Mass. 109; *Cavin v. Gleason*, 105 N. Y. 256; *Peters v. Bain*, 133 U. S. 670. The judgment of the district court is reversed and the petition of the administratrix is dismissed.

REVERSED.

JOHN DOBRY V. WESTERN MANUFACTURING COMPANY.

FILED DECEMBER 22, 1898. NO. 8527.

Affidavit for Attachment: AMENDMENT: NOTARY PUBLIC. While a notary public may not take the affidavit of his client for the purpose of procuring an attachment, the taking of an affidavit as indicated is a mere irregularity, and the affidavit is not a nullity, and its defects may therefore be cured by amendment.

ERROR from the district court of Howard county. Tried below before HARRISON, J. *Affirmed.*

Henry Nunn, for plaintiff in error.

Frank J. Taylor and *F. H. Woods*, *contra.*

RYAN, C.

The questions presented in this case arise upon a motion to discharge an attachment and upon an order directing a sale of the attached property which was entered contemporaneously with the entry of final judgment.

It was held in *Horkey v. Kendall*, 53 Neb. 522, that a notary public who is the attorney of one of the parties to an action is not permitted to take the affidavit of his client for the purpose of procuring an attachment; but it was also held that an affidavit of the nature and taken as just indicated was not a mere nullity. Under these conditions it was proper to permit the amendment of the affidavit indicated as well as of the sheriff's return, for the objections to these amendments were entirely dependent upon the assumption that the affidavit in question was absolutely void. The right of the court to permit these amendments is recognized in *Struthers v. McDowell*, 5 Neb. 491; *Rudolf v. McDonald*, 6 Neb. 163; *Clarke Banking Co. v. Wright*, 37 Neb. 382; *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb. 520.

As there is found no error in the record the judgment of the district court is

AFFIRMED.

HARRISON, C. J., not sitting.

PETER FRENZER, APPELLEE, V. JAMES PHILLIPS, APPELLANT.

FILED DECEMBER 22, 1898. NO. 8538.

1. **Review**: EVIDENCE. Questions of fact determined in accordance with uncontradicted evidence will not be reviewed in the supreme court.

2. **Ruling on Motion**: EXCEPTION: REVIEW. A ruling on a motion to which no exception was taken cannot be reviewed in the supreme court, especially if such review is sought upon appeal as distinguished from error proceedings.

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

Francis A. Brogan, for appellant.

Will H. Thompson, contra.

RYAN, C.

This action for the foreclosure of a real estate mortgage was begun in the district court of Douglas county, May 4, 1895. The note secured by the mortgage was by its terms due December 1, 1896. The option, and the exercise of the option to foreclose, were asserted by averments of the petition that these rights were given plaintiff by the instruments sued on, and were available by reason of defendant's defaults in paying interest and taxes. There were two defenses, of which one was that the mortgage, not being due by its terms, was not subject to foreclosure, because the mortgagee had neither possessed nor exercised an option in that respect. On the trial there was uncontradicted evidence which sustained each of the above noted averments of plaintiff's petition; hence the defenses pleaded are unavailing to the defendant by whom this appeal is prosecuted.

The other defense related to alleged irregularities in the authorization by the sheriff of a person to serve the summons upon the defendant in the state of New York, wherein he was residing. After the service criticised had been made, however, there was service by publication. This latter service was attacked by motion on special appearance, because the affidavit upon which it was founded had been filed in May, 1895, and the publications were September 4, 11, 18, and 25, 1895, and before there had been a ruling with reference to the sufficiency of the personal service. This motion was overruled, and to this ruling there was no exception. We cannot consider the correctness of this ruling, for two reasons: First, because of the failure to except, and, second, be-

cause this case is presented for review upon appeal and not upon error proceeding. (*Ainsworth v. Taylor*, 53 Neb. 484; *Alling v. Nelson*, 55 Neb. 161; *Village of Syracuse v. Mapes*, 55 Neb. 738.) There is advanced by the appellant no other reason for the reversal of the judgment of the district court, and accordingly such judgment is

AFFIRMED.

J. W. PENFIELD ET AL., APPELLEES, V. DAWSON TOWN & GAS COMPANY ET AL., APPELLANTS.

FILED DECEMBER 22, 1898. No. 8544.

Corporations: EXCHANGE OF PROPERTY FOR STOCK: LIABILITY OF STOCKHOLDERS. In an action to hold liable to creditors of a corporation certain of its stockholders because, as found by the court, the property conveyed by such stockholders in payment for their stock was greatly overvalued, a judgment against the stockholders was improperly rendered in view of the further finding that the defendants acted in good faith and without any attempt to defraud said corporation or its creditors,—the evidence being sufficient to sustain both findings.

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

John C. Cowin and *Cowin & McHugh*, for appellants.

E. G. Thomas, Cavanagh & Thomas, and *Henry W. Pennock, contra.*

RYAN, C.

This equitable action was brought by certain judgment creditors of the Dawson Town & Gas Company, and by plaintiffs and certain interveners was prosecuted to judgment in the district court of Douglas county against certain stockholders in said corporation. In the petition—in which there were averments of the corporate character of the Dawson Town & Gas Company,

the ownership by defendants respectively of certain shares of its capital stock, and the rendition of judgments against said corporation—there were the following averments: "That said corporation is insolvent and has no property out of which plaintiff can make said judgment; that the authorized capitalized stock of said corporation was $300,000; that said stock was issued to each of the defendants Arthur B. Cooley and J. T. Hoile to the amount and of the par value of $120,000 each, and as payment therefor said defendants fraudulently turned in to said corporation certain real estate situated in the state of Iowa at a false and fictitious value of $205,000; that no payment was ever made on such stock, except said real estate; that said real estate was worth, at the time of said transaction, not to exceed $20,000; that the said defendants and the directors of said corporation knew the value of said real estate, and that said real estate was fraudulently received in payment of said stock; that said real estate was largely incumbered." The holders of stock other than Hoile and Cooley, it was in effect alleged, became such stockholders by assignments from Hoile and Cooley and were therefore liable ratably, as were also Hoile and Cooley, for the difference between the par value of the stock at any time held by them and the actual value of the real property which formed the consideration for the issue of the stock as fully paid up.

In the light of subsequent developments it is not difficult to approve the finding of the district court that the real property, in consideration of which the capital stock of the company was issued, was received by the Dawson Town & Gas Company at a great overvaluation. There was testimony by parties who owned farm lands in the vicinity of the town of Dawson, Iowa, that the lands turned in to the company in payment for its stock was, as farm lands, worth only from $30 to $50 per acre. These witnesses, however, expressly limited their estimates to the value of these lands for farming purposes,

On the other hand, the witnesses who testified as to the enhanced value of the property by reason of the shale, the coal, the fire-clay, and the natural gas found beneath its surface placed a much higher valuation upon it, two of them fixing the value of this property at from $400,000 to $500,000. It is true they were interested witnesses, for they were defendants, but the testimony serves to illustrate what considerations might have led them and their associates into honestly making an estimate of the value of the lands turned in, which now seems absurdly excessive. Their testimony was uncontradicted that there were at least four veins of coal, two of which could be profitably worked, on 300 acres of this land; that this coal was overlaid with a stratum, six to thirty feet thick, of shale suitable for the manufacture of paving bricks, and that beneath the coal was a stratum of fire-clay. It was testified that at Dawson alone was there to be found coal on the line of the Chicago, Milwaukee & St. Paul railroad between Omaha and Chicago. On the other tract turned in, which contained 320 acres, it was testified, without contradiction, that there were three wells which produced natural gas; that the company used this gas for burning bricks; and that its pressure was 120 pounds to the square inch. The town of Dawson, containing about 300 inhabitants, was located on one of these tracts, and it was expected that, with the success of the various manufacturing projects, a considerable portion of the surface could be sold at a high valuation for residence lots. The faith which these parties had in the realization of their hopes is evidenced by their investment in improvements of $40,000, of which $38,000 was in a brick plant and $2,000 was in piping for the gas wells. The valuation by these men was largely speculative, and in their ardor it is possible they may have deceived themselves. In connection with its finding of overvaluation the district court found: "That the defendants acted in good faith and without any attempt to

defraud said corporation or its creditors." In other words, the court, upon evidence which justified both conclusions, found that the property at excessive overvaluation was exchanged for stock by the promoters of the corporation, but that this was done in good faith and with no intent to defraud the corporation or its creditors. On the hearing of another case which grew out of these same transactions it was found by the district court that the property turned in for stock had been excessively overvalued, and, in addition, that the exchange was fraudulent in law, and on appeal to this court the judgment of the district court, based upon these findings against the stockholders, was accordingly affirmed. (*Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333.) The ultimate inquiry in this case was whether or not the issuance of the stock was fraudulent. The overvaluation was a circumstance tending to establish fraud, and yet it was not of such controlling force that a finding that there was no fraud could not be sustained.

In *Gilkie & Anson Co. v. Dawson Town & Gas Co., supra*, it was said: "In this state there were no specific requirements or restrictions in relation to the manner of payment for the stock purchased, and no doubt the land, being such as it was within the province of the company to hold and appropriate for use in its business, could be received in payment for stock. There was no statutory requirement that payment should be in money or the money's worth; but without such an enactment, we think there is a rule of honesty and fair dealing, which should and will be recognized by the courts, which required it. * * * It must be true that where a number of persons have organized themselves as a body corporate and enter the business arena as such and invite and entertain dealings on the faith and credit of a fund, which, increased by gains or decreased by losses, will alone be available for the liquidation or payment of debts, they will be held to fairness and good faith in fulfilling the promise they made to contribute to the

fund which they hold out to the business world as the basis for credit. It is upon the faith of the amount of capital stock, either fully paid in and existing in the form of assets of the corporation, or to be paid in, that the creditor has dealt with and allowed the corporation to incur the liability, or has extended to it the credit, and it seems but just and right to require that payment for stock in other than money be required to be made in the money's worth in good faith and honesty of purpose, and when the circumstances and facts of a sale and purchase of stock disclose that there has been knowingly less than these, that it shall not be upheld against creditors, but the parties be compelled to right what is wrong, to pay and make good that which, through any device or scheme, has been withheld. * * * It may be conceded that when the power exists to accept property in payment for stock the corporation and subscriber may agree upon the value of property to be received in payment for stock in such manner as to be binding upon creditors, if there is no considerable advised and deliberate excessive overvaluations of the property, and that the stockholders will not be liable where the valuation was in good faith, although the property may subsequently prove to be of a less value than that placed upon it, or if there was nothing more than an honest mistake of judgment; but 'a gross and obvious overvaluation of property would be strong evidence of fraud,' in an action by a creditor to enforce a personal liability. (*Coit v. North Carolina Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. Rep. 231.) Where property is conveyed to a corporation as payment of a subscription for stock, it is insufficient to satisfy the liability of subscribers to the creditors of the corporation, if there has been a fraudulent overvaluation of the property,—an overvaluation knowingly and advisedly made." In the opinion from which the above quotations have been made it was said that the decisions of the courts are apparently irreconcilable as to the liability of stockholders to creditors on

stock issued for property received at an overvaluation. That it may be clear that the position adopted by this court is sustained by a very strong array of adjudications we shall now proceed to demonstrate.

In *Du Pont v. Tilden*, 42 Fed. Rep. 87, the syllabus thus correctly reflects the scope of the opinion of Judge Blodgett: "Where a corporation which is authorized by its charter to buy land and pay for it in full-paid stock, issues such stock in payment for land to an amount greatly in excess of the value of the land, and the stock is sold to a purchaser for value, such purchaser is not liable to the creditors of the corporation on the ground that his stock is not fully paid for, where there was no fraud in the original transaction and the corporation has taken no steps to rescind it."

In the state of New York there was a statute which expressly authorized the trustees of manufacturing corporations, in good faith, to purchase property necessary to their business and issue stock to the amount of the value thereof in payment therefor and, in event of such purchase in compliance with the law, exempting such trustees from personal liability. This is the condition of the law in this state without statutory provisions, as has already been shown by the quotations from the case of *Gilkie & Anson Co. v. Dawson Town & Gas Co., supra.*

In *Douglas v. Ireland*, 73 N. Y. 100, it was held that to charge the holder of stock of a manufacturing corporation, issued upon and for the purchase of property, individually for the debts of the company it is not enough to prove that the property was purchased at an overvaluation through a mere mistake or error of judgment on the part of the trustees, and that it must be shown that the purchase was in bad faith and to evade the statute.

In *Boynton v. Andrews*, 63 N. Y. 93, it was held in an action to enforce the individual liability of trustees of a manufacturing corporation because of the exchange of stock for property that the question is whether the purchase was in good faith or at a high valuation with

a fraudulent intent to evade the statute, and that an honest overvaluation of the property received will not of itself subject the owner of the stock to a personal liability. (See, also, *Schenck v. Andrews*, 57 N. Y. 133, to the same effect.)

In *Carr v. Le Fevre*, 27 Pa. St. 413, it was held that where a stockholder produced receipts for the amount of the consideration for land by him conveyed to the corporation for a legitimate purchase, it formed the basis for a credit on stock of the corporation purchased, and the sufficiency of the payment was not affected by after-discovered error in the judgment of the company as to the value of the land.

In *Young v. Erie Iron Co.*, 65 Mich. 111, Morse, J., said: "It must be considered as well settled that corporators cannot agree among themselves that property worth only $80,000 shall be treated as worth $422,000 and count at that sum as so much capital stock paid in, and then proceed to make their shares as fully paid up and non-assessable upon such false basis, as such action would be clearly a fraud upon the creditors. But it is equally well settled that such corporators are not responsible for an honest error of judgment, or a mistake in placing a valuation upon property appropriated or used as capital by a manufacturing or mining company. Nor can the fact that a jury or court finds property of the nature of this leasehold, necessarily fluctuating and speculative in value, worthless now, and of but little actual value at the time of its appropriation as capital, be controlling in deciding whether or not such appropriation was fraudulent as against the creditors of the corporation. Such finding will be presumptive evidence of fraud; but if it is shown that those forming the company honestly believed it to be worth the amount specified in the articles, and that their mistake was one of judgment only, their action cannot be considered fraudulent either in fact or in law. The law imposes no penalty of this kind upon a stockholder or trustee of a company for a mistake or erroneous

judgment in the honest and faithful discharge of his duties."

In *Phelan v. Hazard*, 5 Dil. [U. S. C. C.] 45, it was held that, unless prohibited by statute, an agreement between the incorporators of a company and the directors, by which the former convey to the company property needed for the purpose of its operations and receive payment therefor in full-paid shares of the stock of the company is, in the absence of fraud, binding upon the parties and such stock is full-paid stock.

In *American Tube & Iron Co. v. Hayes*, 30 Atl. Rep. [Pa.] 937, the facts, and the opinion of the supreme court of Pennsylvania thereon, are thus summarized in the syllabus: "(1.) The members of a firm engaged in operating gas wells formed a corporation under the natural gas act of 1885 with a capital stock of $500,000. They agreed with the corporation to transfer the firm's property to it in payment of the $500,000 of stock, and also that they should retain only $175,000 of such stock and turn into the company's treasury the remainder as a working capital. The contracts were performed in good faith. Held, that the stock was paid up, and that the subscribers were not liable to creditors for the amounts subscribed by them. (2.) The facts that the property transferred to the company afterwards proved to be worth much less than $175,000, the amount actually paid for it, and that the parties adopted a clumsy and suspicious method of effecting the transfer, did not render the subscribers liable as for unpaid stock."

In *Bickley v. Schlag*, 20 Atl. Rep. [N. J.] 250, it was held by the court of error and appeals of New Jersey that when a corporation, by virtue of its charter, pays for property purchased with its capital stock, such sale cannot be set aside in the absence of fraud, on the ground that the value of such property was not equal to the value of the stock.

In *Clow v. Brown*, 31 N. E. Rep. [Ind.] 361, it was held by the supreme court of Indiana that where it appears

that the full amount of the capital stock of a corporation was paid to the satisfaction of the contracting parties, such payment can be impeached by a creditor only on the ground of fraud which must be charged in the pleadings.

In *Kelley v. Fletcher*, 28 S. W. Rep. [Tenn.] 1099, the views of the supreme court of Tennessee are thus condensed in the syllabus: "A bill by a corporate creditor to enforce liability on the part of the stockholders for the difference between the amounts of their subscriptions and the value of the property conveyed by them to the corporation in payment of the subscriptions must allege an intentional or fraudulent overvaluation of such property."

The necessity of averment of a fraudulent intent, in conjunction with an overvaluation of property exchanged for the capital stock of a corporation, has been recognized and enforced in *Troup v. Horbach*, 53 Neb. 795, and our conviction with reference to the correctness of our views therein announced is strengthened by a reexamination of the question, rendered necessary in this case. It is true, generally, that the securing of an advantage by a stockholder to himself by reason of his relations with the corporation with which he is connected subjects his conduct to a species of criticism from which he would be free but for his confidential relation; but, even in the face of the presumptions against a stockholder, he may show that the transaction to which he was a party was *bona fide*. (*Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548.) The burden of proof is, doubtless, more strongly devolved upon a stockholder to show good faith with the corporation than it would be if he were a stranger. So it is in transactions between relatives or others sustaining confidential relations in matters involving the rights of creditors, and yet it often happens that such transactions are found valid and the rights of the parties enforceable. The relation of a stockholder to a corporation is no exception to the class of cases involving confidential relations or such that a fraud might

be more likely to take place than between strangers. In the case at bar the district court, upon consideration of all the evidence, found that while the property exchanged for capital stock was exchanged at an excessive valuation, yet that this was done in good faith and with no intent to defraud the corporation or its creditors. There was therefore by the last finding eliminated a very essential ingredient to the establishment of a cause of action for a money judgment against the stockholders, and the judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

OMAHA STREET RAILWAY COMPANY V. SALOME EMMINGER.

FILED DECEMBER 22, 1898. No. 8523.

1. **Personal Injuries:** DAMAGES: SUFFERING: EVIDENCE. In the trial of a case for the recovery of damages for personal injuries it is not improper to permit evidence to be given of complaints by plaintiff of such suffering as would probably be caused by such injury. Following *Hewitt v. Eisenbart*, 36 Neb. 794.

2. ———: ———: COMPENSATION OF SURGEON. When a party is liable for services rendered by a surgeon he may recover the reasonable value of such services where they were necessitated by the injuries for the compensation of which he has brought his action, notwithstanding the fact that he has not actually compensated such surgeon. Following *City of Friend v. Ingersoll*, 39 Neb. 717.

3. ———: ———: CONTRIBUTORY NEGLIGENCE: INSTRUCTIONS. An instruction that a claimant for damages because of personal injuries, to avoid the imputation of contributory negligence, was required to use only such care as a reasonable and prudent person would exercise under the same circumstances, *held*, to excuse an omission to define ordinary care and diligence prescribed, as required in another instruction with reference to contributory negligence.

4. ———: ———: EVIDENCE. Where medical experts had testified to results which would in their opinion follow from personal injuries and with reference to other results which they believe

might follow, *held* not erroneous to instruct the jury that the party injured was entitled to recover damages for such injuries as the jury believed from the evidence such party might labor under in the future as the result of the injuries.

5. ——: ——: ——: PAIN AND SUFFERING. In an action for the recovery of compensation for damages caused by the infliction of personal injury plaintiff is entitled to make proof of such physical pain and mental suffering as resulted from the injury. Following *American Water-Works Co. v. Dougherty*, 37 Neb. 373, and *Harshman v. Rose*, 50 Neb. 113.

ERROR from the district court of Douglas county. Tried below before SLABAUGH, J. *Affirmed upon filing of remittitur.*

John L. Webster, for plaintiff in error.

Weaver & Giller and *Frank T. Ransom*, *contra.*

RYAN, C.

In this case there was a verdict and judgment in the district court of Douglas county in favor of the defendant in error. In the petition in the district court it was alleged that the defendant, a corporation, was, on April 8, 1895, operating a line of street railway on Sherman avenue in the city of Omaha; that plaintiff on said day took passage on one of the cars of the defendant running southward on said avenue, and before reaching Burdette street signaled the conductor in charge of said car that she desired to alight at the intersection of Sherman avenue with Burdette street; that the conductor negligently permitted the train of which said car was a part to run beyond Burdette street a distance of about fifty feet before stopping; that the place where said train halted was not a place at which defendant was accustomed to stop; that within three feet of the rail of the track of defendant farthest west there was, parallel to it, a ditch about two feet wide and eight feet deep from which the dirt excavated had been thrown to the westward; that across this ditch there were crossings at intervals to the sidewalk along the west side of Sherman

avenue; that the place where plaintiff was compelled to alight was ten or fifteen feet north of the nearest of said crossings, which was a part of an alley; that when the said train had stopped as indicated plaintiff attempted to alight from the train, but before she could do so the conductor negligently gave the signal for the train to start, and accordingly said train was started suddenly and thereby plaintiff was thrown so that the hindmost wheel of the rear car ran over her right leg between the knee and the ankle, breaking the bones thereof and inflicting such a shock upon plaintiff and so bruising and injuring her that she was for a long time confined to her bed in a hospital and has since suffered great pain of body and mind; that her injuries are permanent in their nature, and that she has expended $1,000 in and about the treatment necessitated by her injuries. It was further alleged that the injuries complained of were imputable entirely to the negligence of the street railway company, its agents and employés, and the prayer was for judgment in the sum of $26,000 and costs. The answer contained an admission that the defendant was a corporation engaged in the operation of a street railway in Omaha and was a common carrier of passengers for hire, and a denial of every other averment of the petition, with an affirmative allegation that whatever injury plaintiff suffered was chargeable entirely to her own negligence. This last averment was denied in a reply.

On the trial there was an irreconcilable conflict in the evidence with respect to three propositions. Of these the first was as to the place where plaintiff was compelled to alight from the car; the second was as to whether or not she had in fact alighted when the car started forward; and the third was whether or not, after safely alighting on the crossing, she negligently placed herself in such a position that of necessity she was struck by the train when it started forward. Upon all these propositions the evidence was so conflicting that different minds might reasonably reach different conclusions,

and the verdict of the jury settled them beyond question in error proceedings. (*American Water-Works Co. v. Dougherty*, 37 Neb. 373; *Modern Woodmen Accident Ass'n v. Shryock*, 54 Neb. 250, 74 N. W. Rep. 607; *Omaha & R. V. R. Co. v. Brady*, 39 Neb. 27; *Omaha & R. V. R. Co. v. Clarke*, 39 Neb. 65; *Omaha Street R. Co. v. Craig*, 39 Neb. 601; *Omaha & R. V. R. Co. v. Morgan*, 40 Neb. 604; *Omaha & R. V. R. Co. v. Cameron*, 43 Neb. 297; *Spears v. Chicago, B. & Q. R. Co.*, 43 Neb. 720; *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 848; *Miller v. Strivens*, 48 Neb. 458.)

It is complained by plaintiff in error that it was improper to permit evidence to be given as to the distance the street car ran before halting to permit assistance to be rendered defendant in error after she had been injured. There was presented by the plaintiff the theory that the train was started so suddenly that she was thereby thrown to the earth. The evidence as to the distance attained by the train before it stopped was admitted on the assumption that this fact might throw light upon the question of the speed with which the train resumed its course. In this we cannot say there was error. Incidentally this evidence might develop the fact that the conductor evinced but little of the interest which should influence a person of humane instincts, but this, if it existed, was something which ought not to exclude evidence to which the defendant in error was entitled.

In respect to the complaint that the mother of the defendant in error testified that said defendant in error complained of severe pains in her sides, head, and back, and of sleeplessness and want of appetite, it is only necessary to refer to *Hewitt v. Eisenbart*, 36 Neb. 794; for the testimony of expert witnesses was to the effect that such results, it was inferable, would follow the shock sustained by the defendant in error. Under these conditions it was moreover proper that the defendant in error should testify, as she did, to the pains, sleeplessness, and want of appetite, of which she had complained to her mother.

It is not insisted that ordinarily there would be error in exhibiting to a jury a limb injured as this had been, but it is said it was improper in this instance, for the reason that the defendant in error, a female, was young, handsome, and attractive, and consequently that the sympathies of a jury composed of men were unduly excited in her behalf. The motto on the coat of arms of this state is, "Equality before the law." The defendant in error suffered injuries for which she sought compensation in damages, and she was entitled, in sustaining her claim, to resort to the same proofs that she might have resorted to if she had been aged, ugly, and repulsive.

It is urged that the defendant in error made no proof that she was liable for, or that she had paid, the bill of the surgeons who had rendered services in her behalf. This liability is to be presumed from the facts that she had attained her majority before the services were rendered and that they were necessary, and the case therefore falls within the principle stated in *City of Friend v. Ingersoll*, 39 Neb. 717, and *Minneapolis Threshing Machine Co. v. Regier*, 51 Neb. 402.

It is complained that at the request of defendant in error an instruction was given by the terms of which, to entitle her to recover, she was required to have exercised ordinary care and diligence, and such care and diligence were not defined. We do not think the omission of this definition could have left the jury in doubt on this point, in view of the sixth instruction given by the court on its own motion, which was as follows: "You are instructed that it is the duty of plaintiff, in alighting from the car after it had stopped, to use only such care as a reasonable and prudent person would exercise under the same circumstances."

It is insisted there was error in giving the jury an instruction in effect that if the finding was for the plaintiff as to the right to recover, the measure of recovery should be of such damages as the evidence showed she

had sustained, not in excess of the amount claimed in the petition. We have not been able to understand the theory upon which the argument is made that this left an uncontrolled discretion in the jury to find whatever amount of damages the jurors saw fit. The expert surgical witnesses had testified that, in their opinions, the injury had left the limb in such condition that a very slight bruise might cause a desquamation of the tibia at one place; that the limb was not, and probably never would be, as large, as strong, or of the same length that normally it should be; and they further testified that the nervous complications caused by the shock might be permanent. It was therefore proper for the court to instruct the jury, as was done, that the defendant in error was entitled to recover damages for such injuries as the jury believed from the evidence the defendant in error might labor under in the future as the result of her injuries.

It is urged that there was error in an instruction that there might be a recovery for physical pain and mental suffering if the proofs showed that the street railway company was liable for damages. This is settled adversely to the contention of plaintiff in error in *American Water-Works Co. v. Dougherty, supra,* and in *Harshman v. Rose,* 50 Neb. 113.

In support of a motion for a new trial there were submitted various affidavits as to what could be shown on a future trial, if one should be allowed. Some of these were of evidence merely cumulative; others were to the effect that defendant in error, a short time before the trial, was present at a ball and danced; but it was shown that the dancing was of a sort that did not require that a participant should not be a cripple, and even this dancing caused defendant in error such pain that she very soon desisted. There was therefore no abuse of discretion in overruling this motion. (*Davis v. State,* 51 Neb. 307.)

Upon a very full consideration of all the evidence as to

the extent and nature of the injuries from which the defendant in error has suffered in the past and is likely to suffer in the future we have concluded that the judgment may be affirmed to the extent of $5,000. It is therefore ordered that if, within forty days from the filing of this opinion, the defendant in error shall file in this court a remittitur in the sum of $5,080, as of the date of said judgment, it will be affirmed for the balance; otherwise the entire judgment will be reversed and the cause will be remanded for a new trial.

JUDGMENT ACCORDINGLY.

FIRST NATIONAL BANK OF PLATTSMOUTH, APPELLEE, V. FRANCIS N. GIBSON ET AL., APPELLANTS.

FILED DECEMBER 22, 1898. No. 8562.

Creditors' Bill: PARTIES: PLEADING: DECREE AGAINST TRANSFEREE. In an equitable action to subject the alleged fraudulently conveyed real property of a judgment defendant to the payment of the judgment against him, there is no sufficient foundation for an ordinary judgment against his transferee as a co-defendant if there is a failure to allege that the title of the said property by such transferee has been conveyed or subjected to a lien whereby the equitable relief sought has been rendered unavailable.

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

E. H. Wooley, for appellants.

A. N. Sullivan, contra.

RYAN, C.

In this case there was a judgment in the district court of Cass county against Benjamin A. Gibson and Francis N. Gibson for the sum of $1,412.50. The action was one in equity to subject certain described real property to the

payment of a judgment which had been rendered by the said court in favor of plaintiff against John M. Carter, in a sum which, with interest, equaled the above amount. As against Benjamin A. Gibson it was alleged in the petition that, by the use of a judgment against Carter which said Gibson had procured to be assigned to himself, though in fact he knew it had been discharged by payment, and by means of collusion with Carter, the land in question had been by the sheriff, under an execution sale, conveyed to said Benjamin A. Gibson, by whom it had been conveyed to his brother, Francis N. Gibson, without adequate consideration. By his answer Benjamin A. Gibson insisted that the conveyance whereby he had been divested of his title was *bona fide* and for full consideration. He was therefore in no situation to deny the applicability of the rule laid down in *Smith v. Sands*, 17 Neb. 498, and other cases decided by this court on the same line; and since, in the absence of a bill of exceptions showing what the proofs were, we must presume that the facts properly pleaded were established by the proofs, it results that there must be an affirmance of the judgment against Benjamin A. Gibson.

The judgment against Francis N. Gibson, however, cannot receive the same sanction, because of different conditions, which we shall now consider. There was in the petition no averment of any fact which would indicate that the real property sought to be reached had been conveyed or incumbered by Francis N. Gibson. The relief which plaintiff was entitled to, upon the averments of his petition, was restricted to the appropriation of the land described to the payment of plaintiff's judgment against Carter. The finding that the property had been sold by Benjamin A. and Francis N. Gibson was, in so far as Francis was concerned, a finding not responsive to any issue presented by the petition. It may be that there was evidence to sustain this finding, but in that event the rule applicable is thus stated in the syllabus of *McGarock v. City of Omaha*, 40 Neb. 64: "Facts which

appear in the evidence of a case, on a point not put in issue by the pleadings, cannot be made the basis for a judgment for one of the parties unless the pleadings are made to conform to the facts on proper motion and leave obtained of the court to make such amendments." (See, also, *Union Stock-Yards Co. v. Goodwin*, 57 Neb. 138.) To sustain an ordinary judgment against Francis N. Gibson there was lacking the very essential averment that the property sought to be subjected had been conveyed or subjected to some sort of a lien to the prejudice of the right of plaintiff. As this was not alleged, it was immaterial that it may have been proved, for there must be averment as well as proof of all essential facts. As the averments of the petition did not furnish sufficient basis for the rendition of an ordinary judgment against Francis N. Gibson, the judgment of the district court against him is reversed. The judgment against Benjamin A Gibson is affirmed.

JUDGMENT ACCORDINGLY.

CHARLES S. LEFFERTS, APPELLANT, V. HIRAM BELL, IMPLEADED WITH THOMAS SKINNER ET AL., APPELLANTS, AND MANHATTAN BEACH IMPROVEMENT COMPANY ET AL., APPELLEES.

FILED DECEMBER 22, 1898. No. 8571.

1. **Change of Venue:** DISTRICT COURT: JURISDICTION. A district court has no jurisdiction on its own motion to transfer for trial a case from one county to another.

2. **District Court:** JURISDICTION: DISMISSAL OF ACTION IN ANOTHER COUNTY. A district court has no jurisdiction to render a judgment in an action pending in one county dismissing such action from the district court of another county.

3. ——: ——: ——: CHANGE OF VENUE. Douglas and Sarpy counties are in the same judicial district. An action to quiet title to real estate was brought in the district court of Sarpy county, the petition alleging that the real estate was situate

in that county. The defendants answered, averring that the real estate was situate in Douglas county. The parties stipulated in writing that the evidence in the case should be taken before the judge of the district court at a certain time and place in Douglas county, that counsel there submit their arguments, and that then the cause should be treated as fully submitted to the district court of Sarpy county for final determination. The evidence was so taken, and the arguments so had; and thereupon the district court of Douglas county made an order transferring the record, pleadings, and proceedings of the case on file in Sarpy county to the district court of Douglas county, made an order dismissing the case pending in Sarpy county, caused the case to be docketed in Douglas county, and on the evidence taken under the stipulation entered a decree in the case. *Held*, (1) That the order made in Douglas county by the district court thereof transferring the case from the district court of Sarpy county to the district court of Douglas county was void; (2) that the order made in Douglas county by the district court thereof dismissing the action from the district court of Sarpy county was void; (3) that the decree pronounced in the case by the district court of Douglas county was void.

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

Ross & Ross, *S. B. Snyder*, *O. D. Wheeler*, *E. E. Aylesworth*, and *George W. Cooper*, for appellants.

Gregory, Day & Day, and *Emmet Tinley*, for appellees.

RAGAN, C.

This record presents some unusual features. Charles S. Lefferts brought this action in the district court of Sarpy county against Hiram Bell and a number of others. In his petition Lefferts alleged that he was the owner of certain described real estate situate in said Sarpy county; that each of the parties made defendants set up or claimed title to said real estate or some part thereof. The prayer of Leffert's petition was that his title to the lands described therein might be quieted in him. One J. J. Brown was made a defendant to this action. He filed an answer denying Leffert's title to the

real estate described in his petition, and by way of cross-petition claimed title in himself to said land, or a part thereof, averring that said land was situate in said Sarpy county. The other parties made defendants, who answered Lefferts' petition, in addition to a general denial of Lefferts' title, pleaded, among other things, that the land described in his petition was situate in the county of Douglas, and not in the county of Sarpy. After the issues had been made up all the parties to the action entered into a stipulation in writing and filed the same as one of the papers in the case. This stipulation provided that the evidence in the case should be taken before the Honorable G. W. Ambrose, judge of the district court of Sarpy county, in the district court room in the Bee Building, in the city of Omaha, in Douglas county, at a certain time; that upon the completion of the taking of the evidence counsel for the respective parties might submit their arguments to said judge, and that "the cause shall be treated as fully submitted to the district court of said Sarpy county for the final determination of said court." Douglas and Sarpy counties are both in the same judicial district. In pursuance of this stipulation the evidence in the case was taken, and the argument of counsel had before the said judge at the time and place mentioned in said stipulation. Afterward, at the September, 1895, term, to-wit, on the 19th day of December, 1895, of the district court of Douglas county, the said judge made an order transferring the record, pleadings, and proceedings of the case at bar from the district court of Sarpy county to the district court of Douglas county and ordering this case to be docketed in said latter court, all of which was done; also, as a part of said order, dismissed this case from the district court of Sarpy county, and subsequently, at the same term of the district court of Douglas county, entered a decree in the case which is before us on appeal.

We learn from the record that the learned judge made the order transferring this case from the district court

of Sarpy county to the district court of Douglas county because he had reached the conclusion, after hearing the evidence, that the real estate in controversy was situate in Douglas county. We think that the order made by the learned judge transferring this case from the district court of Sarpy county to the district court of Douglas county, and docketing it in the latter county, was absolutely void, and the order made by the judge in Douglas county dismissing the action from the district court of Sarpy county was likewise void. (*Johnson v. Bouton*, 56 Neb. 626.) If the district judge had jurisdiction—and we do not discuss nor decide that question—to hear the evidence in this case, and the arguments therein, in Douglas county while the action was pending in the district court of Sarpy county, and if he had jurisdiction to decide the case in Douglas county upon the termination of the argument, and if his conclusion that the *situs* of the real estate involved was in Douglas county was correct, then he should have entered a decree in the district court of Sarpy county dismissing Lefferts' action. But he had no jurisdiction to transfer the case from Sarpy county to Douglas county for the purpose of a trial or decision. (*Fisk v. Thorp*, 51 Neb. 1.) The record shows that no trial of this case ever took place in the district court of Douglas county, but by the order of the judge, as already stated, the case was docketed there, and there decided; and since the order of the court docketing the case in Douglas county was void, the case was not there, and the decree of the district court of Douglas county pronounced in that action is a nullity.

It appears from the record that the orders which we have said were made by Judge Ambrose transferring this case from the district court of Sarpy county to the district court of Douglas county and dismissing this action out of the district court of Sarpy county were intended to be orders of the district court of Douglas county, as they purport to have been made at the September term of that court, and purport to be orders of court. But

whether these orders were made by Judge Ambrose as judge, simply, or whether they were made by him as the district court of Douglas county, they were equally void. Neither the district court of Douglas county nor a judge thereof had any jurisdiction to make an order or enter a decree in that county dismissing an action pending in Sarpy county, nor any jurisdiction to make an order or decree in that county transferring the case from another county to that. The decree appealed from is reversed. The entire proceedings, so far as they purport to be brought to or pending in Douglas county, are dismissed.

REVERSED AND DISMISSED.

SOPHIA LOWE V. JOHN RILEY, IMPLEADED WITH DAVID M. MARVIN, GUARDIAN, ET AL., APPELLEES, AND BALFE & READ ET AL., APPELLANTS.

FILED DECEMBER 22, 1898. No. 8555.

1. **Objection to Jurisdiction:** SPECIAL APPEARANCE: PLEADING: WAIVER. Unless the petition in an action discloses that the court has no jurisdiction over the defendant, he must challenge the court's attention to its lack of jurisdiction by special appearance, and if that be overruled, go no further, but stand upon his special appearance; or, if he pleads to the merits, to avail himself of the want of the court's jurisdiction over him, he must plead that want of jurisdiction as a defense; and if, on overruling his special appearance, he pleads to the merits of the case, omitting as a defense the court's want of jurisdiction, he will be deemed to have waived that objection.

2. **Appointment of Receiver:** SUPERSEDEAS: SURETIES: PARTIES. One who signs as surety a bond superseding an order of a court appointing a receiver thereby becomes, for all the purposes of that suit, a party thereto.

3. **Mortgage Foreclosure:** APPOINTMENT OF RECEIVER PENDING APPEAL: SUPERSEDEAS: RENTS AND PROFITS: JURY TRIAL. From a decree foreclosing a real estate mortgage an appeal was taken to the supreme court. Pending the appeal the district court appointed a receiver with power to take possession of the property

involved, and collect the rents. Appellants superseded this last order by giving a bond to account for and pay into court for distribution the rents and profits of the premises during the time the receivership was superseded, if the order appointing the receiver should be affirmed. The foreclosure decree and the order appointing the receiver were affirmed. *Held*, (1) That the court, by an order to show cause issued in the foreclosure case and served upon the appellants, might enter a judgment against them for the rents and profits of the premises during the time the receivership was suspended; (2) that such a proceeding was not an independent civil action, but a proper step in the foreclosure case to effectuate and carry out the decree rendered therein; (3) that since the court had jurisdiction of the foreclosure suit for one purpose, it had the right to retain it and enter all orders, judgments, and decrees necessary to a final and complete disposition of the litigation; (4) that the appellants were not entitled to a jury to try the issues made by their answer to the order to show cause.

4. **Appeal:** ACTION AT LAW: PROCEEDING IN ERROR. An appeal will not lie to this court from a judgment of a district court rendered in an action purely legal in its nature. Such a judgment can only be reviewed by this court on petition in error.

5. **Appointment of Receiver:** RIGHT TO SUPERSEDE. An order appointing a receiver is not one that is supersedable as a matter of right. Whether it may be superseded is a matter resting in the discretion of the court making the order, and if the court make such order, it may fix the terms and conditions upon which it shall become operative.

6. **Appeal:** WASTE BOND: APPOINTMENT OF RECEIVER: SUPERSEDEAS. A bond executed in accordance with the third clause of section 677 of the Code of Civil Procedure, conditioned that the appellants will prosecute an appeal without delay and during its pendency not commit, or suffer to be committed, any waste upon the premises involved in the action, will not supersede an order appointing a receiver for said premises.

7. ——: ——: ——: ——: RENTS AND PROFITS. Where the appellants executed such a waste bond supposing they had thereby superseded the order of the court appointing a receiver for the premises of which they were in possession, and subsequently the court permitted them to remain in possession of the premises upon their executing a bond superseding the court's order appointing a receiver, conditioned that they would account for and pay into court the rents and profits of the premises during the time the receivership was suspended if the order appointing the receiver should be finally affirmed, *held*, that the second bond was not invalid for want of consideration.

8. ——: ——: ——: ——: ——. In such a case the contract

of the appellants to account for the rents and profits of the premises is a contract upon their part to account for the fair rental value of the premises.

9. **Mortgage Foreclosure:** JUDGMENT FOR RENTS AND PROFITS. Evidence examined, and *held* to sustain the decree of the district court.

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

C. J. Smyth and *T. J. Mahoney*, for appellants.

James H. McIntosh, contra.

RAGAN, C.

The facts necessary to an understanding of this case are: In the district court of Douglas county Sophia Lowe brought suit to foreclose an ordinary real estate mortgage against John Riley. Balfe & Read, David M. Marvin, guardian, and Charles E. Bates were, among others, also made parties defendant to the action. By the decree pronounced by the district court in that action Marvin, guardian, was given a first, Charles E. Bates a second, Sophia Lowe a third, and Balfe & Read a fourth lien upon the property. Balfe & Read appealed from that decree to this court. While the appeal was pending here the district court of Douglas county appointed a receiver for the property involved in the foreclosure action, conferring upon him the usual powers to take possession of the property in litigation, collect the rents and profits thereof, etc. The receiver accepted the trust and duly qualified therefor. Riley and Balfe & Read excepted to this order and the court made this entry: "Their bond for appeal is hereby fixed by the court at the sum of $1,000." Riley and Balfe & Read thereupon, supposing, we presume, that they were superseding the order of the district court appointing a receiver, executed their bond in the sum of $1,000, had the same approved, and filed by the clerk of the district court. This bond recited that the court had appointed a receiver for the

property in litigation, and that the court had prescribed a bond in the sum of $1,000 in order for them, the bondsmen, to obtain a review of said order in the supreme court, and was conditioned that they, Riley and Balfe & Read, would duly prosecute the appeal without delay, and would not during the pendency of such appeal commit, or suffer to be committed, any waste upon the real estate. Riley, the mortgagor and the owner of the equity of redemption of the premises, either before or after the bringing of the foreclosure suit, being indebted to Balfe & Read, leased to them the real estate, the lease providing that Balfe & Read should have possession of the property and retain possession thereof until the rents should discharge Riley's debt to them. Balfe & Read were in possession of the property when they appealed from the decree of the district court foreclosing the mortgage to this court, and in possession of the property as lessees of Riley at the time they executed the undertaking superseding, as they supposed, the order of the district court appointing a receiver for the property. Some time after Balfe & Read had executed the undertaking last mentioned the receiver attempted to take possession of the property, or to collect the rents from the tenants in the actual possession thereof, and was resisted or thwarted by Balfe & Read, and thereupon the district court caused Balfe & Read to be brought before it to show cause why they should not be attached for contempt for interfering with the court's receiver. The contempt proceeding resulted in the district court making an order giving Balfe & Read five days in which to file and have approved a supersedeas bond in the sum of $1,500, for the purpose of superseding the court's order appointing the receiver, the bond to be conditioned that "Balfe & Read account for and pay into court, to be distributed among the person or persons finally found to be entitled thereto, the rents and profits of the premises in controversy in this suit in case the order appointing such receiver shall be affirmed." Balfe & Read executed

this bond with one Benson as surety. It was approved and filed, and thereupon the contempt proceedings were discontinued and Balfe & Read left in undisturbed possession of the mortgaged property. A condition of the bond was: Balfe & Read "will account for and pay into this court, to be distributed among the persons finally found to be entitled thereto, the rents and profits of the premises in controversy which may be legally required of them during the time they may occupy or control such premises, by virtue of such appeal, in case the order appointing such receiver shall be confirmed." This court finally affirmed the decree of the district court entered in the mortgage foreclosure suit and the decree of the court appointing a receiver for the mortgaged property. The mortgaged premises were duly sold and the proceeds applied towards the discharge of the liens fixed thereon by the decree; and deficiency judgments were rendered against Riley in favor of Marvin, guardian, for $1,118.38 and in favor of Bates for $489. These judgments not having been paid, Marvin, guardian, and Bates and Sophia Lowe filed in the district court of Douglas county in the case of Lowe against Riley a paper denominated "Petition for Order to Show Cause." The application recited the facts already narrated; that Balfe & Read had continued in the possession of the premises to the exclusion of the court's receiver for a certain time in pursuance and by virtue of the bond given by them to supersede the order of the court appointing the receiver; that the rental value of such premises during the time Balfe & Read were in possession of them and during the time the receivership was superseded was $75 per month; and prayed the court for an order directed to Balfe & Read and Benson, and each of them, to show cause by a day named why they should not account for the rental value of the mortgaged premises during the period the possession thereof by the receiver was superseded, and to show cause why they should not pay the rental value of said premises into court for distribution among the

petitioners in the order of priority of their claims. The court issued the order prayed for. Balfe & Read and Benson appeared. A trial was had resulting in a decree against Balfe & Read and Benson, and they have appealed.

1. The first contention is that the court had no jurisdiction of the appellants. In pursuance of the order to show cause served upon them Balfe & Read and Benson appeared specially and objected to the jurisdiction of the court over them, on the ground that there had never been a summons served upon them as provided by section 62 of the Code of Civil Procedure. The contention of the appellants was that this proceeding was a civil action and could be commenced only by filing in the office of the clerk of the district court a petition and causing a summons to be issued thereon; and that as no summons had ever been issued and served upon them the court had no jurisdiction over them. The objection of appellants was overruled, and thereupon they answered to the merits, but did not interpose in their answers as a defense the court's lack of jurisdiction over them by reason of their having been served with an order to show cause instead of being duly summoned. We think that the appellants, by answering to the merits of the case, and by not pleading in their answer as a defense the lack of the court's jurisdiction over them, waived that defense and entered a general appearance in the proceeding. (*Walker v. Turner*, 27 Neb. 103; *Hurlburt v. Palmer*, 39 Neb. 158.) In support of their contention that the court was without jurisdiction over them appellants rely upon *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb. 897. In that case it was said: "Under the provisions of our Code it is proper to plead as a distinct defense any facts not disclosed by the petition from which it appears that the court has not acquired jurisdiction of the person of the defendant, or the subject of the action." In that case Busch was made a defendant, and personal service of a summons was had upon him in the state of Missouri.

He challenged the jurisdiction of the court over him by a special appearance. This challenge having been overruled, he pleaded the fact that he was served in the state of Missouri as a defense in his answer, and this court sustained the plea. Counsel for appellants say that the want of the court's jurisdiction over them appeared upon the face of the record, and therefore no such a defense as want of the court's jurisdiction was necessary in the answer. We cannot agree to this contention. If the court had no jurisdiction over the defendants, the fact did not appear from the application to show cause, or, as counsel for appellants call it, "the petition in the proceeding." It did appear from the record that the appellants were in court in obedience to the order to show cause, but if this had been a suit upon an ordinary promissory note, and a summons had been issued and served in another state, then the record would have shown that the court was without jurisdiction over the parties served in the foreign state, but the fact would not have appeared from the petition itself; and in the case stated had the parties served in the foreign state appeared specially and objected to the jurisdiction of the court, and, on the overruling of that objection, answered to the merits of the case and gone to trial, they would certainly have been held to have entered a general appearance and submitted themselves to the jurisdiction of the court, unless as a defense to the action they had pleaded the want of the court's jurisdiction over them. We understand the rule to be that unless the petition in the action discloses that the court has no jurisdiction over the defendant, he must challenge the court's attention to its lack of jurisdiction by special appearance, and if that be overruled must go no further, but stand upon his special appearance; or, if he pleads to the merits, to avail himself of the want of the court's jurisdiction over him, he must plead that want of jurisdiction as a defense; and if, on overruling his special appearance, he pleads to the merits of the case, omitting as a defense

the court's want of jurisdiction, he will be deemed to have waived that objection. But we think the argument of the appellants that the court had no jurisdiction over them is untenable for another reason. Balfe & Read were parties to this foreclosure proceeding, and Benson, by signing their bond as surety to supersede the order made by the court appointing a receiver, became for all the purposes thereof also a party to this action, and at the time this order to show cause was issued the foreclosure action was still pending,—not finally disposed of. These appellants, being parties to the suit, were entitled to nothing more than the notice to show cause why the order demanded by the appellees should not be made. This proceeding is not an independent civil action. It is one of the steps taken or proceedings had by the district court to effectuate and carry out the decree rendered in the main action.

2. In the district court appellants demanded a jury, which was refused, for the trial of the issues in the proceeding at bar, and this action of the court is urged here for a reversal of the decree appealed from. This demand for a jury is predicated upon the theory that the proceeding was a law action. We do not think it was. It was a special proceeding in an equity case originated and carried on for the purpose of carrying into effect the decree rendered in the mortgage foreclosure suit; and since the district court as a court of equity had jurisdiction of this foreclosure suit for one purpose, it had the right to retain it and enter all orders, judgments, and decrees necessary to a final and complete disposition of the litigation. (*Morrissey v. Broomal*, 37 Neb. 766; *Disher v. Disher*, 45 Neb. 100; *Flentham v. Steward*, 45 Neb. 640.) But the argument of the appellants that this is a law action would put them out of court. This case is here on appeal, and an appeal will not lie to this court from a judgment of a district court rendered in an action purely legal in its nature. Such a judgment can only be reviewed by this court in a proceeding in error. (*Camp-*

bell v. Farmers & Merchants Bank of Elk Creek, 49 Neb. 143.) Again, if the district court erred in denying the appellants a jury for a trial of the issues in this proceeding, that was an error of law which occurred at the trial and cannot be reviewed on appeal, but only on petition in error. (*Ainsworth v. Taylor*, 53 Neb. 484; *Alling v. Nelson*, 55 Neb. 161; *Village of Syracuse v. Mapes*, 55 Neb. 738; *Frenzer v. Phillips*, 57 Neb. 229.)

3. A third argument is that the supersedeas bond for $1,000, executed by the appellants and which they supposed superseded the order of the district court appointing a receiver, did supersede that order, and that the $1,500-bond subsequently executed by the appellants to supersede the order of the court appointing a receiver was executed without consideration. But an order appointing a receiver is not one that may be superseded as a matter of right. Whether it may be superseded is a matter resting in the discretion of the court, and if an order be made allowing it to be superseded the court, in its discretion, may fix the terms and conditions upon which the supersedeas may become operative. (*Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755; *State v. Stull*, 49 Neb. 739.) The $1,000-bond executed by the appellants was conditioned against waste according to the third clause of section 677 of the Code of Civil Procedure. This section of the Code has no application to an appeal from an order appointing a receiver, and the bond of $1,000 executed by appellants did not supersede the order made by the court appointing the receiver. We do not think the argument of the appellants that the $1,500-bond executed by them to supersede the court's order appointing a receiver was without consideration is tenable. The receiver of the court was entitled to possession of the premises involved in the foreclosure suit,—entitled to the rents and profits of these premises pending that action, and the appellants in effect said to the court: "Grant us a supersedeas of the order appointing a receiver; permit us to remain in possession of the premises and collect

the rents and profits thereof, and if your order appointing this receiver shall be finally affirmed, then we will account for and pay into court the rents and profits of the premises while the order appointing the receiver remains superseded." The court supersedes its order appointing the receiver, allows the appellants to remain in possession of the property and collect the rents and profits upon their giving a bond. The order appointing the receiver is affirmed by the supreme court, and the appellants are called upon to account for the rents and profits of the premises, and they answer that "there was no consideration for our agreement." That the court permitted them to remain in possession of the mortgaged property and collect the rents and profits thereof instead of its receiver was a sufficient consideration for the execution of the supersedeas bond.

4. The next argument is that the application for an order to show cause or, as counsel for appellants style it, "the petition" does not state a cause of action. The application alleges that the appellants gave a bond conditioned that they would account for and pay into court the rents and profits of the premises in controversy which might be legally required of them during the time they occupied and controlled the said premises in case the order appointing the receiver should be affirmed. There was another allegation in the application that the rental value of the premises during the time they were in possession of the appellants was $75 per month, and there was a prayer in the application that the appellants might be required to show cause why judgment should not be rendered against them for the rental value of said premises. It is said in argument that a contract to account for rents and profits of premises is not a contract to pay their rental value. If this argument be correct, we are unable to see that the petition does not state a cause of action. But we think in this case the contract of the appellants to account for the rents and profits of the premises in controversy during the time they occupied

them was a contract to pay into court the fair rental value of the premises during that time. The contract of appellants was not merely to account for such rents as they received from the property, but its fair rental value.

5. A final argument is that the finding made by the district court as to the rental value of the property during the time it was held by appellants is unsupported by sufficient evidence. We think it is. The decree of the district court is right and is

AFFIRMED.

IRVINE, C., not sitting.

JOHN L. CARSON'S EXECUTORS V. JOHN A. BUCKSTAFF.

FILED DECEMBER 22, 1898. No. 8401.

1. **Suit on Note:** DEFENSE: COLLATERAL SECURITY. In a suit on a promissory note the maker answered that plaintiff held the note of a third party as collateral security for the note sued on, and that the maker of the collateral note was solvent and the collateral of greater value than the amount due on the note in suit. *Held*, That the answer stated no defense.

2. ———: ———: ———: PRODUCTION IN COURT. A creditor who holds a promissory note belonging to his debtor as collateral security for his debtor's note cannot be compelled to produce such note in court and turn it over to his debtor so long as the latter's debt remains unpaid.

3. ———: ———: ———. Such a creditor cannot be compelled to exhaust the collateral security held by him as a condition precedent to his right to sue his debtor upon his note.

4. ———: ———: ———: COUNTER-CLAIM. A debtor, when sued by his creditor, may plead as a counter-claim or set-off the actual value of any collateral security which the creditor has converted to his own use or the value of any collateral security which he has released, dissipated, or diverted from the purpose for which he held it.

5. ———: ———: ———: CONVERSION. But in such a suit an answer which simply avers that the creditor still has possession of the collateral security pledged to him, but does not allege that the debt sued for has been paid, is not a good plea of conversion.

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

J. H. Broady, for plaintiff in error.

Charles E. Magoon, contra.

RAGAN, C.

In the district court of Lancaster county John L. Carson sued John A. Buckstaff on a promissory note. Since the institution of the suit Carson died and the action has been revived in the name of his executors. Buckstaff had judgment in the district court, and the case is before us on petition in error.

1. The answer of Buckstaff was in words and figures as follows:

"Comes now the defendant John A. Buckstaff, and for answer to the plaintiff's petition filed herein denies each and every allegation in said petition contained, excepting such as are hereinafter expressly admitted to be true. The defendant admits that heretofore, and on or about the time mentioned in said plaintiff's petition, he made, executed, and delivered to the plaintiff the note set forth in said plaintiff's petition under the following circumstances and conditions: Prior to the execution of said note set forth in the plaintiff's petition, and on or about the 24th day of October, 1892, one Louie Meyer came to this defendant with a note for the sum and amount of $3,000, to which note was attached, as collateral security therefor, a note for $3,000 signed by John Fitzgerald, a citizen of Lancaster county, Nebraska; that said Louie Meyer requested this defendant to sign said note as surety for him, the said Louie Meyer, in order that the same might be negotiated with said note of said John Fitzgerald, attached thereto as collateral; that this defendant signed said note as such surety for the consideration and with the distinct agreement that said note of

John Fitzgerald was to be and remain as collateral security for said note and attached thereto; that said note so signed by this defendant as surety, together with said collateral attached thereto, was sold to the plaintiff in this action, John L. Carson, and said John L. Carson accepted said note with said note of said John Fitzgerald attached as collateral to said note signed as surety by this defendant; that when said note so signed by this defendant became due, the same was presented to this defendant for payment by the said John L. Carson; that this defendant thereupon requested a further extension of time, and at the request of the said John L. Carson a new note was given as an evidence of said indebtedness, at which time the said John L. Carson promised and agreed to and with this defendant that said collateral note for $3,000 signed by said John Fitzgerald should be attached to said note as collateral; and this defendant alleges that said note is now held by said John L. Carson as collateral for the said note set forth in plaintiff's petition and sued on in this action, and this defendant offers to confess judgment upon said note upon the production thereof in court, and upon the said collateral note being turned over to him, this defendant.

"The defendant further alleges that said John Fitzgerald is a man of large means and well able to pay said note, and that said note can easily be collected by process of law, and that said John Fitzgerald is financially solvent and well able and willing to meet his obligations, and that said John L. Carson ought to be required to exhaust said collateral security before looking to this defendant as surety; and that said plaintiff holds and retains said note for $3,000, together with accrued interest thereon. This defendant alleges that said collateral note is worth its face value and the interest thereon, to-wit, $3,000 and interest at the rate of ten per cent per annum from the —— day of ——, 1893.

"This defendant further claims as a set-off to the cause of action set forth in the plaintiff's petition the said note

so held by said John L. Carson, to-wit, $3,000, and interest thereon from the day on which said note was given, and prays judgment against the plaintiff in said sum.

"Wherefore this defendant prays judgment against said John L. Carson for the sum of $3,000, with interest from the —— day of ——, 1892, and for his costs in this action, and that he may be hence dismissed."

Does this answer state a defense? It is to be observed that the answer admits the execution and delivery of the note sued on; and the only defense interposed thereto is that Carson has in his possession a note signed by John Fitzgerald for $3,000, which note he holds as collateral security for the note signed by Buckstaff, and that the maker of this collateral note is solvent. There is no allegation in this answer that Fitzgerald or any one else has ever paid any part of this collateral note; that Carson has returned or surrendered this note to Fitzgerald or his assignee; that he has neglected and delayed to enforce the collection of the note until Fitzgerald has become insolvent; nor that he has converted the collateral note to his own use. The answer does allege that the collateral note is in Carson's possession, but since it was pledged to him by Buckstaff as collateral security for the note sued on, Carson is rightfully in possession. We do not know of any rule of law by which a creditor who holds a promissory note belonging to his debtor as collateral security for his debtor's note can be compelled to produce such note in court and turn over to his debtor so long as the latter's debt remains unpaid; nor do we know of any rule of law by which such a creditor can be compelled to exhaust the collateral security as a condition precedent to his right to sue his debtor upon his note. We do not doubt that a creditor who holds the property of his debtor as collateral security for the latter's debt should be compelled to credit the debt with all he realizes from the collateral; nor do we doubt but that in a suit upon the debt the debtor may plead as a counter-claim or set-off the actual value of

any collateral security which the creditor has converted to his own use, or the value of any collateral security which he has released, dissipated, or diverted from the purpose for which he held it. But putting the most liberal construction possible upon this answer, it does not allege that Carson has ever converted to his own use the collateral security pledged to him, nor that such collateral security has been lost to the pledgor through any wrong or neglect of Carson. The answer alleges, and alleges only, as a defense that the collateral security pledged by Buckstaff is in the hands of Carson. This is not enough. The answer states no defense. The judgment of the district court is wrong, and is reversed, and the cause remanded.

REVERSED AND REMANDED.

OLIVER P. LORANCE V. MILO HILLYER.

FILED DECEMBER 22, 1898. No. 8548.

1. **Trespassing Animals:** DAMAGES. At common law every one was bound at his peril to keep his cattle upon his own land, and was liable for injuries committed by them while trespassing upon the lands of others, whether such lands were cultivated or uncultivated.

2. **Common Law.** So much of the common law of England as is applicable and not inconsistent with the constitution of the United States and the constitution or laws of this state is in force here.

3. **Trespassing Animals:** DAMAGES: HERD LAW. The herd law (Compiled Statutes 1897, ch. 2, art. 3) was not enacted to do away with the common-law liability of the owners of stock for damages and trespasses committed by them.

4. ———: ———: ———. The object of this herd law was to give one injured by animals trespassing upon his cultivated lands the right to take possession of such animals, invest him with a lien thereon, and the right to hold such animals until his damages were adjusted.

5. ———: ———: ———. The remedy afforded by the herd law to one injured by trespassing animals is not an exclusive one.

6. ——: ——: ——: COMMON LAW. If the common-law rule has been modified by the herd law at all, the extent of the modification is to limit the liability of the owner of trespassing animals to damages committed by them upon cultivated lands.

7. **Cultivated Lands:** CITY LOTS. A city lot on which are planted fruit trees is cultivated land, within the meaning of section 8 of the herd law.

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

E. O. Kretsinger, for plaintiff in error.

L. W. Colby and *Bush & Bush, contra.*

RAGAN, C.

Milo Hillyer in the district court of Gage county sued Oliver P. Lorance for damages which he alleged he had sustained by reason of the latter's cow trespassing upon his lot, tearing up the grass, shrubbery, and breaking down and destroying certain cherry trees growing thereon. Lorance, in addition to a general denial, pleaded as a defense to such action that his cow was a well-domesticated Jersey milch cow; that on the evening or night before the time when it was alleged she had trespassed on the plaintiff's property he, the defendant, had placed said cow in a good and substantial frame barn and securely fastened the door thereof so that said cow could not escape therefrom; that during the night some chicken thieves opened the door of the barn and turned out said cow; that as soon as he, the defendant, knew that the cow was out he pursued, captured, and returned her to his barn. The district court, on motion of the plaintiff below, struck out of defendant's answer this special matter. On the trial the court instructed the jury that the owner of cattle was liable for all damages done by them upon the cultivated lands of others; and if they found from the evidence that the cow went upon plaintiff's premises and destroyed or damaged his fruit trees, they should find for the plaintiff. Hillyer

had judgment, and Lorance has brought the same here for review on error.

The court did not err in striking out the affirmative matter in the answer, nor in giving the instruction it did. The evidence shows that the cow of Lorance went upon the lawn or lot of Hillyer and injured the grass, shrubbery, and cherry trees growing thereon. Conceding that the cow escaped from her owner and did this damage without any negligence on his part, still we think Lorance is liable. At common law every one was bound at his peril to keep his cattle upon his own land, and was liable for injuries committed by them while trespassing upon the lands of others. (*Star v. Rookesby*, 1 Salk. [Eng.] 335; *Rust v. Low*, 6 Mass. 90; *Ricketts v. East & W. I. D. & B. J. R. Co.*, 12 Eng. L. & Eq. 520; *McCormick v. Tate*, 20 Ill. 334; *McBride v. Lynd*, 55 Ill. 411; *D'Arcy v. Miller*, 86 Ill. 102; *Birket v. Williams*, 30 Ill. App. 451; *Lyons v. Merrick*, 105 Mass. 71; *Vandegrift v. Rediker*, 22 N. J. Law 185; *Baker v. Robbins*, 9 Kan. 303.) And so much of the common law of England as is applicable and not inconsistent with the constitution of the United States and the constitution or laws of this state is in force here. (Compiled Statutes, ch. 15.)

It seems to be the contention of counsel for plaintiff in error that his client is protected by article 3 of chapter 2, Compiled Statutes, known as the "Herd Law." The argument is that the cow was not running at large, and that therefore her owner is not liable for damages she committed after she escaped; and that the herd law only makes owners of stock liable for damages they commit when running at large. But we are not prepared to adopt this contention. The herd law was not enacted to do away with the common-law liability of the owners of stock for damages and trespasses committed by them. The object of that act was to give one injured by animals trespassing upon his cultivated lands the right to take possession of such animals, invest him with a lien thereon and the right to hold such animals until

his damages were adjusted. But even the remedy afforded by the herd law to one injured by trespassing animals is not an exclusive remedy. (*Keith v. Tilford*, 12 Neb. 271; *Laflin v. Svoboda*, 37 Neb. 368.) At common law the owner of animals trespassing was liable whether the lands trespassed upon were cultivated or uncultivated, and, if this common-law rule has been modified by the statute at all, the modification limits the owner's liability to trespasses committed by his stock upon cultivated lands. This seems to have been the construction placed upon the act by this court in *Delaney v. Errickson*, 10 Neb. 492. But in the case at bar the lawn or lot of Hillyer was cultivated land, within the express language of section 8 of the herd law, which declares: "Cultivated lands, within the meaning of this act, shall include all forest trees, fruit trees, and hedge rows planted on said lands." Cases cited by counsel in support of his contention are: *Kinder v. Gillespie*, 63 Ill. 88; *McBride v. Hicklin*, 24 N. E. Rep. [Ind.] 755; *Wolf v. Nicholson*, 27 N. E. Rep. [Ind.] 505. These cases are not in point. In the case from Illinois the plaintiff's horses escaped from his inclosure. He immediately went in search of them, but before he found them, they were seized by a police constable, who impounded them under the ordinances of the city. But the court held that the horses were not running at large within the meaning of the ordinance of the city, and therefore the constable had no right to their possession as against the owner. The other two cases cited are similar to the Illinois case. The judgment of the district court is

AFFIRMED.

FIRST NATIONAL BANK OF CHADRON, APPELLEE, V. GEORGE ENGELBERCHT ET AL., IMPLEADED WITH WILLIAM K. MILLER, APPELLANT.

FILED DECEMBER 22, 1898. No. 8444.

1. **Mortgage Foreclosure:** NATURE OF ACTION. An action to foreclose a mortgage securing payment of a promissory note is not one founded upon an instrument for the unconditional payment of money only, within the meaning of section 129 of the Code of Civil Procedure. *Lincoln Mortgage & Trust Co. v. Hutchins*, 55 Neb. 158, followed.

2. ———: ———: PLEADING: COPY OF INSTRUMENT: EXHIBITS. An action to foreclose a mortgage securing a debt evidenced by a writing is one founded on a written instrument as evidence of indebtedness, within the meaning of section 124 of the Code of Civil Procedure; and a copy of such evidence of the indebtedness must be attached to and filed with the pleading, and if not so attached and filed the petition must assign a sufficient reason therefor.

3. ———: PLEADING: COPY OF INSTRUMENT. The object of said section of the Code in requiring copies of written instruments, upon which a suit is founded, to be attached to and filed with the petition, is to furnish the opposite party with a copy of the evidence of indebtedness sued on for his inspection and to enable him to prepare his defense.

4. **Denial of Statutory Right:** REVIEW. The denial to a litigant of a right expressly conferred upon him by statute, which right he has not waived and which he has demanded in due time and in a proper manner, is reversible error.

5. **Mortgage Foreclosure:** PETITION: COPY OF NOTE. In a suit to foreclose a mortgage given to secure payment of a promissory note the note was not incorporated into and made a substantive part of the petition. A copy of the note was not attached to the petition and by express averment made a part thereof. A copy of the note was not attached to and filed with the petition, nor did the latter aver any reason why the last was not done. *Held*, That the overruling of a motion of defendant to require the plaintiff to attach to and file with his petition a copy of the note was reversible error.

6. ———: ———: ———: EXHIBITS. In a suit to foreclose a mortgage securing the payment of a debt evidenced by another written instrument, neither the evidence of the debt nor the mortgage which secures its payment need be incorporated into the petition,

nor need a copy of either the note or mortgage be attached to the petition and made a part thereof by express averment, nor need a copy of the mortgage be attached to the petition, but only a copy of the evidence of the indebtedness should be attached to and filed with the petition.

APPEAL from the district court of Sioux county. Heard below before KINKAID, J. *Reversed.*

R. C. Noleman, for appellant.

Albert W. Crites, contra.

RAGAN, C.

In the district court of Sioux county the First National Bank of Chadron brought suit against George Engelbercht, William K. Miller, and others to foreclose an ordinary real estate mortgage given to secure payment of a promissory note. The bank had a decree as prayed, and Miller has brought the judgment here for review.

In its petition the bank set forth with sufficient particularity the facts of the execution and delivery to it of the note and mortgage and the facts of the maturity and non-payment of the note which the mortgage was given to secure. The note was not copied into the petition. No copy of it was attached thereto and filed with the petition, nor did the latter aver any reason why a copy of the note was not so attached and filed. Miller moved the court for an order compelling the bank to attach and file with its petition a copy of the note on which its action was predicated. This motion was overruled, and the correctness of this ruling is the only question presented by this record. Two sections of our Code deal with the subject of copies of instruments sued upon. Section 129 provides: "In an action, counter-claim, or set-off, founded upon an account, promissory note, bill of exchange, or other instrument, for the unconditional payment of money only, it shall be sufficient for the party to give a copy of the account or instrument, with all credits and indorsements thereon, and to state that

there is due to him on such account or instrument, from the adverse party, a specified sum, which he claims with interest." It is to be observed that this section deals with an action founded upon an account or upon some instrument for the unconditional payment of money only; and in such an action the pleading is declared to be sufficient if the pleader gives a copy of the account or instrument, with all credits and indorsements thereon, and states that there is due him on such account or instrument, from the adverse party, a specified sum, which he claims with interest. (*McArthur v. Clarke Drug Co.*, 48 Neb. 899.) This section of the Code doubtless contemplates that a copy of the account or instrument should be attached to the pleading. It does not provide that such account or instrument shall be incorporated into and thus made a substantive part of the pleading, nor that a copy of the account or instrument shall be attached to the pleading and by express averment made a part thereof. Nevertheless, in an action founded on an account or an instrument for the unconditional payment of money only, if the account or instrument be made a substantive part of the pleading, or if a copy of the account or instrument be attached to the pleading and made a part thereof, it satisfies the requirements of the Code, since the object of the section is to give the adverse party an opportunity to inspect the account or instrument upon which the suit is based. (*McArthur v. Clarke Drug Co., supra.*) While such a pleading might be vulnerable to a motion, because the account or instrument was incorporated into the pleading and made a substantive part thereof or attached thereto and made a part thereof, the pleading would nevertheless be good against demurrer. But an action to foreclose a mortgage is not founded upon an instrument for the unconditional payment of money only, and therefore whether a copy of the note should be attached to the petition in such an action is not to be determined from this section of the Code.

In *Lincoln Mortgage & Trust Co. v. Hutchins*, 55 Neb. 158, SULLIVAN, J., speaking for this court, said: "By section 129 of the Code of Civil Procedure any instrument for the unconditional payment of money only may be attached to, and made a part of, a pleading founded thereon. But this action does not fall within the provisions of that section. It is not founded on an instrument for the unconditional payment of money only. Its purpose is to ascertain the amount of the plaintiff's claim and appropriate the land described in the mortgage to its payment." The suit was one to foreclose an ordinary real estate mortgage, and copies of the note and mortgage were attached as exhibits to the petition and made a part thereof. A motion was made in the court below to strike these exhibits from the petition on the ground that they were redundant and irrelevant. The district court overruled the motion, and its action in that respect was the only thing complained of in this court. The action of the district court was sustained on the authority of *Pefley v. Johnson*, 30 Neb. 529, which holds that an exhibit attached to a pleading and by express averment made a part thereof is to be considered in connection with the other averments of the petition. But in *Pefley v. Johnson* the action was based upon a written contract for the unconditional payment of money only. The contract was annexed as an exhibit to the petition and by express averments made a part thereof. No motion was submitted to this petition because this contract was thus made a part thereof, but the petition was attacked by demurrer, and it was held that the petition stated a cause of action, notwithstanding the instrument sued on was attached as an exhibit and made a part of the petition, instead of being attached thereto as a mere copy. The decision rests upon the principle of liberal construction of pleading as required by section 121 of the Code. The ruling of the district court in *Lincoln Mortgage & Trust Co. v. Hutchins, supra*, was also sustained upon the theory that even if the action of the

district court was error it was not prejudicial. In this conclusion we were certainly correct, for reasons which will be presently stated.

The other section of our Code which deals with copies of instruments to be attached to pleadings is section 124, providing: "If the action, counter-claim or set-off be founded on an account or on a note, bill, or other written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading. * * * If not so attached and filed, the reason thereof must be shown in the pleading." Now a suit to foreclose a mortgage securing payment of a promissory note is an action founded on a written instrument which is the evidence of the indebtedness, and therefore a copy of such an instrument should be attached to and filed with the petition; or, if not so attached and filed, the pleader must aver a sufficient reason for the omission. In *Lincoln Mortgage & Trust Co. Case* copies of the note and mortgage were attached to and filed with the pleading. The only objection made was that they were made a part of the pleading, but since the purpose of this section of the Code, requiring a copy of a note to be attached, is to furnish the opposite party with a copy of the evidence of the indebtedness sued on, for inspection, and to enable him to prepare his defense, it was held in that case that that object was accomplished quite as well by making the attached copy a part of the petition as it would have been had it been attached and filed without making it a part of the petition, and therefore the refusal of the district court to strike was, if error at all, error without prejudice. And in the case at bar, if the note sued on was incorporated in the petition, or if a copy was annexed as an exhibit, and by express averment made a part of the petition, then the action of the district court in overruling Walker's motion, if error at all, would have been error without prejudice, because the very object and purpose of the Code would have been subserved, though its requirements would not have been

literally complied with. But in the case at bar the note made the basis upon which this action was founded was not incorporated in the petition. A copy was not attached to and made a part of the petition, and no copy was attached merely as such, nor is any reason given why it was not. The court then erred in overruling this motion. The defendants below were entitled to have a copy of the evidence of the indebtedness sued on attached to the petition for their inspection, and to enable them to understand the nature and character of that evidence and to prepare their defense if they had one. This section 124 of the Code is designed as a substitute for the old common-law petition of oyer, and while it is not good pleading to copy or incorporate the written instrument into the pleading, nor to attach a copy thereof to the pleading making it a part thereof, and while it is also true that when a copy of an instrument is filed as required by section 124 of the Code it forms no part of the pleading itself, still, the defendant in this action was entitled to have a copy of the note sued on attached to and filed with the plaintiff's petition, in the absence of an averment in the petition showing a sufficient reason why this was not done. The proper practice and the one authorized and required by the Code in foreclosing an ordinary mortgage securing the payment of a debt evidenced by another written instrument is to set out in the pleading the facts relating to the contracting of the debt, the execution and delivery of the writing which evidences it, the execution and delivery, recording, etc., of the mortgage given to secure the payment of the debt, and the facts showing a breach of the contract, and the facts whereby the pleader has become entitled to have the mortgage foreclosed. Into such a petition neither the evidence of the debt nor the mortgage which secures its payment should be incorporated, nor should a copy of either the note or mortgage be attached to the petition and made a part thereof by express averment, nor should a copy of the mortgage

be attached to the petition at all, but a copy of the note or evidence of the indebtedness only should be attached to and filed with the petition. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

ELIZABETH F. P. TOSCAN ET AL., APPELLEES, V. HENRY O. DEVRIES ET AL., APPELLANTS.

FILED DECEMBER 22, 1898. No. 8482.

1. **Judicial Sales:** SPECIAL MASTER: OATH: PRESUMPTIONS. If a special master appointed to make a judicial sale is required to take an oath, it will be presumed, in the absence of any showing to the contrary, that such oath was taken.

2. ———: APPEAL FROM CONFIRMATION: APPRAISEMENT. A defendant, appealing from an order confirming a judicial sale of land, cannot be heard to complain that his interest was not singled out for appraisement, when the appraisement was the total value of the land less only liens which from their nature would have to be deducted from such defendant's interest.

3. ———: ———: OBJECTIONS. On an appeal from an order confirming a sale this court will consider only objections specifically made in the district court, and this whether the irregularity complained of appeared on the face of the record or was disclosed by evidence *aliunde*.

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

Frank Heller, for appellants.

Wharton & Baird, contra.

IRVINE, C.

This is an appeal from an order confirming a sale made in pursuance of a decree of foreclosure. Confirmation was opposed because the sale was made by a master commissioner who had not taken and filed an oath. This

is the same question as was presented in *Omaha Loan & Trust Co. v. Bertrand*, 51 Neb. 508, and the record is in the same condition. It follows from that decision that if an oath was requisite it must be presumed that one was taken, there being no showing to the contrary.

It is next argued that the appraisers were not sworn. This argument is based on the supposed absence of an oath by the master, who undertook to administer the oath to the appraisers. The disposition of the former question decides this one.

It is objected that the appraisers did not appraise the interest of the proper persons. The appraisement is in its essential parts as follows: "We * * * do appraise the property hereinafter described, at its real money value, as the property to be sold * * * at the sum of twenty-one hundred dollars." Then followed a statement of prior incumbrances, consisting altogether of taxes, Then followed: "The interest of Henry O. Devries *et al.*, defendants, we value at nineteen hundred and sixty-four and 61-100 dollars." It is evident that the value was fixed by taking the whole value of the land and deducting therefrom the taxes. As taxes, when they become liens, override all other interests there could therefore have been no deduction of liens created or attempted to be created by adverse interests, or which would not attach to the estate of the owners of the equity, and as this countervailing incumbrance was deducted from the total valuation of the land, the appraisement must have been as high as if made exclusively with regard to the interest of the appealing defendants. They cannot complain.

In the briefs complaint is made that a copy of the appraisement was not filed with the clerk until after publication of notice of sale had been commenced, and the record seems to bear out that objection. Attention of the district court was not called to this defect by the objections to confirmation or motion to set aside the sale. It is a most familiar rule that this court will not,

except for insufficiency of the petition to state a cause of action, or where there is a want of jurisdiction, entertain questions not presented to the trial court. This principle has been frequently applied both in error proceedings and appeals from orders confirming judicial and execution sales. The court will only in such case consider objections specifically made in the district court. (*Johnson v. Bemis*, 7 Neb. 224; *Parrat v. Neligh*, 7 Neb. 456; *Runge v. Brown*, 29 Neb. 116; *Norton v. Nebraska Loan & Trust Co.*, 40 Neb. 395; *Ecklund v. Willis*, 44 Neb. 129; *Hooper v. Castetter*, 45 Neb. 67; *Creighton University v. Mulvihill*, 49 Neb. 577; *Nebraska Land, Stock-Growing & Investment Co. v. Cutting*, 51 Neb. 647.) It has been suggested that the statute requires the judge to examine the proceedings, and demands confirmation only after such examination has disclosed that the sale has been made in all respects in conformity to law (Code of Civil Procedure, sec. 498); that in view of this active duty imposed on the judge, the foregoing principle ought not to apply where the defect or irregularity is apparent on the face of the record. An inspection of the foregoing cases will show that the court has never regarded such distinction. In *Johnson v. Bemis* one of the objections actually made in the district court was "For other reasons appearing on the face of the return." This was held too indefinite to present any question for review. In *Nebraska Land, Stock-Growing & Investment Co. v. Cutting* one of the objections made in this court was the failure of the record to disclose that the sale was advertised in the proper county, and this was not considered, for the reason, among others, that it had not been made in the district court. In *Hooper v. Castetter* and in *Creighton University v. Mulvihill* the objection made was the same as in this case,—the failure to file a copy of the appraisal before advertising, and the objection was held unavailing because not made in the district court. The rule itself is sound and salutary, and in no way conflicts with the duty of the district judge to examine the

proceedings even in the absence of objection. It only means that a party cannot be heard to complain for the first time in this court of the failure of the district judge to perceive an irregularity, when the party himself has neglected to challenge his attention thereto. Some diligence is required of the suitor as well as of the judge.

AFFIRMED.

NORVAL, J., concurring.

I concur in the affirmance of the order of confirmation, but express no opinion upon the proposition stated in the third paragraph of the syllabus, for the reason the same is not presented by the record, and the determination thereof is not essential to a proper disposition of the cause. The return of the special master commissioner to the order of sale discloses that the order was received by him on September 13, 1895; that the premises were appraised in writing by himself and two disinterested freeholders of the county, "which appraisement is herewith returned, a copy of which I forthwith deposited with the clerk of the district court of said county, * * * and thereupon on the 20th day of September, A. D. 1895, I caused a notice to be published in the Omaha *Mercury*, a newspaper printed in and of general circulation in said county, that I would offer said lands for sale," etc. The first publication of the notice of sale was made on September 20, 1895, and the foregoing quotation from the return of the master commissioner establishes that a copy of the appraisement was duly deposited with the clerk of the district court prior to the commencement of the publication of the notice of sale. It is true a copy of the appraisement, as disclosed by the transcript, was filed September 21, 1895, but that is insufficient to show that another copy of the appraisement had not been previously filed, as stated in the return to the order of sale, especially as the transcript brought here does not purport to contain all of the record.

HARRISON, C. J., concurring.

If the question of what objections may be considered in an appeal to this court from an order of the confirmation of a sale of real estate under an execution or to enforce a decree of foreclosure was an open one or one of first impression, I might be disposed to take a different view to that expressed in the opinion of IRVINE, C., herein, but in an opinion in the case of *Parrat v. Neligh*, 7 Neb. 456, it was said in effect that in an appeal from an order of confirmation of a sale of real estate under a decree the matter will be heard *de novo*, but on objections which were made and presented in the district court. The doctrine of the opinion in the case at bar on the question of matters to be considered on the hearing in an appeal has been established by this court in a line of decisions (see citations in the opinion), and must now be followed. Hence I concur.

ELISHA P. REYNOLDS, JR., APPELLANT, V. LAKE BRIDENTHAL ET AL., APPELLEES.

FILED DECEMBER 22, 1898. No. 8540.

1. **Corporations:** RIGHT TO VOTE STOCK. *Prima facie*, at least, the right to vote stock in a corporation does not exist until such stock has been registered in the name of the person seeking to vote it.

2. ———: ILLEGAL ELECTION OF DIRECTORS: INJUNCTION. A stockholder may obtain an injunction to restrain persons claiming to have been elected directors from acting as such, when the election was illegal and void. *Humboldt Driving Park Ass'n v. Stevens*, 34 Neb. 528, followed.

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

E. N. Kauffman, for appellant.

A. D. McCandless, *contra*.

IRVINE, C.

Reynolds brought this suit against Bridenthal and the other defendants, who claim to have been elected directors of the Touzalin Improvement Company, a corporation, for the purpose of enjoining them from acting as such directors. A temporary injunction was allowed, but subsequently a demurrer to the petition was sustained, the injunction vacated, and the case dismissed. Plaintiff appeals.

It is in brief charged that plaintiff was the owner of a large number of shares of the corporate stock; that 300 of these had been pledged to the Union National Bank of Chicago as collateral security; that the bank claimed to have sold those shares at public sale, and to have bought them, but that such sale was fraudulent and void; that the stock had not been registered on the books of the company in the name of the bank. It is also charged that at the meeting when the defendants claim to have been elected this stock was voted on a proxy from the bank; that without it a majority of the stock would not have been represented at the election; that the defendants were about to assume office and threatened certain action detrimental to the interests of the corporation and of the plaintiff.

In support of the judgment below it is urged that injunction is not in such case the proper remedy. This question would seem to depend upon whether the stockholder suing has a remedy by quo warranto; and if so, whether that remedy is adequate under the facts of the case. An independent investigation of the question is unnecessary here, because we have a precedent from which we do not feel at liberty to depart. *Humboldt Driving Park Ass'n v. Stevens*, 34 Neb. 528, was a case essentially like this, and it was held that an injunction was properly allowed to prevent the persons claiming to have been elected from acting as directors. There the charge was that they had been chosen by the vote of

stock illegally issued; here it is that they were chosen by stock voted by persons having no right to vote it. No other distinction is observable, and the difference mentioned does not affect the principle involved. *Prima facie* the right to vote does not exist until the stock is registered, so that the petition makes out a *prima facie* right.

REVERSED AND REMANDED.

PEOPLE'S FURNITURE & CARPET COMPANY V. MRS. G. A. CROSBY ET AL.

FILED DECEMBER 22, 1898. No. 8546.

1. **Tender:** AMOUNT: REFUSAL. A tender is sufficient, although of too large an amount and accompanied by a demand for the change, when it is refused not on that ground, but absolutely, as being insufficient in amount.

2. **Conditional Sale:** PART PAYMENT: DEMAND FOR BALANCE: REPLEVIN. Where goods have been sold under a contract reserving title in the vendor as security for the purchase-money, which is payable in installments, where the vendee has paid a large part of the purchase-money, and where the vendor has accepted payments after the time the whole became due, the vendor cannot retake the property without a previous demand for the unpaid money.

3. ——: ——: ——: ——. The rule whereby a demand is unnecessary to maintain replevin, where the defendant contests the case on the merits, does not apply to cases where a demand is necessary, not merely as a basis for asserting the remedy, but to vest in the plaintiff a right of possession, as where the plaintiff's right depends upon a condition which is broken only by demand and refusal.

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

Duffie & Van Dusen, for plaintiff in error.

F. W. Fitch, contra.

IRVINE, C.

The People's Furniture & Carpet Company sold to Mrs. Crosby a bedstead, mattress, and pillows for $92.50. The sale was evidenced by a written contract, under the guise of a lease with an option in the lessee to purchase. In legal effect the contract was plainly one of conditional sale, the vendor reserving title as security for the purchase-money. Payments were made from time to time, not always according to the terms of the so-called lease, and some after the time when by its terms payment should have been complete. In this way there was paid altogether the sum of $87, leaving $5.50 unpaid. Mrs. Crosby thereafter sold, or attempted to sell, the bedstead and mattress to Ellis Coder, and gave him possession thereof. The People's Company later sued out a writ of replevin for the goods, and they were taken from the possession of Coder. The suit was brought in the court of a justice of the peace. On appeal Coder recovered a judgment, and the plaintiff brings the case here on error.

A decision is sought on several points relating to the construction and legal effect of the contract, but the judgment must be affirmed on a consideration of only a part of the transactions. The writ of replevin was sued out against Mrs. Crosby alone,—the original vendee. No demand was made upon her, nor was there ever any service of process upon her. An agent of the plaintiff went with the officer, while he held the writ, to the house of Coder, and there demanded the property. The agent informed Coder of the rights of the plaintiff, of which he seems to have been in fact ignorant, although charged with notice by a proper filing of the contract for record. As soon as possible, and before the property had been removed, Coder made a tender of the amount which the agent stated to be due. It is true that this amount was $5.50 and Coder tendered $6, demanding the change; but the tender was not refused because not of a legal

character, but because the costs of the replevin proceedings were not included. When the tender is refused because not deemed sufficient in amount, and absolutely, it cannot be avoided merely because not in lawful money to the precise amount. (*Guthman v. Kearn*, 8 Neb. 502; *Dakota Stock & Grazing Co. v. Price*, 22 Neb. 96.) The officer then took the goods. Afterwards Coder made a precise legal tender to the plaintiff, and it was refused. Later Coder's name was inserted in the writ and other papers, and he appeared and defended. We think it is the law, and it certainly ought to be, that where goods have been sold, reserving title as security for the purchase-money, a large portion thereof has been paid, and the vendor has accepted payments, as in this case, after the day when payment should have been completed, he is in no position to retake the goods without notice and without demand. In such case a tender on demand of the amount remaining due is sufficient to retain in the vendee the right of possession. (*O'Rorke v. Hadcock*, 114 N. Y. 541; *Taylor v. Finley*, 48 Vt. 78; *New Home Sewing-Machine Co. v. Bothane*, 70 Mich. 443.) Besides the objection to the tender already disposed of, it is said that it was not kept good, and that it should have included costs. The whole of the record before the justice of the peace is not before us. So far as we have the record here the tender seems to have been kept good, and we need not therefore inquire whether it was necessary to do so. On the other point it is quite clear that there was, when the tender was made, no liability for costs. The cases* cited as holding that no demand is necessary prior to bringing suit are cases where the question was as to the liability for costs at the close of the action, or where the attempt was to defeat an action in replevin for want of demand. In such cases it is held that asserting a right in one's self avoids the necessity of a previous demand. In such cases the demand reaches only the

Homan v. Laboo, 1 Neb. 204; *Ogden v. Warren*, 36 Neb. 715; *Rodgers v. Graham*, 36 Neb. 730.

question of procedure. It has not been held, nor is it the law, that, when a demand is necessary, not merely to lay the foundation for the remedy, but to complete a right of possession in the plaintiff, the defendant by denying the right of possession waives such requisite thereto. Under the rule above stated the plaintiff was in no position to assert a right of possession until a demand had been made and there had been afforded an opportunity to make the remaining payment. The suit had been instituted without a demand. Coder was not a party and the officer was then as to him a trespasser. He was not required to pay costs on his own account. Regarding him as the representative of Mrs. Crosby the situation is the same. The plaintiff had no right of action against her until demand,—not for the goods but for the money. The writ had been sued out without such demand, and when tender was made she was not liable for the costs then accrued.

The point is not made, but it undoubtedly suggests itself, that interest was properly demandable from the time payment should have been made. The tender was made of the amount which the plaintiff's agent stated remained unpaid, and defendant had a right to rely on such statement.

Error is assigned on the admission in evidence of certain documents from the files of the justice. The case was tried to the court without the intervention of a jury, so these assignments are unavailing. Moreover, the evidence objected to was competent and material as showing that when tender was made Coder had not been sued.

AFFIRMED.

ARLINGTON MILL & ELEVATOR COMPANY V. WILLIAM J. YATES ET AL.

FILED DECEMBER 22, 1898. No. 8515.

1. **Execution:** PURCHASER: PRIOR LIENS: ESTOPPEL. One who buys land at an execution sale, where an apparently valid mortgage has been deducted as a prior incumbrance for the purpose of appraisal, is thereby estopped from denying the validity of such mortgage.

2. **Deed of Quitclaim.** A deed of quitclaim passes only the interest of the grantor, subject to any equities which might be enforced against him.

3. **Mortgage:** EQUITABLE ESTATE. An equitable estate may be mortgaged, and the subsequent conveyance of the legal title will not defeat the mortgage where the rights of an innocent purchaser without notice are not involved.

4. **Chattel Mortgages:** CHANGE IN FORM OF DEBT. A chattel mortgage generally will be construed to secure the debt and not merely its evidence. Therefore, while the original debt remains, the mortgage will not be defeated by a change in its form.

5. ———: STATUTE OF LIMITATIONS. It follows that such a mortgage is not barred by the statute of limitations on the ground that the original evidence of the debt would be barred, when it has been kept alive by renewal notes.

6. ———: ———. The statute, whereby a chattel mortgage ceases to be valid as against creditors or subsequent purchasers or mortgagees in good faith after the expiration of five years from the filing thereof, protects only creditors, purchasers, and mortgagees whose rights accrued after the five years.

7. **Vendor and Vendee:** FIXTURES: PERSONALTY. Articles, such as machinery, of an ambiguous character, and which may or may not become attached to the freehold according to circumstances, will retain their character of personalty by virtue of a contract between vendor and vendee to that effect, when the rights of innocent purchasers relying on their apparent character are not involved.

8. **Chattel Mortgages:** DESCRIPTION OF PREMISES. A chattel mortgage specifically described the chattels, but described them as contained in a certain building where they had not yet been put, but where they were placed before any other rights intervened. *Held*, That the misdescription of the place did not render the mortgage void.

9. **Mortgages:** IMPROVEMENTS. The owner of mortgaged property who expends money in improvements, believing the mortgage to be ineffective, cannot defend a foreclosure case on that ground where there was no fraud, misrepresentation, or concealment of fact.

ERROR from the district court of Washington county. Tried below before BLAIR, J. *Affirmed.*

L. W. Osborn, W. S. Cook, Frick & Dolezal, and *Osborn & O'Hanlon,* for plaintiff in error.

References as to effect of the mortgage on partnership property, the execution sale of the realty, and the rights acquired by making the improvements: *Murrell v. Mandelbaum,* 19 S. W. Rep. [Tex.] 880; *Harney v. First Nat. Bank,* 29 Atl. Rep. [N. J.] 221; *Goldthwaite v. Janney,* 15 So. Rep. [Ala.] 560; *Rosenbaum v. Hayden,* 22 Neb. 744; *Donaldson v. Bank of Cape Fear,* 18 Am. Dec. [N. Car.] 577; *Tarbell v. West,* 86 N. Y. 286; *Barber v. Palmer,* 24 N. Y. Supp. 451; *Graham v. Thornton,* 9 So. Rep. [Miss.] 292.

The chattel mortgage should have been declared void from its inception, especially as to creditors and subsequent purchasers. (*Jones v. Richardson,* 10 Met. [Mass.] 481; *Wright v. Bircher,* 5 Mo. App. 322; *Barnard v. Eaton,* 2 Cush. [Mass.] 294; *Pettis v. Kellogg,* 7 Cush. [Mass.] 456; *Wilhelmi v. Leonard,* 13 Ia. 330.)

The notes were barred, but whether so or not, the lien of the chattel mortgage had expired. (Compiled Statutes, ch. 32, secs. 14, 16; *Thompson v. Van Vechten,* 27 N. Y. 568.)

Jesse T. Davis, F. S. Howell, and *Gregory, Day & Day, contra.*

IRVINE, C.

The Arlington Mill & Elevator Company, hereafter called the mill company, seeks by these proceedings in error to secure the reversal of a decree whereby its prop-

erty, or a portion thereof, was ordered sold to satisfy a real estate mortgage held by William J. Yates, the plaintiff below, and a chattel mortgage held by the Cockle Separator Manufacturing Company, hereafter called the Cockle Company. There were other parties to the record below, but the contest is confined to the mill company on one side and the two mortgagees named on the other, and only their respective rights are open for consideration.

The facts are somewhat complicated, but their statement in some detail is essential to an elucidation of the questions presented. One Shepard and one Lane seem to have been the owners of a large quantity of land in Arlington, Washington county. In 1888 one Y. D. Denison appeared in Arlington with a project to erect a flouring mill. He procured certain donations, and obtained from Shepard and Lane a contract, informal in its terms but sufficient to meet legal requirements, whereby Shepard and Lane agreed to convey to "Denison & Co." certain land, upon the completion and putting in operation thereon of a flouring mill of forty barrels capacity. At that time Denison had no partner. The enterprise was his own, but he procured the contract in that form in contemplation of taking a partner. He proceeded to erect a mill which all the evidence on the subject tends to show met the requirements of the contract. Shepard and Lane did not, however, make the conveyance. Denison purchased machinery for the mill from the Cockle Company of Milwaukee, giving his notes for the purchase-money and securing the same by chattel mortgage on the machinery purchased. This mortgage was dated October 4, 1888, and was filed in the office of the county clerk of Washington county October 11. The machinery was described as contained in the elevator in Arlington situated on the land above mentioned. In fact the machinery had not left Milwaukee when the mortgage was executed, but it was about that time shipped and was soon thereafter placed in the mill. Denison about this

time disposed of a one-half interest in the business to one Baith, who afterward sold to one Monroe, and Monroe later bought one-half of Denison's remaining interest. These transfers do not seem to have been evidenced by any instrument in writing. Having become indebted to one McMasters, Denison, May 22, 1891, executed a real estate mortgage to him, containing covenants of warranty and purporting to convey a one-fourth interest in the land already mentioned, and apparently a small tract additional. This is the mortgage which Yates, who acquired it from McMasters, brought this action to foreclose. The Commercial National Bank of Fremont, having obtained certain judgments against Denison and Monroe, caused executions to be levied on the land, and a sale was made to McMasters. In making the appraisement for the purpose of the sale the whole amount of the Yates mortgage was deducted as a lien prior to the judgments. McMasters knew, and was before he bought expressly warned, of the claim of the Cockle Company on the machinery. McMasters conveyed by quitclaim deed to Jewett & Baith. After this suit was begun the mill company was incorporated and Jewett & Baith conveyed to it, also by quitclaim. In the meantime Lane had conveyed his interest in the legal title to Shepard. In April, 1892, the legal title passed to L. M. Keene, ostensibly as trustee for Martha Shepard and Ada Shepard. In July, 1892, Shepard undertook to convey by warranty deed to McMasters, who then held under the sheriff's deed, but that conveyance passed nothing, as it was subsequent to the deed to Keene. In November, 1892, Keene conveyed by quitclaim to Jewett & Baith, who had in the meantime bought McMaster's title. Jewett & Baith expended large sums in improving the property. The decree of the district court ordered a sale of the machinery described in the Cockle Company's mortgage to satisfy the same, and a sale of the mortgaged real estate to satisfy Yates.

The number of questions involved requires that each

be disposed of as briefly as possible, but some are of sufficient importance to warrant a more extended discussion than is here practicable.

With regard to the Yates mortgage it is contended that Denison had no mortgageable interest on account of the state of his title, and also because the land was partnership property and he could not convey any fixed interest, but only that which would result to him on the settlement of the partnership with Denison. Further, that the land having been sold on execution to pay partnership debts, that sale passed title as against one claiming under a single partner. Reliance is also placed on the title derived through Keene. The nature of Denison's interest and the original effect of the mortgage are immaterial. When McMasters bought at the execution sale he bought under an appraisement recognizing the mortgage as a valid senior incumbrance, his bid was based on that hypothesis, and he became estopped to deny the validity of that mortgage. (*Koch v. Losch*, 31 Neb. 625; *Nye & Schneider Co. v. Fahrenholz*, 49 Neb. 276; *Farmers Loan & Trust Co. v. Schwenk*, 54 Neb. 657.) The conveyances whereby the title so acquired by McMasters passed to the mill company are all deeds of quitclaim, and operated to convey McMasters' rights and no greater. (*Lincoln Building & Saving Ass'n v. Hass*, 10 Neb. 581; *Savage v. Hazard*, 11 Neb. 323; *Hoyt v. Schuyler*, 19 Neb. 657; *Snowden v. Tyler*, 21 Neb. 199; *Bowman v. Griffith*, 35 Neb. 361; *Connell v. Galligher*, 36 Neb. 749; *Pleasants v. Blodgett*, 39 Neb. 741.) Nor is the case of the mill company aided by the subsequent conveyances of the legal title. In this state an equitable estate may be mortgaged, and the lien of that mortgage will not be defeated by a subsequent conveyance of the naked legal title, where the rights of innocent purchasers are not involved. (*Lincoln Building & Saving Ass'n v. Hass, supra.*) The conveyance of the legal title to the successors of Denison operated only as an execution of Shepard's contract to convey, and through the covenants of warranty

in the mortgage, if not independently thereof, inured to the benefit of the mortgagee.

The objections urged to the chattel mortgage are many. In the first place it is said that it was barred by the statute of limitations. This argument is founded on the fact that the statute would have run against the notes which the mortgage was first given to secure. Some payments had been made on these and new notes had from time to time been given in extension and renewal. The last ones were well within the period of limitations. Generally, a mortgage is held to secure the debt and not merely the instruments evidencing it. While the original debt remains the mortgage is not defeated by a change in the form of the debt or its evidence. It on the contrary continues as security for the debt in its new form. (*Sloan v. Rice*, 41 Ia. 465; *Wayman v. Cochrane*, 35 Ill. 152; *Davis v. Maynard*, 9 Mass. 242; *Boxheimer v. Gunn*, 24 Mich. 372; *Williams v. Starr*, 5 Wis. 534.)

Next it is said that the mill company is protected by section 16, chapter 32, Compiled Statutes, whereby a chattel mortgage "shall cease to be valid as against the creditors of the person making the same, or subsequent purchasers or mortgagees in good faith, after the expiration of five years from the filing of the same copy thereof." While there is some conflict as to the construction of similar statutes, the better authority and the better reason favor the view that the object is to protect persons who acquire rights after the expiration of the time named, not to protect those whose rights accrued when they were bound to take notice of the record, but against whom enforcement is not sought until after the period. (*Farmers & Merchants Bank v. Bank of Glen Elder*, 26 Pac. Rep. [Kan.] 680; *Nix v. Wiswell*, 54 N. W. Rep. [Wis.] 620.) This disposes of the claim through McMasters, Jewett, and Baith, either as purchasers or as successors to creditors. All their rights accrued before the five years had elapsed. The mill company bought *pendente lite*, and, moreover, it does not claim to have bought without

notice, and is not, therefore, a purchaser in good faith. Indeed, it is best now to remark that none of the participants in these transactions stands in the attitude of a creditor or purchaser without notice of the rights of others,—a consideration which considerably simplifies the case.

It is argued that the machinery became a part of the realty, and was no longer subject to the chattel mortgage. All evidence as to manner of attachment was rejected on the objection of the mill company itself, on the ground that it was immaterial. It can hardly now be permitted to say that such evidence was material, and claim anything by reason of its absence. There is nothing in the nature of such machinery to stamp it as realty under all circumstances. It may become so or not according to circumstances. If a man sells bricks or nails or shingles for the purpose of erecting a house, these cannot in their specific character be continued, after such use, as personalty, because their very nature forbids such a result; but when an article is of an ambiguous character, such that it may either remain personalty or become attached to the freehold, much depends on the intention of the parties. This is especially true of trade fixtures and of machinery for trade purposes, where they may be removed without substantially impairing, not the property, taking its value with them remaining, but the property considered separately. There it is held that where the vendor and vendee agree that they shall remain personal property they do so, unless perhaps where innocent purchasers have acquired rights in reliance upon their apparent character. From the large number of cases illustrating this principle there may be cited the following, where the contest was between a vendor seeking to enforce the purchase price against the articles as personalty, and an execution purchaser of the real estate: *Sisson v. Hibbard*, 75 N. Y. 542; *Manwaring v. Jenison*, 61 Mich. 117; *Sword v. Low*, 122 Ill. 487.

Finally, it is argued that the machinery did not belong to Denison when the mortgage was made and that a chattel mortgage will not attach to after-acquired chattels. We need not consider the legal point made, because the proof shows that if Denison had not purchased the property prior to the mortgage, the purchase and the execution of the mortgage were concurrent. The title passed in Milwaukee. The mortgage was recorded in Washington county, which seems to have been then Denison's residence, and this was proper and sufficient. (Compiled Statutes, ch. 32, sec. 14.) The record would not perhaps impart notice until the goods were placed in the building described as containing them; but we do not think that it was forever void, even as against those buying with full notice, when it specifically described the property, merely because it stated the location as a building where it was not yet placed, although it was intended to at once place it there and when it was there placed before any intervening rights accrued.

Stress is laid on the fact that the defendants made large outlays on the faith of their ownership discharged of the mortgages. If so, the mistake was one of law alone; there was no concealment or ignorance of any facts affecting the rights of the parties. The case is like that of any mortgagor who improves the property while the mortgage subsists.

The decree is criticised as directing a sale of all the land instead of only the one-fourth covered by the mortgage of Yates. The language of the decree is not the aptest in this regard, but it is nevertheless sufficiently clear that it directs the sale of only an undivided one-fourth.

AFFIRMED.

ANNA GOOS, APPELLEE, V. HANS GOOS ET AL., APPELLANTS.

FILED DECEMBER 22, 1898. No. 8532.

1. **Vendor and Vendee:** ASSUMPTION OF MORTGAGE: ESTOPPEL. One who accepts a conveyance of land, and as part of the consideration agrees to pay an existing incumbrance thereon, is bound not only to the promisee but to the incumbrancer to do so, and estopped from denying the validity of such incumbrance.

2. ———: ———: CONSIDERATION: MERGER. A sold land to B, receiving in part security for the purchase price a mortgage on the land. B afterwards made a mortgage to C. Thereafter B reconveyed the land to A and gave A also his note for an agreed sum, and A agreed to pay the mortgage to C. *Held*, That the conveyance of the land and giving of the note constituted a sufficient consideration for the assumption of the mortgage debt, and that, in the absence of fraud or other ground of rescission, the contract had the effect of merging A's mortgage in the legal title, and leaving C's mortgage as a subsisting valid charge upon the land.

3. ———: ———: FRAUD: DURESS. The fact that A was induced to make the contract by B's threat to convey or lease the land, B having a right so to do, did not constitute fraud or duress.

4. **Appeal:** TRANSCRIPT: RIGHTS OF APPELLEE. Under our system of appeals in equity cases, after a transcript has been in due time lodged in this court by any party, any other may assume the attitude of an appellant by seasonably filing a brief assailing the decree.

5. **Contract for Benefit of Third Person:** FRAUD. Where two persons have made a contract involving a promise by one party for the benefit of a third person, such third person may be heard to defend such contract against an attack for fraud.

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

Byron Clark and *C. A. Rawls*, for appellants.

Matthew Gering and *A. N. Sullivan*, *contra.*

IRVINE, C.

The main object of this action was to foreclose a mortgage, but the complications are such that its precise

nature may be best disclosed by a short analysis of the pleadings. The plaintiff Anna Goos alleged that in 1891 she became the owner of certain described land in Cass county. May 3, 1893, she sold and conveyed the land to Hans Goos for the sum of $8,000. The consideration was arranged by his paying $1,000, assuming an existing mortgage of $1,000, and executing his notes for $6,000, secured by mortgage on the land. It is charged that this mortgage plaintiff, after its delivery, committed to the custody of the mortgagee for the purpose of having it recorded, and that he failed to cause it to be recorded, a fact not known to plaintiff until the autumn of 1894. It is next alleged that October 20, 1894, Hans Goos and William Weber conspiring to defraud plaintiff, Hans executed to Weber a mortgage for $1,000, which Weber, November 15, 1894, assigned to the Krug Brewing Company, the mortgage and assignment being both recorded. It is charged that the brewing company knew of plaintiff's mortgage and of all the facts. It is further charged that thereafter Hans Goos, contriving to induce plaintiff to assume the Weber mortgage, fraudulently induced her to accept a reconveyance of the land, together with Hans' notes for $250. The prayer was for a rescission of the last contract and a foreclosure of the plaintiff's mortgage to the exclusion of that to Weber. The answers of the several defendants deny all charges of fraud, allege a consideration for the Weber mortgage and its assignment, and charge that as a part of the contract whereby the land was reconveyed to plaintiff, and in consideration thereof, and of Hans' notes for $250, plaintiff assumed and agreed to pay the Weber mortgage. The reply reiterates the charge that the last contract was obtained by fraud. The district court found that Hans fraudulently neglected to file plaintiff's mortgage for record; that it created a vendor's lien; that the Weber mortgage was executed to secure a pre-existing debt and future advances, with the intention on Hans' part to defraud plaintiff; that Weber knew of plaintiff's mortgage, but

that the brewing company did not; that the assignment to the latter was to secure a pre-existing debt of Weber; that the settlement, whereby the land was reconveyed and the mortgage assumed, was without consideration and fraudulent. A foreclosure of both mortgages was decreed, the plaintiff to have priority.

Many interesting questions are presented by the record and ably argued in the briefs; but the conclusion reached on one branch of the case renders unnecessary the consideration of other phases. It is now the well settled law of this state that where one makes a promise to another for the benefit of a third person, the third person may enforce it, although not a party to the consideration. (*Morrill v. Skinner*, 57 Neb. 164, and cases there cited.) This rule has several times been applied to cases where one accepts a conveyance of land, and as part of the consideration agrees to pay an existing incumbrance thereon. The mortgagee may enforce the promise. (*Rockwell v. Blair Savings Bank*, 31 Neb. 128; *Cooper v. Foss*, 15 Neb. 515; *Reynolds v. Dietz*, 39 Neb. 180; *Meehan v. First Nat. Bank of Fairfield*, 44 Neb. 213.) Even where there has been no agreement to assume and pay the debt, a purchase wherein an apparent lien has been recognized as valid, and allowed for in fixing the price, has been held to estop the purchaser from denying its validity. (*Koch v. Losch*, 31 Neb. 625.)

It follows that if the contract whereby the land was reconveyed was not open to rescission for fraud, it constituted a binding obligation upon the plaintiff to discharge the Weber mortgage, and it is immaterial whether, before that agreement, that mortgage was senior or junior to the plaintiff's. The finding that there was no consideration for the agreement is manifestly wrong. Plaintiff received the land and Hans' notes for $250 as a consideration for the assumption of the Weber mortgage. From the cases already cited it follows that it was immaterial that the holder of that mortgage was not a party to the consideration, or that he did not know

of the promise at the time it was made. We are thus relegated to an inquiry as to the fraud. Plaintiff knew long before this transaction that her mortgage had not been recorded; so that she was not induced to make the contract by any deception which had before been practiced upon her with regard to that fact. The only fraud charged in the petition is, first, that plaintiff relied on the validity of the Weber mortgage, and, secondly, that Hans threatened that unless she made the settlement he would transfer the land or lease it for five years. The first charge is flatly contradicted by the plaintiff's own reply, where she says that she relied on Hans' statement that he had made the Weber mortgage only to cloud her title and force a settlement. These averments offset one another, but whichever may indicate plaintiff's position it is insufficient. If she relied on the validity of the Weber mortgage as charged in the petition, she relied on the truth, for it is shown that that mortgage was given for a *bona fide* debt, and was undoubtedly good as between the parties. It may have been in equity junior to plaintiff's, but there is no charge of any misrepresentation affecting the priorities. If, on the other hand, plaintiff relied on Hans' statement that the mortgage was invalid, as alleged in the reply, that would be a reason for not assuming it. If she were willing to pay it believing it to have been made solely to defraud her, she ought to be held to her bargain when the contrary appeared. The second charge shows no fraud. It was neither a false statement nor a suppression of the truth. It merely expressed a purpose to do what Hans had a right to do. He owned the land and might convey it or lease it. If he should do either, it could not affect plaintiff if she then took the proper steps for her own protection. Such a threat does not constitute duress. Finally it may be said that the proof wholly failed to sustain such allegations as were made. The most that the evidence tended to show was that Hans told her that if she did not accept his proposition he "would beat her out of it,"

whatever that may mean. It is quite evident that the plaintiff, with full knowledge of all material facts, and in the absence of anything approaching fraud or duress, for a sufficient consideration took back the land and agreed to pay the Weber mortgage; that the intention was thus to close matters with Hans, and to merge the plaintiff's mortgage in the legal title, leaving the Weber mortgage as a valid, recognized subsisting lien. Neither on the face of the record nor by evidence did she show a right to the relief demanded.

It is argued that we are foreclosed by the condition of the record here from examining the question just decided. This is upon the theory that the brewing company alone appeals and that the case for rescission affects only the plaintiff and Hans Goos. The claim that the brewing company is the only appellant is founded on the fact that it alone gave a supersedeas bond. But a supersedeas is not necessary to an appeal. An appeal is taken by lodging a transcript in this court within the statutory period. When one party does so the other may avail himself of the same transcript for the purpose of an appeal on his own part, by simply filing in due season his briefs assailing the decree. (*McDonald v. Buckstaff*, 56 Neb. 88.) Here all the defendants join in a brief, relying on the same grounds, and we have no other means of ascertaining who appeals. Furthermore, by virtue of the contract which it was sought to rescind, the brewing company, as holder of the mortgage, obtained a vested legal right, which it has a right to defend on its own behalf. The decree of the district court is reversed and the cause remanded with directions to dismiss plaintiff's case and to award foreclosure of the Weber mortgage as prayed in the cross-petition of the defendant brewing company.

REVERSED AND REMANDED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1899.

PRESENT:

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

WIGTON & WHITHAM V. WILLIAM G. SMITH.

FILED JANUARY 5, 1899. No. 10335.

1. **Partnership:** PLEADING. A petition filed in this cause *held* to be a declaration against the individual members of a firm, and not against the partnership. (*Hanna v. Emerson*, 45 Neb. 708.)

2. ———: ACTION AGAINST FIRM: AMENDMENT OF PETITION: LIMITATION OF ACTIONS. The suit was instituted against the partnership, and during its pendency a petition was filed in which the suit was changed to one against the individual members of the firm. *Held*, That the prior pleadings were of no further effect, and there was an abandonment or a discontinuance of the action against the firm. The time within which an action on the claim might be instituted had expired at the time of the occurrences above set forth, a subsequent amendment of the petition to make it run against the firm was ineffectual, and the bar of the statute of limitations a forceful defense as against this last petition,

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

Wigton & Whitham, for plaintiffs in error.

Brome & Burnett and *Mapes & Hazen, contra.*

HARRISON, C. J.

The defendant in error commenced an action against the partnership of Wigton & Whitham to recover an amount alleged to be due him from the firm. On review by this court of a judgment rendered in the district court the judgment was reversed and the cause remanded. The decision at that time will be found reported in 35 Neb. 460. The suit was again tried in the district court and a second time presented to this court in an error proceeding, and the judgment reversed and the cause remanded. For report of the opinion see 46 Neb. 461. When it again reached the district court there was filed for defendant in error an amended petition, in which the declaration was against "Frank P. Wigton and George L. Whitham, partners doing business in the state of Nebraska under the firm name and style of Wigton & Whitham." This was filed January 12, 1897, and after a demurrer and a motion had been filed and a disposition made of each on June 16, 1897, another amended petition was filed in which the party against whom the pleadings ran was the firm of Wigton & Whitham. To this a general demurrer was interposed and on hearing overruled. Then an answer was filed in which the bar of the statute of limitations was asserted. A trial resulted in a judgment for the defendant in error and the case has been for the third time submitted to this court for review.

The right of action accrued on or about March 30, 1888, and it is now argued for plaintiffs in error that the amended petition of January 12, 1897, was one by which the action was changed to one against the individual members of the partnership, and an abandonment or

discontinuance of the action against the partnership; and that the petition filed June 16, 1897, which was directed against the partnership, and not the individual members thereof, worked an abandonment of the pleading against the individuals of the firm; that when the petition of January 12, 1897, was filed, and the action against the partnership distinctively was abandoned, it became barred by the statute of limitations, and without life. The petition filed January 12, 1897, was against the individual members of the partnership, and not against the firm. It was in effect a statement of a separate and distinct action from the one originally commenced, which was against the firm under the provisions of section 24 of the Code of Civil Procedure, which allows a suit to be instituted against a firm by the name which it has assumed or is known. In the cause of Emerson against Hanna the petition declared against "Robert Hanna and J. M. Shugar, a firm doing business under the firm name of Hanna & Shugar," and it was held in an error proceeding to this court that it was an action against the individuals, and not the partnership; that statement of the partnership relation in the petition was merely *descriptio personæ*. (See *Hanna v. Emerson*, 45 Neb. 708.) When the amended petition of January 12, 1897, was filed in the case at bar the original complaint against the partnership ceased and lost its effect as a pleading; a discontinuance of the action against the firm was worked; and as more than four years had elapsed, such action was barred and no relief could be granted against the partnership on the complaint of June 16, 1897. (*La Societe Francaise De Bienfaisance Mutuelle v. Weidemann*, 32 Pac. Rep. [Cal.] 583; *Bassett v. Fish*, 75 N. Y. 303; *New York State Monitor Milk Pan Ass'n v. Remington Agricultural Works*, 89 N. Y. 22.) It follows that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

NORTH NEBRASKA FAIR & DRIVING-PARK ASSOCIATION v. GEORGE W. BOX.

FILED JANUARY 5, 1899. No. 8596.

1. **Pleading:** ADMISSIONS: SETTLEMENT. A pleading which states that if a settlement or adjustment of an account was of occurrence its effect was avoided by reason of a mistake or of fraud therein is an admission of the fact of the settlement or adjustment.

2. **Settlement:** FRAUD: MISTAKE: EVIDENCE. The circumstances of a settlement presented in this action *held* to include matters of mistake or fraud sufficient to avoid its effect against the complaining party.

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

George A. Latimer and *Powers & Hays*, for plaintiff in error.

Barnes & Tyler, contra.

HARRISON, C. J.

The plaintiff instituted this action against defendant to recover an amount alleged to be its due of moneys collected by him in the capacity of secretary of the association and which it was further pleaded it was his duty to account for and turn over to its treasurer, which duty defendant had failed and refused to perform. In the answer the receipt of the moneys was admitted and a settlement and adjustment of the account was pleaded. In a reply there was a denial of the affirmative matter of the answer, but there was a further statement that if there had occurred a settlement between the association and the defendant of the alleged differences, it was effected or induced by fraud and mistake. A trial of the issues resulted favorably for the defendant, and the cause is presented here in an error proceeding on behalf of the plaintiff.

The matter of the reply relative to a settlement constituted an admission of the fact and an asserted avoidance of it. (*Dinsmore v. Stimbert*, 12 Neb. 433; *Smiley v. Anderson*, 28 Neb. 100; *Dwelling-House Ins. Co. v. Brewster*, 43 Neb. 528; *School District v. Holmes*, 16 Neb. 486; *State v. Hill*, 47 Neb. 456.)

The secretary of the association, the defendant herein, was required by the articles and by-laws of the corporation to collect all moneys due it and pay the same to its treasurer, and to report regularly his actions as an officer of the association. He collected money, but did not pay it to the treasurer. He retained it, and constituted himself in effect the manager or managing agent of the plaintiff, made collections, hired parties to perform labor, also to furnish supplies for the association, and paid the bills without an allowance by the auditing committee provided for by the rules which had been adopted for the government of the corporation and by which it was provided all bills should be examined and allowed or rejected. There was also a provision in the by-laws that all payments should be by order on the treasurer signed by the secretary and countersigned by the president or vice-president. These rules of conduct of business, as we have stated, were wholly disregarded by the secretary, the defendant herein, for reasons which he detailed in his testimony at the hearing, and which he deemed at the time sufficient. What the reasons were we need not here enumerate. There was at least one item, if not more, in regard to which, to the extent the record discloses, the corporation or parties acting for it were not fully informed,—did not possess knowledge of the attendant and connected facts and circumstances, which rendered it or them, to say the least, more than doubtful in character as a claim or claims against the association. The party who rendered the report or account which formed the basis of the adjustment between him and the association knew all the facts, but did not impart them to the other party. This being true, the adjustment was made under

a mistake, even if the element of fraud was absent, and the association could go back of it and collect amounts due it. It follows that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

JAMES MORTON V. CHARLES A. HARVEY ET AL.

FILED JANUARY 5, 1899. No. 8302.

1. **Building Contract:** PROMISE TO PAY FOR LABOR AND MATERIAL: BOND. A stipulation in a building contract *held* to embody a promise to satisfy true claims of laborers and parties who furnished material in the performance of the contract; also, that this promise of the contract was included in the obligations of the bond given to secure the fulfillment of said contract.

2. **Bonds:** CONDITIONAL SIGNATURE: PRINCIPAL AND SURETY. If a bond in form a joint obligation is signed by a surety on condition that others are to become parties to the instrument in the same capacity, and delivery of the bond occurs without a compliance with the condition, the instrument is ineffective as to the party who so signed it, unless the obligee, prior to the delivery, was not apprised of the condition, or the signer, subsequent to execution of the bond, waived the condition. (*Middleboro Nat. Bank v. Richards*, 55 Neb. 682.)

3. ———: ———: ———. If, when delivery of such a bond is made, there appears on its face that which discloses or suggests an infirmity or irregularity relative to one of the requisite signatures sufficient to cast the duty of an inquiry on the obligee, and no investigation follows, the condition and its lack of fulfillment may be potent matter of defense for the party who signed the bond conditionally, in an action thereon. (*Middleboro Nat. Bank v. Richards*, 55 Neb. 682.)

4. ———: ———: ———. A surety may insist on a compliance with the plain import of his contract, inclusive, in a case like the present, of the condition which accompanied his signature; and, where the condition exacted the signature to the instrument of another party, it will not be satisfied with a subsequent ratification of the signature which had been at the time of the execution thereof written on the paper by an unauthorized person. (*Middleboro Nat. Bank v. Richards*, 55 Neb. 682.)

5. **Peremptory Instruction:** CONFLICTING EVIDENCE. It is error to

give a peremptory instruction and direct a verdict where of the existence of facts of litigated issues there is a conflict in the evidence.

6. **Instructions:** CONFLICTING EVIDENCE. A court may not give an instruction in which there is the assumption of the existence of facts relative to which the evidence is conflicting, and also submit the question of the existence of such facts to the jury.

7. ——: ——. Where a court has given an instruction in which there is expressed the existence of certain facts, or its opinion that they do exist, in a case wherein there is a conflict in the evidence relative to said facts, the error is not cured by submitting special interrogatories of their establishment, or the contrary, and the further instruction that the jury is not to be influenced in the determination of the special queries by the fact that the court has given the former instruction which embodied its opinion on the subject.

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

W. H. De France and *E. Wakeley,* for plaintiff in error.

James H. McIntosh, contra.

HARRISON, C. J.

The firm of James Richards & Co. entered into a contract with Washington county to erect for it a courthouse, to furnish all material and perform all the labor, and in the course of the transaction gave a bond for the due and faithful compliance with the obligations of the contract, of which instrument the plaintiff in error was signer as surety. The defendant in error, Charles A. Harvey, as subcontractor, furnished some material for use in and about the building, and did some labor thereon. for all of which the agreed price was $1,650, of which sum he had been paid a part, and for the recovery of the unpaid balance instituted this action on the bond mentioned, and as a result of a trial of the issues joined was accorded a judgment. The case is presented to this court for review of the proceedings in the district court.

One of the questions raised and argued is whether the

terms of the bond in suit were sufficiently comprehensive to include any obligation of the contract by which the contractors became bound for the payment of laborers and parties who furnished material necessary to a performance of the agreement, so that, in the event of a failure on the part of the contractors to make such payment, the bond could be resorted to by the aggrieved person as it was sought to do in this case. Within the doctrine heretofore announced on this subject this question must be solved favorably to the contention of the defendant in error Harvey, the plaintiff in the suit. The stipulation in the contract relative to the payment for labor and material was included in the obligatory terms of the bond, and there was such a privity between the defendant in error and the sureties as entitled him to maintain the action against them. (*Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb. 649.)

There are some other questions presented which relate to the assertions made in pleading certain defenses for plaintiff in error,—one in regard to a condition which he states accompanied his signature to the bond, and the non-compliance with or non-fulfillment of such condition, and his consequent non-liability; and in close connection with this is another question relating to the ratification, by one of the apparent sureties, of a signature, which had been written by some one else, and, it is contended, without authority. In an action against the sureties and on this same bond, and in which the plaintiff was a defendant, he interposed like defenses, and in an error proceeding to this court it was determined: "(1.) If a bond in form a joint obligation is signed by a surety on condition that others are to become parties to the instrument in the same capacity, and delivery of the bond occurs without a compliance with the condition, the instrument is ineffective as to the party who so signed it, unless the obligee, prior to the delivery, was not apprised of the condition, or the signer, subsequent to execution of the bond, waived the condition.

(2.) If, when delivery of such a bond is made, there appears on its face that which discloses or suggests an infirmity or irregularity relative to one of the requisite signatures sufficient to cast the duty of an inquiry on the obligee, and no investigation follows, the condition and its lack of fulfillment may be potent matter of defense for the party who signed the bond conditionally in an action thereon. (3.) A surety may insist on a compliance with the plain import of his contract, inclusive, in a case like the present, of the condition which accompanied his signature; and, where the condition exacted the signature to the instrument of another party, it will not be satisfied with a subsequent ratification of the signature which had been at the time of the execution thereof written on the paper by an unauthorized person." (*Middleboro Nat. Bank v. Richards*, 55 Neb. 682.) The rules of law then announced are applicable in the case at bar, and must govern on the points covered by them.

Of the inquiries in evidence were two which are involved in the consideration of the case at the present time, viz., did the plaintiff in error, when he signed the bond, do so conditionally? And did John Epeneter, whose name appeared in the body of and was attached to the bond as a surety, authorize the party who wrote the name "John Epeneter" as a signature on the bond so to do and for him? Relative to each of these questions there was a direct and sharp conflict in the evidence, and they were material issues of the litigation, hence were matters to be submitted to and determined by the jury impaneled to try the issues of fact. The court instructed the jury: "Under the pleadings and evidence in this case the plaintiff is entitled to recover of the defendants John H. Hulbert, James Morton, and Albert Foll the sum of $1,194.56, and such will be your verdict;" also submitted to it two special interrogatories as follows: "(1.) Do the jury find from the evidence that James Morton, at the time he signed the bond as surety, stated to James Richards that he would sign

the same only upon condition that in case the other persons, or any one of them, named in the body of the bond as sureties should not all so sign the same, said bond should be returned and delivered up to him, or words to that effect? (2.) Did John Epeneter, before he left for Europe, authorize his son, Oscar E. Epeneter, to sign his name as surety to said bond for him?" And instructed further in regard to the special question that "In answering the first interrogatory the jury will bear in mind that the burden of proof is upon the defendant James Morton to establish to the satisfaction of the jury by a preponderance of the evidence that he did sign the said bond upon the condition named. And in answering the second interrogatory the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that the said John Epeneter did authorize his son to sign his name to said bond." Also in regard to the direction to return a verdict for plaintiff in connection with the special interrogatories, as follows: "The court gives the jury further instructions in this case which are to govern the jury in answering two special interrogatories submitted to the jury; and the court specially instructs the jury that the fact that the court directs the jury to find for the plaintiff is in nowise to influence the jury in determining what answers ought to be given to such special interrogatories." The general direction to return a verdict for the party indicated was erroneous for the reason that there were material issues, as we have seen, as to which there was a conflict in the evidence. On these points the judge should have expressed no opinion. He should have avoided it. What he did do was to make more than an objectionable comment on the evidence relative to these matters; it was a decision of them, and that decision was in clear terms placed before the jury. There was a withdrawal from the consideration of the jury matters of fact which it was an imperative duty to submit to it. This was an invasion of the province of the jury. There was also a direct expression of

the opinion of the judge on litigated questions in respect to which the evidence was conflicting. This was not proper. The fact that the judge further instructed the jury as to these questions did not cure the error, nor did the instruction that the fact that he had directed a verdict for plaintiff was in nowise to influence the jury in determining from the evidence the answers to be given to the special interrogatories relieve the situation. Standing alone the direction of the verdict was wholly unwarranted and prejudicial, and cannot be upheld. The opinion of the trial judge has great weight with a jury, and properly so. The jury in this case may have, in answering the special queries, been influenced by the opinion of the judge as stated in the direction for a verdict, or it may have followed the instruction not to be influenced. We cannot determine which. The answers to the interrogatories were such as made the special findings agree with the verdict, which last was as directed. The direction had for its basis the assumption or conclusion that certain disputed facts actually existed, and it was error to so state, and then submit the question of their existence or non-existence. Whether the jury followed the plain indications furnished it by the opinion embodied in the direction, or gave ear to and acted according to the other and further advice given to them by a portion at least of which it was sought to rob the direction of some of its significance, is not ascertainable. (*State v. Bartley*, 56 Neb. 810.) It follows that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN H. YAGER V. EXCHANGE NATIONAL BANK OF HASTINGS.

FILED JANUARY 5, 1899. No. 10393.

Verdict Insufficient in Amount: DEED TO LAND AS SECURITY: SALE BY GRANTEE: ACCOUNTING. Under the pleadings and evidence the plaintiff, for whom there was a verdict, was entitled to recover, if at all, a greater sum than was awarded him.

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

Capps & Stevens, for plaintiff in error.

Tibbets Bros., Morey & Ferris, contra.

HARRISON, C. J.

There was asserted in the pleading for the plaintiff in this action, and it was one of the issues for trial, that a deed of real estate which had been by him executed and delivered to an officer of the defendant bank was in effect a mortgage, and to secure the payment of an indebtedness due the bank. It was also asserted that in the transaction certain moneys had been received by the bank which should have been accounted for, and paid to plaintiff, and of the performance of such duty there had been a neglect and refusal. In the answer of the bank it was asserted that the conveyance of the real estate was a deed absolute, and to the grantee named therein, and without reference to the bank or its rights, except that the grantee named in the deed was to dispose of the land and pay certain of the indebtedness of the grantor to said bank; that this was to be done was pleaded as embodied in a written agreement in relation to the transfer of the real estate which it was stated was of existence between the, at least nominal, parties thereto. It was stated in the reply that the recognition of this agreement by the plaintiff, if any, was procured or induced by fraud,

This is the second appearance of the case in this court, and in the opinion rendered at the former hearing appears a somewhat more extended statement of the matters in litigation. To this statement we refer for further particulars. For opinion see *Yager v. Exchange Nat. Bank of Hastings*, 52 Neb. 321. At the former appearance of the cause in this court it was complained that the issues were of such nature that a jury trial could be demanded as a matter of right, and that it had been denied in the district court. It was determined that the contention was right, and the judgment was reversed and the cause remanded. When again pending in the district court there was a trial before a jury, which returned a verdict for the plaintiff, allowed him the sum of one dollar, and in accordance with the verdict he was given judgment for the amount named.

In this error proceeding the plaintiff contends that the verdict was insufficient in amount and within no view of the evidence, and supported thereby, could there be a verdict in his favor, and yet for no greater sum than one dollar. In a case such as this, when the amount of recovery awarded by the verdict is too small, it may call for a reversal of the judgment. (Code of Civil Procedure, sec. 314; *McDonald v. Aufdengarten*, 41 Neb. 40; *Ellsworth v. City of Fairbury*, 41 Neb. 881; *First Nat. Bank of Dorchester v. Smith*, 39 Neb. 90.)

Elemental of a verdict for the plaintiff in this action was a determination that the transaction from which the action originated was one of security to the bank for the payment to it of the indebtedness of the adverse party. It is asserted in argument for the defendant that the verdict was in reality a finding for the bank, and an ineffectual attempt to make the bank liable for the costs, but that it must be treated as what in terms and in substance it was,—a finding favorable to the plaintiff. After some arguments in answer to points discussed in the brief of plaintiff, counsel for defendant have discussed certain matters in the briefs filed, and in the oral argu-

ment, and produce what it is claimed are valid reasons why there was no error, or none that was prejudicial to the complaining party, in that the jury did not return a verdict for a larger amount. We have carefully considered all these arguments in connection with the pleadings and evidence and are forced to conclude that we cannot approve them. Within the issues and evidence presented in the record before us there is sufficient to sustain a verdict for the plaintiff, and it should, under the evidence now in the record, have been for a larger sum than it was.

There are other points presented in the briefs, but we do not think it necessary to discuss them at this time. It follows that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

ROSA LEVY ET AL. V. SOUTH OMAHA SAVINGS BANK.

FILED JANUARY 5, 1899. No. 8606.

Joint Assignments of Error: REVIEW. Joint assignments of error in a petition in error which are not good as to all persons who join must be overruled.

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

A. S. Churchill and *Lane & Murdock*, for plaintiffs in error.

W. W. Morsman, contra.

HARRISON, C. J.

In an action for the foreclosure of a real estate mortgage a decree was rendered for the plaintiff, and the defendants have presented the cause to this court for review. In the district court there were answers for but

two of the now plaintiffs in error, and as to the one for whom there was no answer the decree must be taken as confessed and entirely proper. One of the motions for a new trial was jointly for the non-answering party and one of the others, and the petition in error is jointly by all three plaintiffs in error. One of the parties had not answered, had raised no issues, and could not question the decree. The petition in error must necessarily be overruled as to him, and this being true, it is unavailable to any of the parties who joined in it. If two or more persons join in a petition in error and it is not good as to all, it will be overruled. (*Shabata v. Johnston*, 53 Neb. 12, 73 N. W. Rep. 278; *Small v. Sandall*, 45 Neb. 306, 63 N. W. Rep. 824; *Harold v. Moline, Milburn & Stoddard Co.*, 45 Neb. 618, 63 N. W. Rep. 929; *Gordon v. Little*, 41 Neb. 250, 59 N. W. Rep. 783; *Omaha Fair & Exposition Ass'n v. Missouri P. R. Co.*, 42 Neb. 105.) It follows that the judgment must be

AFFIRMED.

CHARLES C. GEORGE, ADMINISTRATOR, ET AL., APPELLEES, v. DANIEL KENISTON ET AL., APPELLANTS.

FILED JANUARY 5, 1899. No. 8620.

1. **Mortgage Foreclosure:** MASTER COMMISSIONER: OATH. The statute does not require that a master commissioner appointed to make a mortgage foreclosure sale shall take, subscribe, and file an oath. *Northwestern Mutual Life Ins. Co. v. Mulvihill*, 53 Neb. 538, followed.

2. ———: ———: APPRAISERS: OATH. A master commissioner appointed to make a judicial sale has authority to administer the oath to the appraisers. (*Supra.*)

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

Gregory, Day & Day, for appellants.

Wharton & Baird, contra.

NORVAL, J.

This is an appeal from an order confirming a sale of real estate made by a special master commissioner in pursuance of a decree of foreclosure of a mortgage.

The defendants below and appellants urge in the briefs these grounds for reversal: (1.) The special master commissioner did not qualify by taking the oath of office. (2.) The appraisers were never sworn to make the appraisement as required by law, in that the oath was administered by the special master commissioner. (3.) The appraisement was so grossly inadequate as to amount to a fraud. In the briefs it is conceded that this case is on all fours with the *Northwestern Mutual Life Ins. Co. v. Mulvihill*, 53 Neb. 538, and as all the objections to the appraisement and sale therein were decided adversely to the contention of these defendants, the order from which this appeal was taken is accordingly

AFFIRMED.

HENRY T. CLARKE V. NEBRASKA NATIONAL BANK.

FILED JANUARY 5, 1899. No. 8590.

1. **Proceeding in Aid of Execution:** INSUFFICIENT AFFIDAVIT: VACATING ORDER. An order for the examination of a judgment debtor and his debtors in aid of execution in pursuance of sections 534 and 538 of the Code of Civil Procedure, will be vacated when procured solely on an affidavit wherein the averments are upon information and belief, especially when the sources of the information and the grounds of the affiant's belief are not disclosed.
2. ———: AFFIDAVIT. The facts in an affidavit for such an order should be set forth by positive averments, and not upon information and belief.

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

John L. Webster, for plaintiff in error.

Warren Switzler, *contra.*

NORVAL, J.

An opinion was filed herein at the September term, 1896, denying a motion to dismiss made on the ground that the order sought to be reviewed was not a final order within the meaning of section 581 of the Code of Civil Procedure. (*Clarke v. Nebraska Nat. Bank*, 49 Neb. 800.) This submission is upon the merits. The Nebraska National Bank, on April 10, 1896, obtained a judgment in the district court of Douglas county against Henry T. Clarke and William E. Clarke for $12,843.75, besides costs. On April 11, 1896, an execution was issued thereon, which was returned by the sheriff wholly unsatisfied. During the same month and year an alias execution was issued on said judgment, and while the same remained in the hands of the sheriff wholly unsatisfied there was filed with the clerk of the court below the affidavit of Lewis S. Reed, the cashier of said bank, to institute proceedings in aid of execution. This affidavit is entitled in the cause in which the judgment was entered, and, after setting forth the facts already narrated, continues thus: "Affiant further says that said defendants have not personal or real property subject to levy or execution sufficient to satisfy the said judgment. Affiant further says that the said defendants are residents of Douglas county, Nebraska, and that said defendant Henry T. Clarke has property, as affiant believes and has reason to believe, which he unjustly refuses to apply upon said judgment. Affiant further says that he believes, and has reason to believe, that the First National Bank of Omaha, * * * John T. Clarke, and A. M. Clarke, and each of them, have property of the judgment debtor, Henry T. Clarke, and are indebted to said judgment debtor Henry T. Clarke, and further affiant sayeth not." The district court on the same day made an order requiring Henry T. Clarke and the persons and corporations named in the affidavit to appear at a time and place designated and make answer under oath to

all such questions as should be propounded to them relative to the property of said Henry T. Clarke. The latter moved to vacate the said order for examination, on the ground that the affidavit therefor was insufficient to justify the said order, which motion was denied, and this ruling is now before us for review.

The affidavit of Lewis S. Reed is assailed upon three grounds, only one of which will be noticed, namely, that the averments therein having been made upon information and belief without disclosing the sources of the affiant's information or the grounds for his belief, render the affidavit fatally defective. The proceeding below was instituted under sections 532-549 of the Code of Civil Procedure. Sections 533, 534, and 538 of said Code read as follows:

"Sec. 533. When an execution against the property of a judgment debtor, or one of the several debtors in the same judgment, is issued to the sheriff of a county where he resides, or, if he do not reside in the state, to the sheriff of the county where the judgment was rendered, or a transcript of a justice's judgment has been filed, is returned unsatisfied in whole or in part, the judgment creditor is entitled to an order from a probate judge or a judge of the district court of the county to which the execution was issued, requiring such debtor to appear and answer concerning his property, before such judge, or referee appointed by such judge, at a time and place specified in such order, within the county to which the execution was issued.

"Sec. 534. After the issuing of an execution against property, and upon proof by affidavit of the judgment creditor or otherwise, to the satisfaction of the district court, or a judge thereof, or a probate judge of the county in which the order may be served, that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by order, require the judgment debtor to appear at a time and place in said county to answer con-

cerning the same. And such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are prescribed in this chapter."

"Sec. 538. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear, at a specified time and place, within the county in which such person or corporation may be served with the order to answer; and answer concerning the same. The judge may also, in his discretion, require notice of such proceeding to be given to any party in the action in such manner as may seem to him proper."

These sections were adopted by the territorial legislature of 1858, and have remained upon the statute book until the present time, although in the various published statutes section 534 has not always been printed the same. In the Revised Statutes of 1866 and the several editions of the Compiled Statutes said section is printed to read "such court or judge may by order require the judgment creditor to appear," etc., while in the Session Laws of 1859 (p. 188, sec. 474), the year said section was enacted as a law, and also in the General Statutes of 1873, the section is published precisely as quoted above. The original enrolled bill on file in the office of the secretary of state we have not examined. Manifestly the legislature intended to provide for the examination of the judgment debtor, and not his creditor, and for the purpose of the present investigation we shall so construe the section.

It is insisted by counsel for the bank that no affidavit was necessary to obtain an order for the examination of Henry T. Clarke, since one execution which had been

issued on the judgment had been returned unsatisfied. This argument is based upon the wording of section 533, which provides for the examination of a judgment debtor when an execution against his property has been returned unsatisfied in whole or in part, and contains no expression, as is found in sections 534 and 538, that the order for examination may be issued after satisfactory proof "by affidavit of the judgment creditor or otherwise" or "by affidavit [of the party], or otherwise." In our view it is unnecessary to determine in this cause whether the order requiring the debtor to appear and make disclosure must be based upon competent proof in the form of an affidavit or other testimony, because it is very evident that this proceeding was not instituted under said section, but under sections 534 and 538 of said Code. The last section, it will be observed, relates to the examination of the judgment debtor's debtor, and section 534 makes provision for the examination of the judgment debtor when execution has been issued and no return thereof has been made. Section 533 authorizes the making of the order only after the return of the execution in whole or in part unsatisfied, and section 534 allows the order to be issued where no return of the execution has been made. Had the bank desired to proceed under the former section, no alias execution should have been taken out, but having caused it to issue, it must comply with the provisions contained in section 534, which in clear and unmistakable terms require that the order for examination must be made upon proof by affidavit or otherwise, to the satisfaction of the court or judge, that the judgment debtor has property which he unjustly refuses to apply on the judgment.

The order for examination refers to the affidavit of Lewis S. Reed, and makes the same a part thereof by such reference, and it not being disclosed from the face of such order, or evidence *aliunde*, that it was predicated upon evidence other than said affidavit, no other inference is permissible than that the affidavit, and nothing

else, was the foundation of the proceeding, and that the order of examination was based thereon.

We will now consider the sufficiency of the affidavit. It cannot escape observation that more than one of the material averments therein are not sworn to positively, but are in express terms made upon the mere belief of the affiant. Then it is not alleged as a fact that Henry T. Clarke has property which he unjustly refuses to apply on the judgment, but merely "as affiant believes, and has reason to believe," and in the same manner it is stated that the several persons and corporations named in the affidavit have property of the judgment debtor or are indebted to them. At no place in the affidavit is the source of the information from which the affiant formed his belief of the matters alleged, nor is a single fact alleged from which it could be inferred that Clarke has property which he unjustly refused to have applied on the judgment in question, or that any one of the persons or corporations designated in the affidavit is his debtor. The statute does not say that the order for examination may issue upon an affidavit made upon information and belief, but before the order can go, it is required to be established to the satisfaction of the court or judge by affidavit of the judgment creditor or otherwise that the statutory grounds exist for the issuance of the order. An affidavit made upon information and belief merely, or upon the belief of the affiant, does not meet the requirements of sections 534 and 538. This view is strengthened by the consideration of section 244 of the Code of Civil Procedure relating to the issuance of summons in garnishment. That section expressly provides that the summons shall issue when an affidavit is filed by the execution creditor, his agent or attorney, stating "that he has good reason to and does believe that any person or corporation (naming them) have property of and are indebted to the judgment debtor." Under this section mere belief is all that is required of the affiant. (*Burnham v. Doolittle*, 14 Neb. 214.) Had the legislature

intended that an order requiring an examination of a judgment debtor may issue upon an affidavit made upon the belief of affiant, doubtless the statute in express terms would have so provided, especially as the law-making body was careful to insert a provision in section 244 of said Code authorizing an affidavit to be made thereunder upon belief, or when the affiant entertains good reason to believe his averments. In other jurisdictions it has been decided that an affidavit for attachment is insufficient when made on information and belief. (*Dunley v. Schwartz*, 17 O. St. 640; *Garner v. White*, 23 O. St. 192; *Archer v. Claflin*, 31 Ill. 306; *Wilson v. Arnold*, 5 Mich. 98; *Pierse v. Smith*, 1 Minn. 82; *Neal v. Gordon*, 60 Ga. 112; *Greene v. Tripp*, 11 R. I. 424; *Steuben County Bank v. Alberger*, 78 N. Y. 252; *Bray v. McClury*, 55 Mo. 128.) It has been ruled that in an affidavit of merits in support of a motion to open a default the averments should be positive, and not upon information and belief. (*Hitchcock v. Herzer*, 90 Ill. 543; *Brown v. Cowee*, 2 Doug. [Mich.] 432; *Adamson v. Wood*, 5 Blackf. [Ind.] 448; *Jenkins v. Gamewell Fire Alarm Telegraph Co.*, 31 Pac. Rep. [Cal.] 570.) An application for a change of venue based solely on an affidavit in which the statements therein are made upon belief is fatally defective. (*McCormick Harvesting Machine Co. v. Hayes*, 53 Pac. Rep. [Kan.] 70.) And the same rule ought to and does apply to an affidavit made under section 534 of the Code of Civil Procedure. It requires proof to be made to the satisfaction of the court or judge before the order for examination of the judgment debtor shall issue. How can a court or judge be satisfied that a "judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment" upon mere statements contained in an affidavit made upon belief? If a witness should in an oral examination testify to matters upon information and belief, his evidence would be disregarded, because it would prove nothing, and the same rule applies to affidavits made upon information and belief, unless

the statute clearly permits them to be so made, at least, where the grounds of the belief and the source of the information are not stated in the affidavit. In the language employed by the court in the opinion in *Mowry v. Sanborn*, 65 N. Y. 581: "It may, as a general rule, be safely affirmed that, in the sense of the law, a general assertion of a fact in an affidavit upon information and belief proves nothing. A witness would not be allowed on the trial of a cause, in any court, to give evidence of a fact which he only knew from information derived from another, or which he simply believed to be true. The commonest process in our courts designed to affect the property or person of a party, which do not issue of course, cannot be properly obtained upon sworn statements made upon information and belief only. And in cases of substituted service of any kind of process an order which in some cases may, by virtue of some statute, be obtained upon proof made upon information and belief, the sources of information and the grounds of belief must be specifically set forth to enable the judicial mind to determine whether the information and belief is well or ill founded." The provisions of the Code of Civil Procedure of the state of New York relating to proceeding in aid of execution are quite like those in this state. There the statute authorizes the order requiring the judgment debtor to appear and be examined to be issued "upon proof, by affidavit, or other competent written evidence, that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment." (2 Stover's Annotated Code, sec. 2436.) It has been frequently decided that an affidavit under said provision must allege the facts positively, and if stated upon information and belief without divulging the source of information the affidavit is insufficient. (Bradner, Supplementary Proceedings, pp. 38, 80; *Bowery Bank of New York v. Widmayer*, 9 N. Y. Supp. 629; *Kahle v. Muller*, 11 N. Y. Supp. 26; *Leonard v. Bowman*, 15 N. Y. Supp. 822; *In re Leslie*, 44 N. Y. Supp. 1103; *Pierce v. Parish*,

50 N. Y. Supp. 735; *Netzel v. Mulford*, 59 How. Pr. [N. Y.] 452; *Day v. Lee*, 52 How. Pr. [N. Y.] 95; *Manken v. Pape*, 65 How. Pr. [N. Y.] 453.)

Counsel for the bank have cited four decisions to sustain the sufficiency of the affidavit,—three from the state of New York, and the other by the supreme court of North Carolina,—which we will now notice.

Teft v. Epstein, 7 N. Y. Supp. 897, and *Grinnell v. Sherman*, 11 N. Y. Supp. 682, held that an affidavit on information and belief was sufficient, but those cases were overruled on that point by the opinion in *Re Leslie*, 44 N. Y. Supp. 1103.

Miller v. Adams, 52 N. Y. 409, contains language to the effect that an affidavit upon information and belief was sufficient whereon to base an order for an examination of a judgment debtor's debtor, but what is said in the opinion on that subject is mere *obiter*, and the court in the opinion expressly stated that "as it is unnecessary to determine this question in this case, I shall not discuss it, nor is it passed upon by the court."

In the North Carolina case (*National Bank of Westminster v. Burns*, 13 S. E. Rep. 871) the affidavit made in aid of execution was substantially like the one at bar, and was held good. It was not assailed on the ground that the averments were upon information and belief, nor did the court discuss or refer to that feature of the affidavit.

Upon principle, as well as authority, we are constrained to hold that the affidavit of Lewis S. Reed was so defective as to make the order based thereon erroneous. The court below erred in refusing to vacate the order for the examination of the judgment debtor and his alleged debtors.

REVERSED.

EDWARDS & BRADFORD LUMBER COMPANY, APPELLEE, V. MURRAY RANK ET AL., APPELLEES, AND OTTO GAS-ENGINE WORKS, APPELLANT.

FILED JANUARY 5, 1899. No. 8604.

Fixtures: CHATTEL MORTGAGES: ENGINES: MECHANICS' LIENS. Where one purchases an engine with a view that it shall be placed in a flouring mill of which he is the owner, to propel the machinery therein, and he executes a chattel mortgage on such engine to secure the payment of a portion of the purchase price, he thereby evinces his intention that the engine shall retain its status as personalty, even though physically attached to the freehold by such owner, and it will be so regarded by the courts whenever the rights of innocent third persons will not be prejudiced.

APPEAL from the district court of Dakota county. Heard below before NORRIS, J. *Reversed.*

The opinion contains a statement of the case.

Powers & Hays, E. D. Wigton, and *Wilbra Coleman,* for appellant:

The engine never became a fixture or part of the realty. It was not the intention of the parties that it should. This intention governs. The giving of the chattel mortgage and therein authorizing the mortgagee to take possession of the property and sell same upon default, or to take possession at any time the mortgagees may deem themselves insecure, as was done in this case, evidences the intention of the parties to treat it as personalty. This agreement to hold it as personal property is not only binding upon the parties thereto, but also upon all who acquire prior or subsequent interest in the realty. (*Tifft v. Horton,* 53 N. Y. 382; *Binkley v. Forkner,* 117 Ind. 176; *Ford v. Cobb,* 20 N. Y. 344; *Campbell v. Roddy,* 44 N. J. Eq. 244; *Buzzell v. Cummings,* 18 Atl. Rep. [Vt.] 93; *Eaves v. Estes,* 10 Kan. 314; *Crippen v. Morrison,* 13 Mich. 30; *Myrick v. Bill,* 3 Dak. 284; *Rowland v. Anderson,* 33 Kan. 264; *Burrill v. Wilcox Lumber Co.,* 32 N. W. Rep.

[Mich.] 824; *Simons v. Pierce*, 16 O. St. 215; *Sword v. Low*, 13 N. E. Rep. [Ill.] 826; *Sisson v. Hibbard*, 75 N. Y. 542; *Keeler v. Keeler*, 31 N. J. Eq. 181; *Williamson v. New Jersey S. R. Co.*, 29 N. J. Eq. 311; *Sturgis v. Warner*, 11 Vt. 433; *Manwaring v. Jenison*, 61 Mich. 117; *Tibbetts v. Moore*, 23 Cal. 208; *First Nat. Bank v. Elmore*, 52 Ia. 541; *Sowden v. Craig*, 26 Ia. 156; *Miller v. Wilson*, 33 N. W. Rep. [Ia.] 128; *Carpenter v. Allen*, 150 Mass. 281; *Smith v. Waggoner*, 50 Wis. 155; *Malott v. Price*, 109 Ind. 22; *Denhan v. Sankey*, 38 Ia. 269; *Wolford v. Baxter*, 33 Minn. 12; *Grand Island Banking Co. v. Frey*, 25 Neb. 66.)

M. B. Slocum, Jay & Welty, J. T. Spencer, J. Fowler, R. E. Evans, and *W. P. Warner, contra:*

The engine is a fixture and will pass with the realty. (*Helms v. Gilroy*, 26 Pac. Rep. [Ore.] 851; *Lyle v. Palmer*, 3 N. W. Rep. [Mich.] 921; *Howlett v. Tuttle*, 24 Pac. Rep. [Colo.] 921; *Taylor v. Collins*, 8 N. W. Rep. [Wis.] 22; *Stillman v. Flenniken*, 10 N. W. Rep. [Ia.] 842; *Capehart v. Foster*, 63 N. W. Rep. [Minn.] 257; *Fletcher v. Kelly*, 55 N. W. Rep. [Ia.] 474; *Gray v. Holdship*, 17 S. & R. [Pa.] 413; *Cooper v. Cleghorn*, 50 Wis. 113; *Franklin v. Moulton*, 5 Wis. 1; *Great Western Mfg. Co. v. Hunter*, 15 Neb. 32.)

NORVAL, J.

This was a suit to foreclose a mechanic's lien for materials sold and delivered by the Edwards & Bradford Lumber Company, a corporation, to Murray Rank for the erection of a steam flouring mill upon certain real estate in South Sioux City, of which Rank was the owner of the undivided two-thirds and the estate of J. M. Moon, deceased, was the owner of the other one-third. Among those made parties defendants were the holders of mechanics' liens on the premises, and J. P. Twohig, and the Dubuque Turbine Roller Mill Company, who owned real estate mortgages thereon. Answers and cross-petitions were filed on behalf of said lienors and mortgagees.

Subsequently the Otto Gas-Engine Works intervened and set up a chattel mortgage on the engine in the mill, executed by Rank and others to secure the payment of the purchase price thereof. Upon the hearing a decree was entered allowing the Moon estate a one-third interest in the realty in the unimproved condition, dismissing the claim of the intervener, awarding foreclosure of the various mechanics' liens and real estate mortgages, and directing a sale of the property subject to the interest of the Moon estate, including the engine embraced in the intervener's chattel mortgage. The Otto Gas-Engine Works prosecutes this appeal.

There is no controversy as to the facts. The several mechanics' liens and real estate mortgages are valid, and the decree foreclosing them is correct. It is disclosed by the written stipulation of the parties that on July 15, 1893, and while the mill was being constructed, Murray Rank and those interested with him in the building of the mill entered into a written contract with Schleicher, Schumen & Co. for the purchase from the latter, to be used in operating said mill, the engine in controversy and the fixtures thereto belonging, for the sum of $1,800, of which amount $450 were to be deposited by the purchasers in the Citizens State Bank of South Sioux City, to be held by it in trust until the conditions of said contract were complied with, and the remainder of the consideration was to be divided into three notes of $450 each, due in six, twelve, and fifteen months respectively from the date of the delivery of the engine. The purchasers were to be permitted to receive the engine on thirty days' trial, and if found satisfactory upon such trial the money so deposited was to be forwarded to Schleicher, Schumen & Co. and the purchasers were to execute their promissory notes as aforesaid. The engine was shipped and received as agreed, and having given satisfaction upon the trial thereof on October 26, 1893, the $450 were paid as agreed and the purchasers also executed and delivered to the vendor their three notes of $450 each, and secured

the payment thereof by a chattel mortgage on the engine, which was duly filed for record on November 2, 1893, in Dakota county. The notes were, before their maturity, for a valuable consideration sold and indorsed to the intervener, the Otto Gas-Engine Works, and no part thereof has been paid. The engine was placed in an outside building upon a suitable brick foundation imbedded in the ground, being securely attached to said foundation by bolts. The tank was set upon a similar foundation of lighter construction, and the forty feet of gas pipe was buried under ground. The engine can be removed without substantial injury to the realty.

The vendors and purchasers alike treated the engine as personalty, and no innocent third parties will be prejudiced by the court holding that the engine did not become a fixture and a part of the real estate. The intention of the parties is a controlling consideration in determining whether the engine was personalty or a fixture. As was well said by IRVINE, C., in the course of his opinion upon the same subject in *Arlington Mill & Elevator Co. v. Yates*, 57 Neb. 286: "There is nothing in the nature of such machinery to stamp it as realty under all circumstances. It may become so or not according to circumstances. If a man sells bricks or nails or shingles for the purpose of erecting a house, these cannot in their specific character be continued, after such use, as personalty, because their very nature forbids such a result; but when an article is of an ambiguous character, such that it may either remain personalty or become attached to the freehold, much depends on the intention of the parties. This is especially true of trade fixtures and of machinery for trade purposes, where they may be removed without substantially impairing, not the property, taking its value with them remaining, but the property considered separately. There it is held that where the vendor and vendee agree that they shall remain personal property they do so, unless perhaps where innocent purchasers have acquired rights in reliance upon their apparent charac-

ter. From the large number of cases illustrating this principle there may be cited the following, where the contest was between a vendor seeking to enforce the purchase price against the articles as personalty, and an execution purchaser of the real estate: *Sisson v. Hibbard*, 75 N. Y. 542; *Manwaring v. Jenison*, 61 Mich. 117; *Sword v. Low*, 122 Ill. 487."

In *Tifft v. Horton*, 53 N. Y. 380, the court gave expression to the following: "It is well settled that chattels may be annexed to real estate and still retain their character as personal property. * * * It may in this case be conceded that if there were no fact in it but the placing upon the premises of the engine and boilers in the manner in which they were attached thereto, they would have become fixtures, and would pass as a part of the realty. But the agreement of the then owner of the land and the plaintiff is express, that they should be and remain personal property until the notes given therefor were paid, and by the same agreement power was given to the plaintiff to enter upon the premises in certain contingencies and to take and carry them away. While there is no doubt but that the intention of the owner of the land was that the engine and boilers should ultimately become a part of the realty and be permanently affixed to it, this was subordinate to the prior intention expressed by the agreement. That fully shows her intention and the intention of the plaintiff, that the act of annexing them to the freehold should not change or take away the character of them as chattels until the price of them had been fully paid. * * * But it is contended that where in the solution of this question the intention is a criterion, it must be the intention of all those who are interested in the lands, and that here the defendants, prior mortgagees of the real estate, were interested and have not expressed nor shown such intention. It is not to be denied that, as a general rule, all fixtures put upon the land by the owner thereof, whether before or after the execution of a mortgage upon it, become subject to

the lien thereof. Yet I do not think that the prior mortgagee of the realty can interpose before foreclosure and sale to prevent the carrying out of such an agreement as that in this case. Had the mortgagees taken their mortgage upon the lands, after the boilers and engine had been placed thereon under this agreement, they would have had no right to prevent the removal of them by the plaintiff on the happening of the contingencies contemplated by it. The rights of a subsequent mortgagee are no greater than those of a subsequent grantee, and he, it is held, cannot claim the chattels thus annexed, and must seek his remedy for their removal by virtue of such an agreement upon the covenants in his conveyance of the lands. A prior mortgagee, who certainly has not been induced to enter into his relation to the lands by the presence thereon of the chattels in dispute subsequently annexed thereto, has no greater right than a subsequent mortgagee. Neither could claim as subject to the lien of his mortgage personal property brought on to the premises with permission of the owner of the lands and not at all affixed thereto.. Nor can either claim personal property as so subject from the mere fact of the affixing where, by the express agreement of the owner of the fee and the owner of the chattel, its character as personal property was not to be changed, but was to continue, and it to be subject to the right of removal by the owner of the chattel on failure of performance of conditions."

The following authorities fully sustain the doctrine that the engine in question did not become a part of the real estate, and that the chattel mortgage given thereon to secure the payment of the balance of the purchase-money is valid and binding: *Ford v. Cobb*, 20 N. Y. 344; *Eaves v. Estes*, 10 Kan. 314; *Crippen v. Morrison*, 13 Mich. 24; *Buzzell v. Cummings*, 18 Atl. Rep. [Vt.] 93; *Myrick v. Bill*, 3 Dak. 284; *Simmons v. Pierce*, 16 O. St. 215; *Sword v. Low*, 13 N. E. Rep. [Ill.] 826; *Tibbetts v. Moore*, 23 Cal. 208; *First Nat. Bank v. Elmore*, 52 Ia. 541; *Carpenter v. Walker*, 5 N. E. Rep. [Mass.] 160.

The decree, so far as it refuses the intervener a lien upon the engine and fixtures, is reversed and the cause is remanded to the court below to enter a decree foreclosing the chattel mortgage, giving the intervener the first and paramount lien on said engine.

REVERSED AND REMANDED.

BENJAMIN F. TROXELL, APPELLANT, V. WILLIAM J. STEVENS ET AL., APPELLEES.

FILED JANUARY 5, 1899. No. 8577.

1. **Deeds:** AFTER-ACQUIRED INTEREST. By virtue of section 51, chapter 73, Compiled Statutes, an after-acquired interest in real estate by a grantor inures to the benefit of the grantee when the deed purports to convey a greater interest or estate than the grantor owns at the time of the conveyance.

2. ———: ———. A grantee in a quitclaim deed takes only the grantor's existing interest, and the after-acquired title of his grantor in the property does not pass to him.

3. ———: ———: CANCELLATION OF CONVEYANCE. An after-acquired title does not inure to the benefit of the grantee, where the deed of conveyance under which he claims has been canceled and annulled by a decree of court.

4. **Action on Covenant:** EVICTION. An action cannot be maintained on a covenant of warranty of title, where it appears there has been no actual eviction or surrender of possession of the granted premises by reason of a paramount title.

5. **Occupying Claimants:** EVICTION: IMPROVEMENTS. A decree canceling a deed under which a grantee asserted title, the appointment of appraisers under the act for the relief of occupying claimants (Compiled Statutes, ch. 63) to assess the value of the lasting improvements of the grantee, and the confirmation of the report of the appraisers by the court, alone do not amount to an eviction, where the owner of the paramount title has neither elected to accept the value of the land nor to pay the occupant the value of his improvements, and the physical possession of the latter has not been disturbed.

6. **Deeds:** COVENANTS OF WARRANTY. Covenants of warranty in a deed for the conveyance of real estate, not broken when made, pass

with the title, even though the subsequent conveyances are by quitclaim deeds.

7. **Occupying Claimants:** IMPROVEMENTS: APPRAISEMENT: EVICTION. Where the appraisement has been made under said act, the unsuccessful occupant cannot be ousted of possession of the premises until the successful owner has elected to pay, and has paid, the appraised value of the improvements or elected to accept the value of the land, and the occupant has refused to pay the same.

8. ———: ———: SALE. The occupant may not have the land and improvements sold to pay the parties the value of their respective interests,—at least not until a time has been fixed by the court within which the successful owner may elect whether he will accept the value of the land without the improvements, or pay the value of the improvements, and he has refused to make such election.

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

Warren Switzler, for appellant.

H. L. Day, J. Q. Burgner, Meikle & Gaines, Silas Cobb, Bartlett, Baldrige & De Bord, W. H. De France, E. W. Simeral, William Simeral, Wright & Thomas, and *Montgomery & Hall, contra.*

NORVAL, J.

This is a suit by Benjamin F. Troxell to foreclose a mortgage on lot 1 of Troxell's subdivision of lot 3 of Geise's addition to the city of Omaha, executed by William Stevens, one of the defendants. Several judgment creditors of Stevens were made defendants, who appeared in the cause and set up their judgments. The Somerset Trust Company presented an answer and cross-petition, praying the foreclosure of a tax-sale certificate. William J. Stevens filed an answer, pleading a counterclaim for damages for breach of the covenant of warranty in a deed to the mortgaged premises made by plaintiff to Richard S. Maulsby, said Stevens' immediate grantor. Jennie E. Stevens answered, asserting a lien

upon the premises by reason of the assignment to her by said William J. Stevens of his rights and interests in a decree rendered in his favor under the statute in the case of Englebert against Troxell and others in the district court of Douglas county, for lasting improvements placed on the lots covered by the Troxell mortgage. Upon the trial the court below found, *inter alia*, that William J. Stevens had sustained damages by reason of the breach of plaintiff's covenant of warranty in the sum of $1,614.67, from which amount was deducted $1,342.71, due on the mortgage, and a decree was rendered against Troxell in favor of William J. Stevens for $271.96. The court also awarded Jennie E. Stevens a lien on the premises for lasting improvements in the sum of $1,613. There are other provisions in the decree which need not now be stated. Plaintiff has appealed. The sole controversy in this court is between Troxell and William J. and Jennie E. Stevens.

It is disclosed that one Francis Leon Englebert, a minor, was the former owner of the lot described in the mortgage, and while remaining such owner he executed a deed conveying the same and other real estate to one George E. Pritchett, who conveyed the property to Adolph Meyer. The latter sold and conveyed to John I. Reddick, who executed a deed to the premises to Troxell, the plaintiff and appellant herein. On November 10, 1887, by deed of general warranty he conveyed to one Richard S. Maulsby, who with covenant of warranty deeded the lot to Peter Ulrich, and the latter subsequently quitclaimed his interest in the property to his said grantor. Afterwards Maulsby executed a conveyance to the premises to William J. Stevens, and the latter subsequently gave the mortgage in suit. On August 17, 1893, William J. Stevens, by deed of quitclaim, conveyed said lot 1 to Jennie E. Stevens. On November 14, 1889, shortly after Francis Leon Englebert had reached his majority, he instituted in the district court of Douglas county a suit against said George E. Pritchett and the other persons

named, to whom the lot had been conveyed, down to and including William J. Stevens, to cancel and set aside his deed to Pritchett and the other conveyances, because of his minority at the time his deed was executed. The district court rendered a decree canceling all the deeds and ordered an appraisement of the real estate and lasting improvements, in accordance with the statute enacted for the benefit of occupying claimants. The appraisal was made in accordance with the decree, which the district court confirmed. Troxell prosecuted an appeal, and the decree was affirmed by this court. (*Englebert v. Troxell*, 40 Neb. 195.) Shortly after said decision, on May 7, 1894, said Francis Leon Englebert, by his attorney in fact, conveyed the mortgaged premises to one William A. Reddick, who on October 26 of the same year executed a deed for the same to Troxell. Subsequently the present suit was instituted in the court below.

It is argued on behalf of plaintiff that there has been no breach of his covenant of warranty, because he defended the title to the lot in the district court, as well as here on appeal, as he agreed to do by the covenant of his deed, and when defeated in the court of last resort he purchased the Englebert title, thereby preventing an ouster of William J. Stevens and his grantee, Jennie E. Stevens. Section 51, chapter 73, of the Compiled Statutes is invoked to support this line of argument, which section declares: "When a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor to the extent of that which the deed purports to convey, shall accrue to the benefit of the grantee; *Provided, however*, That such after-acquired interest shall not inure to the benefit of the original grantor, or his heirs or assigns, if the deed conveying said real estate was either a quitclaim or special warranty," etc. This piece of legislation makes an after-acquired interest in real estate by a grantor inure to the benefit of the grantee only, where the deed purports to convey a greater interest or estate

than the grantor at the time owned. If he merely conveys a present title or interest, then any title which he subsequently obtains to the property does not pass to the grantee. Manifestly the statute has no application where the transfer is by a deed of quitclaim. (*Pleasants v. Blodgett*, 39 Neb. 741.) If the provision quoted has any bearing on the present controversy it is obvious that it did not have the effect to vest in either William J. Stevens or Jennie E. Stevens the subsequently obtained interest of Englebert in the property, since all the conveyances through which they claimed title did not purport to transfer the fee. The record shows that Jennie E. Stevens asserts title through a quitclaim deed from William J. Stevens, and also that one Peter Ulrich, a grantor in one of the conveyances in his chain of title, on November 8, 1888, made a quitclaim deed to the lot to Maulsby, so that, under the statute, the after-obtained Englebert title did not reach to Jennie E. Stevens, or inure to her benefit. This after-acquired title did not pass either to her or William J. Stevens for another reason. All the deeds constituting their chain of title, beginning from the one to Pritchett and all the subsequent *mesne* conveyances down to and including the deed to William J. Stevens, were canceled and annulled by the decree in the case of *Englebert v. Troxell, supra*. The several deeds, therefore, were no longer in existence for the purpose of conveying, or supporting, title, and hence were wholly insufficient to transmit the after-acquired estate to the Stevenses. The deed subsequent to the decree in the case above mentioned from Englebert to Reddick, and from Reddick to Troxell, vested the paramount title in the latter, in whom, so far as this record shows, it still remains. The procuring of the Englebert title by this plaintiff was alone insufficient to defeat an action for a breach of his covenant of warranty. If plaintiff desires to invest the title to the lot in William J. Stevens and make good his covenant, he can effectuate such purpose by an appropriate conveyance.

It is insisted that the covenant has not been broken, inasmuch as neither William J. Stevens nor Jennie E. Stevens has been evicted by, nor have they surrendered possession of the premises to, the owner of the paramount title. This court is unalterably committed to the doctrine that no recovery can be had on the covenant of warranty unless there has been an actual eviction, surrender, or attorning by reason of the paramount title. (*Real v. Hollister*, 20 Neb. 112; *Cheney v. Straube*, 35 Neb. 521; *Troxell v. Johnson*, 52 Neb. 46; *Hampton v. Webster*, 56 Neb. 628.) The wisdom and soundness of this rule may well be doubted, but it has been so often announced and applied by this court as to become a settled rule of property, and should be adhered to by the court until the rule is changed by appropriate legislation. In the case in which we are dealing there is an entire failure of proof of actual eviction or surrender of possession. William J. Stevens or Jennie E. Stevens has been and now is in the actual occupancy of the lot. The owner of the paramount title since the decree in *Englebert v. Troxell* has asked neither of them to vacate the property or attorn to him. They have not pleaded an actual eviction or surrender, unless said decree amounts to that. The averments in the answer upon that subject follow: "That by virtue of the said paramount title of the said Francis Leon Englebert, and contrary to said deed and covenants of the deed as aforesaid, this defendant, after his entry into possession of said premises under his said deed of conveyance as aforesaid, was ousted and dispossessed of said premises and evicted from the same by due course of law, by virtue of certain proceedings duly instituted in the district court of Douglas county, state of Nebraska, wherein the said Francis Leon Englebert was plaintiff and Benjamin F. Troxell and others were defendants, wherein it was adjudged that the plaintiff herein, said Benjamin F. Troxell, did not have a good and sufficient title to said premises at the time of the said conveyance of said premises by him to the said

Richmond S. Maulsby. This defendant has therefore sustained damages by reason thereof in the sum of $1,500 and seven per cent interest thereon from December 10, 1888, together with the sum of $500, incurred as expenses by this defendant in defending against said suit of said Englebert as aforesaid, less the said sum of $1,000 paid by plaintiff thereon by means of his said payment of his said promissory note, as set out in his petition herein." Thus it will be seen the defendants plead the decree in the case of Englebert against Troxell as constituting an eviction, and the proofs make no stronger case against this plaintiff than is stated in the foregoing excerpt from the answer. The same decree was pleaded and proven in the case of Troxell against Johnson,—an action for breach of the covenant of warranty in the deed covering other property described in the conveyance heretofore mentioned from Troxell to Maulsby; and yet this court held that, as there had been no actual eviction or surrender of possession on account of the Englebert title, an action on Troxell's covenant of warranty would not lie. That decision controls the disposition to be made of this case on the branch we are now considering, except in one particular. In that case the reported decision does not show that appraisers were appointed under the occupying claimants act to appraise the lasting improvements and the value of the premises, while it is established by this record that such appraisement was made in conformity with the statute on the subject. And it is strenuously urged that those proceedings in the decree of *Englebert v. Troxell* are equivalent to an actual eviction or actual surrender to the owner of the superior title. In the light of the adjudications of this court we cannot so hold. It is true in *Englebert v. Troxell* the decree provided for the issuance of a writ of ouster, and the value of the real estate, as well as the value of the lasting improvements, were assessed by appraisers duly selected for that purpose. But no writ of restitution has ever been demanded by any owner of the Englebert title, nor

has such process ever issued. The physical possession of the premises by Stevens has never been disturbed. No election prior to this suit had ever been made by the owner of the paramount title to either accept the value of the land, or to pay Stevens the amount assessed for the improvements, as the statute relating to occupying claimants permitted him to do. Nor does the decree in the case of *Englebert v. Troxell* fix the time in which such election should be made. The owner of the paramount title may never avail himself of the benefit of the statute or disturb the occupant of the lot in his possession thereof. Had the owner of the Englebert title elected to accept the value of the land as found by the appraisers and approved by the court, and Stevens had paid the same, then these might be ground for an argument that there had been a technical eviction by the paramount title, although he remained in the physical occupancy of the premises. But this is not such a case. Stevens has not as yet lost the land. He or his grantee may never be dispossessed, and possession may ripen into a perfect title. Under the occupying claimant's act Stevens could not be ousted of possession until there had been an election to receive the value of the property or pay the value of the improvements and a compliance therewith; but as there has been no election and as Stevens could not be evicted until he had been paid for his improvements, it is obvious that the decree in *Englebert v. Troxell* does not constitute an eviction, or surrender to the paramount title; and hence a cause of action for breach of covenant of warranty has not yet accrued.

William J. Stevens cannot recover on the covenant of warranty for another reason. Prior to the bringing of this suit he executed and delivered a quitclaim deed to the premises to Jennie E. Stevens, thereby conveying to her any cause of action he may have for breach of covenant of warranty. The covenant in Troxell's deed was not broken when made. He at that time possessed title to the lot, which was perfect until Englebert dis-

affirmed his conveyance to Pritchett, which act of disaffirmance was subsequent to the making of the deed by Troxell to Maulsby. The rule is that covenants of warranty, in a deed for the conveyance of real estate, not broken when made, pass with the land, notwithstanding the subsequent conveyances are by quitclaim deeds. (*Walton v. Campbell*, 51 Neb. 788.) So in any view the decree allowing William J. Stevens damages for breach of covenant of warranty is erroneous.

We pass now to the consideration of the question whether Jennie E. Stevens is entitled to a decree for the sale of the premises to pay the value of the lasting improvements placed on the lot by her grantor. As heretofore stated, the value of the real estate without the improvements, and the value of the improvements alone, were appraised under chapter 63, Compiled Statutes, entitled "Occupying Claimants." The sections of said chapter which have a bearing on this branch of the case read as follows:

"Sec. 7. If upon the final hearing there shall be found a balance in favor of the occupant or unsuccessful claimants, the person proving the better title may either demand of the occupant or claimant the value of the real estate without improvements as shown by the appraisement, and tender a general warranty deed for the real estate in question to such occupant or claimant, or he may pay into court the balance so found due such occupant or claimant within such time as the court shall allow in its final decree.

"Sec. 8. If the successful claimant shall elect to pay and does pay to the occupant or claimant the balance found due him on the final hearing within such time as the court shall direct, then a writ of possession shall be issued in his favor against such occupant, or decree shall be entered against such unsuccessful claimant as the case may require.

"Sec. 9. If the successful claimant shall elect to receive the value of the real estate without improvements,

to be paid by the occupants or claimant within such time as the court shall direct, and shall tender a general warranty deed for such real estate to the occupant or claimant, and such occupant or claimant shall refuse or neglect to pay said sum of money to the successful claimant within the time allowed by the court for that purpose, then such successful claimant shall deposit with the clerk of the court the amount found due the occupant or claimant, and thereupon a writ of possession shall be issued in favor of such successful claimant, or decree shall be entered in his favor as the case shall require.

"Sec. 10. The occupant or claimant shall in no case be evicted from possession, or deprived of his right in the premises, except as provided in the two preceding sections, and in case the successful claimant shall neglect to elect to take said real estate with improvements, or to convey the same to the occupant or claimant within such time as the court shall direct, then decree shall be entered in favor of the occupant or claimant upon his payment into court the value of the real estate without improvement. Such decree shall have the effect to transfer and convey to such occupant or claimant the title and rights of the successful claimant."

By the provisions of said sections Englebert had the right to elect to demand from the occupant the value of the lot in question without the improvements as determined by the appraisers in the case of *Englebert v. Troxell*, and approved by the court, and tender a general warranty deed for the premises to such occupant, or pay the amount found by the appraisers for valuable and lasting improvements placed upon the lot; and in case he chose the second alternative and complied therewith within the time that should be named by the court, he was entitled to a writ to dispossess the occupant, or the rendition of a decree in his favor, as the nature of the case should suggest. Englebert had the option to either accept the assessed value of the land without the improvement or keep the lot; and Troxell, being the owner

of the paramount title, is subrogated to the rights of Englebert in the premises. The district court, in confirming the report of the appraisers in *Englebert v. Troxell*, did not fix, nor has it since fixed, a time within which the election should be made as the statute contemplated, and until such time has been designated and there has been a failure to elect within the period so granted, the occupant is in no position to demand that the premises be sold to satisfy the appraised value of the improvements. The owner of the paramount title is given the right of election, and until he has exercised that right, or the time has elapsed in which he may take such step, he is not in default, and manifestly it will be contrary to the spirit of the law that the lot should be sold to pay the value of the improvements. The owner of the paramount title, doubtless, might waive the value of the lot and by appropriate deed convey the title to the occupant, in which case the latter could not ask pay for improvements. The statute forbids that the occupant shall be dispossessed until he has been compensated for the value of the improvements. But in the present case the lien for the improvements is junior to the mortgage given by William J. Stevens and also the lien for taxes.

The decree of the district court in the present case is reversed and the cause remanded with instructions to enter a decree foreclosing plaintiff's mortgage, as well as the tax lien in favor of the Somerset Trust Company, giving the lien for taxes priority over the mortgage, and decree that William J. Stevens has no claim or interest in the property; that Jennie E. Stevens has a lien on the lot for the value of the lasting and valuable improvements placed thereon, as ascertained and found by the appraisers, and is entitled to retain the possession of the lot until said sum is paid, or the land is sold as provided by decree; that the plaintiff has the option to pay the value of the improvements at any time within sixty days after the entry of the decree, and upon the payment thereof to the clerk of the district court for

the use of Jennie E. Stevens all her right and claim for the possession of the land and improvements thereon shall be thereby extinguished, and the plaintiff shall immediately be let into possession of said property; or plaintiff may within said time elect to receive the value of the land without the improvements, and in case he do so and Jennie E. Stevens complies therewith by paying such value, plaintiff shall forthwith execute a deed of general warranty conveying said lot to her; or plaintiff, as a third alternative, may within said time execute and deliver such deed without demanding the value of the lot; and if said plaintiff shall decline to exercise any one of said options within the time specified, then, upon the motion of either of said plaintiff or Jennie E. Stevens, the district court will direct said land, with improvements thereon, to be sold as upon execution to the highest bidder for cash in hand, and upon the confirmation of such sale a deed shall be made to the purchaser for the property, which shall have the effect to vest in him all the right, title, estate, and interest of the said plaintiff and Jennie E. Stevens in said lot and improvements thereon, and said purchaser shall be let into the possession of the same. After paying costs of the suit, the remaining proceeds of the sale of the said land and improvements, after paying the amount found due on the mortgage and the tax lien of the said Somerset Trust Company, shall be paid to the plaintiff and Jennie E. Stevens in the proportion that the value of the improvements bears to the value of the land.

REVERSED AND REMANDED.

HATTIE W. BROWN V. EPHRAIM P. HARTMAN.

FILED JANUARY 5, 1899. No. 8581.

1. **Deeds:** EFFECT OF DELIVERY: REGISTRATION. Where a deed is delivered to the grantee by the grantor, it at once becomes operative as a conveyance, if such was the intention of the parties, even though the instrument was not to be recorded during the lifetime of the grantor.

2. ———: DESTRUCTION. The destruction of a deed, after its delivery, does not divest the title of the grantee.

3. ———: SURRENDER. The surrender of an unrecorded deed by the grantee to the grantor will not reinvest the title in the latter.

4. ———: EJECTMENT: FINDING FOR DEFENDANT. The findings and judgment are not supported by the evidence.

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

M. L. Hayward and *Paul Jessen*, for plaintiff in error.

John C. Watson, for defendant in error:

An unrecorded deed of land voluntarily given up and canceled by the parties with intent to reinvest the estate in the grantor will, as between the parties and all persons subsequently claiming under them, operate as a reconveyance and revest the estate in the grantor. (*Schade v. Bissinger*, 3 Neb. 140; *Commonwealth v. Dudley*, 10 Mass. 403; *Thompson v. Ward*, 1 N. H. 9.)

NORVAL, J.

This was an action in ejectment to recover about ninety acres of land in Otoe county. The petition contained the usual averments, and the answer was a general denial. A trial resulted in a judgment for plaintiff below, Hattie W. Brown. A second trial was awarded under the statute, which terminated in a judgment for the defendant, to reverse which is the purpose of this proceeding.

The sole question presented is whether the findings and judgment are sustained by the evidence. The trial was to the court, without the aid of a jury, and much immaterial and incompetent evidence was adduced, which, upon review, must be wholly disregarded. Plaintiff and defendant are sister and brother, and their mother, Sarah Hartman, owned the land in controversy. Both parties claim title through her, the plaintiff by warranty deed executed by Mrs. Hartman on December 11, 1891, and the defendant under a deed executed by Mrs. Hartman and her husband on January 12, 1894. It is asserted by the defendant,—and the trial court evidently so found,—that the deed to plaintiff was never delivered to her by the grantor for the purpose of vesting title to the real estate in the grantee. There is no conflict in the evidence bearing upon the question. The plaintiff and her husband were the only witnesses examined upon that point. It is disclosed from their testimony that Mrs. Hartman, while at the home of her daughter, Mrs. Brown, in December, requested the husband of the latter to prepare the deed for the land to the daughter to carry out the desire the grantor had more than once expressed to convey the premises to her said daughter. The deed was drawn as requested, reserving therein an estate for life in Mrs. Hartman, which instrument she signed in the presence of, and acknowledged the execution thereof before, F. E. Brown, the grantee's husband, as a notary public. The evidence is positive that the deed was thereupon by Mrs. Hartman delivered to her daughter with the request that she keep the same, but not record it until after the grantor's death, the reason she assigned therefor at the time being "that certain members of the family would kick up a family quarrel if they found it out," and for this reason alone it was withheld from the record. The deed was delivered by plaintiff to her husband for safe-keeping, who placed the same in his safe, where it remained from December, 1891, until January 10, 1894, when, at the

request of Mrs. Hartman, who at the time was very ill and confined to her bed, Mrs. Brown obtained the deed and, after having a copy made, handed the original to her mother without any intention on the part of plaintiff to reinvest the title to the premises in Mrs. Hartman, but solely for the purpose of pacifying the latter. To the question propounded to plaintiff on cross-examination by defendant's counsel, "How did you happen to deliver that deed to your mother?" the witness answered, "She was sick at the time and told me that she wanted it, and I would do anything to please her, so I gave it to her." Shortly after Mrs. Hartman received the deed it was destroyed by the defendant, but whether at the request of the plaintiff or her mother the witnesses do not agree in their statement of the occurrence. It is, however, testified to positively by plaintiff, and there is no conflict in the evidence on the point, that Mrs. Hartman, before obtaining the deed, did not inform her daughter that she was going to have it destroyed, but on the contrary stated to Mrs. Brown that "she wanted to put it in her box with the rest of her papers." Mrs. Hartman died on February 2, 1894. The deed to plaintiff was executed and delivered for some purpose, and all the testimony tends to show that the object of its execution, and the only one, was to invest the title to the property in Mrs. Brown. That it was not testamentary in its character, to take effect alone on the death of the grantor, is evidenced by the fact that the deed contained a clause reserving a life estate in Mrs. Hartman. If the intention of the parties was that the title was not to pass during the lifetime of the grantor, then there was no occasion for inserting the provision just mentioned. The evidence satisfies us, and no other legitimate conclusion can be drawn from the proofs in this record than that the deed was delivered and received with the intention that it should become effective at once as a conveyance of the property. Only the recording of the instrument was to be delayed until after the death of the grantor. This

case, in some of its principal features, is like the case of *Brown v. Westerfield*, 47 Neb. 399. There a mother signed and acknowledged a deed conveying to her daughter, subject to a life estate, lots in the city of Lincoln. The deed was delivered to the officer taking the acknowledgment for the use of grantee, with the understanding that he was to retain possession of the instrument until the death of the mother, when it was to be filed for record. Subsequently the deed was left in the possession of the mother and was destroyed or had been lost. It was held that the title passed to the daughter upon the delivery of the deed to the officer and the subsequent loss or destruction of the instrument did not operate to divest her title. Neither the surrender of the deed in the case at bar by the daughter to her mother, nor the subsequent destruction, operated as a reconveyance of the title. (*Brown v. Westerfield, supra; Bunz v. Cornelius*, 19 Neb. 107; *Connell v. Galligher*, 39 Neb. 793; Devlin, Deeds sec. 300, and cases there cited; *Rogers v. Rogers*, 53 Wis. 36; and authorities* cited in brief of plaintiff.)

We are cognizant of the rule, and have often applied it, that a decree based on conflicting evidence will not be molested on appeal. But the present case does not fall within that principle. There is absolutely no competent evidence to support the finding of the trial judge that the deed was delivered to plaintiff's husband by the grantor to be retained by him until called for by the

**Starr v. Starr*, 1 O. 321; *Rogers v. Rogers*, 53 Wis. 36; *Taliaferro v. Rolton*, 34 Ark. 503; *Snodgrass v. Ricketts*, 13 Cal. 359; *Jeffers v. Philo*, 35 O. St. 173; *Kearsing v. Kilian*, 18 Cal. 492; *Brady v. Huff*, 75 Ala. 80; *Bowman v. Cudworth*, 31 Cal. 148; *Killey v. Wilson*, 33 Cal. 691; *Lawton v. Gordon*, 34 Cal. 36; *Wallace v. Berdell*, 97 N. Y. 13; *Strawn v. Norris*, 21 Ark. 80; *Hinchliff v. Hinman*, 18 Wis. 139; *Walker v. Renfro*, 26 Tex. 142; *Gilbert v. Bulkley*, 13 Am. Dec. [Conn.] 57; *Botsford v. Morehouse*, 4 Conn. 550; *Raynor v. Wilson*, 6 Hill [N. Y.] 469; *Shotwell v. Harrison*, 22 Mich. 410; *Maupin v. Emmons*, 47 Mo. 304; *Parker v. Kane*, 65 Am. Dec. [Wis.] 283; *Howard v. Huffman*, 75 Am. Dec. [Tenn.] 783; *Van Hook v. Simmons*, 78 Am. Dec. [Tex.] 573; *Alexander v. Hickox*, 86 Am. Dec. [Mo.] 118; *Sutton v. Jervis*, 31 Ind. 267; *Dukes v. Spangler*, 35 O. St. 119.

grantor. The evidence is clear and convincing that there was an actual delivery of the deed to the plaintiff by the mother with the intention of conveying the title. The deed upon such delivery became operative as a conveyance. The defendant was aware of plaintiff's deed when the deed to him was executed. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

ROBERT HUSTON V. ALFRED CANFIELD ET AL., IMPLEADED WITH TECUMSEH NATIONAL BANK, APPELLEE, AND CHAMBERLAIN BANKING HOUSE, APPELLANT.

ALBERT CANFIELD V. ALFRED CANFIELD ET AL., IMPLEADED WITH TECUMSEH NATIONAL BANK, APPELLEE, AND THE CHAMBERLAIN BANKING HOUSE, APPELLANT.

FILED JANUARY 5, 1899. Nos. 8591, 8592.

1. **Deed as Mortgage.** A quitclaim deed given to secure an indebtedness is in legal effect a mortgage.

2. **Mortgages:** RENTS AND PROFITS. A mortgagor in possession is entitled to collect and appropriate to his own use the rents and profits of the mortgaged premises; and this right, being transferable, will pass to his grantee, or to a subsequent mortgagee to whom possession is surrendered.

3. ———: ———: FORECLOSURE. In an action to foreclose a mortgage the district court cannot divert the rents and profits of the mortgaged premises from the tenant lawfully in possession claiming title under the mortgagor, except by the appointment of a receiver pursuant to the provisions of section 266 of the Code of Civil Procedure.

APPEALS from the district court of Johnson county. Heard below before BABCOCK, J. *Modified.*

M. B. C. True, for appellant.

S. P. Davidson, Davidson & Giffen, and *T. Appelget*, *contra*.

SULLIVAN, J.

The questions involved in these cases are identical. The actions were brought in the district court of Johnson county to foreclose real estate mortgages executed by Alfred Canfield and Carrie B. Canfield, his wife, on certain property in the city of Tecumseh. The Tecumseh National Bank asserted a lien on the premises by virtue of a mortgage, in form a warranty deed. The Chamberlain Banking House filed an answer, claiming an interest which, on account of the pleader's indefiniteness of expression, is somewhat difficult to classify. It was either an absolute ownership or a mortgage in the guise of a quitclaim deed. Under this latter conveyance the grantee took possession of the premises and proceeded to collect and appropriate the rents and profits. The controversy which is brought here for decision concerns only the national bank and the Chamberlain Banking House. The trial court made the following finding: "The court further finds that the quitclaim deed executed by the defendant Alfred Canfield and wife to the defendant the Chamberlain Banking House on the 22d day of July, 1893, though in form a quitclaim deed, was in fact a mortgage, and so considered by the parties thereto, and given to secure the indebtedness. * * * The court further finds that defendant, the Chamberlain Banking House, is not entitled to collect the rentals of said mortgaged premises, as against other defendants and the plaintiff." The court also found that the lien of the warranty deed was prior to that of the quitclaim deed, and rendered a decree as follows: "It is therefore considered and decreed that the deeds above found to be mortgages be, and the same are hereby, foreclosed, and

said mortgaged premises be sold in manner and form as real estate is now sold on execution, and that the proceeds of said sale, together with all the rents received of said premises, be applied to the payment of the amount due plaintiff and the answering defendant, except defendant Van Sickle, according to their priority as above found." To reverse this judgment the Chamberlain Banking House brings the cases to this court by appeal.

The first contention is that the quitclaim deed was an absolute conveyance. We do not think it was. In appellant's answer it is alleged that, on July 22, 1893, Alfred Canfield was in failing circumstances, and being indebted to appellant in the sum of $1,500, executed the conveyance in question with intent to secure it and make it a preferred creditor. It is further alleged that "the rentals of said premises have been duly collected by this defendant and have been applied to the payment of said indebtedness of defendant Alfred Canfield to this defendant; that a balance of $628.25 of said indebtedness is yet unpaid, and for which amount this defendant claims a first lien on the rentals of said premises and a right to collect them, superior to the right of any other creditor." We think these averments do not show a sale of the property, but that, on the contrary, they do indicate with reasonable certainty that no part of the bank's debt was immediately extinguished by the execution of the quitclaim deed. If the bank became the owner of the property, it is inconceivable why it should apply the rents subsequently accruing to the payment of an indebtedness due from Canfield to it. Although the evidence is sufficient to sustain the finding of the district court that the quitclaim deed was intended as a mortgage, we think the same conclusion results from a proper construction of appellant's answer. Still it does not follow that the judgment with respect to the application of the rents can be sustained. A mortgagee in possession of mortgaged property has a right to make

his security productive by receiving and appropriating the rents and profits to the payment of his debt. Having succeeded to the rights of the owner of the fee he is not required to account while he remains in possession. (*Fitchburg Cotton Mfg. Corporation v. Melven*, 15 Mass. 270; *Wilder v. Houghton*, 1 Pick. [Mass.] 87.) "The mortgagor has," says Chancellor Kent, "a right to lease, sell, and in every respect to deal with the premises as owner so long as he is permitted to remain in possession." In *Renard v. Brown*, 7 Neb. 449, MAXWELL, J., delivering the opinion, said: "As the mortgagor is not liable for rents and profits while in possession, he may sell and convey the mortgaged property, and his grantee will take his title, and will be protected to the same extent as the mortgagor." In *Gilman v. Illinois & Mississippi Telegraph Co.*, 91 U. S. 603, it was held that the contract of the mortgagor being to pay interest and not rent, he could not be held to account for profits received while retaining possession of the property. And in *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, it was said by the court, speaking of the rights of a mortgagee: "But in the case of a mortgage the land is in the nature of a pledge. It is only the land itself,—the specific thing,—which is pledged. The rents and profits are not pledged. They belong to the tenant in possession, whether the mortgagor or a third person claiming under him." The Chamberlain Banking House having obtained possession of the property with the owner's consent, was entitled to the rents precisely the same as the owner would have been had he retained possession. The appellee was not entitled to have them applied in satisfaction of prior liens. What is here said has, of course, no application to a case where a receiver has been appointed upon a showing that the security is inadequate. The practical effect of an order appointing a receiver is to dispossess the mortgagor or other person in possession. In this case there were no proper steps taken to secure the appointment of a receiver; and the court did not

find, nor the evidence show, that the security was probably insufficient to discharge the debt due from Canfield to the Tecumseh National Bank. The decree in each case will be modified by striking out the clause providing for the application of rents upon the mortgage and other liens according to their priority. As thus modified the judgment in each case will be affirmed.

JUDGMENT ACCORDINGLY.

KENT K. HAYDEN, RECEIVER, APPELLANT, V. JAMES B. HALE ET AL. (ELIAS BAKER, APPELLEE.)

FILED JANUARY 5, 1899. No. 8593.

Appeal: ACTION AT LAW: JURISDICTION. An appeal from an order or judgment of the district court in a law action does not invest this court with jurisdiction of the cause.

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

Cobb & Harvey and *G. M. Lambertson,* for appellant.

Samuel J. Tuttle, for appellee.

SULLIVAN, J.

In an action on a promissory note Kent K. Hayden, as receiver of the Capital National Bank, obtained a judgment against James B. Hale and Joshua Perrin in the district court of Lancaster county for the sum of $1,258.50. This judgment was paid by the defendants therein to Elias Baker, as clerk of the said court. Afterwards Hayden filed a motion to require Baker to pay over to him the whole of the money so received. Baker answered the motion, alleging that various parties had sued Hayden, in his trust character, in said court and

had recovered judgments against him for costs; that such costs being unpaid, fee bills were issued for their collection, and levied by the sheriff upon a portion of the money paid to the clerk on the judgment in favor of the receiver and against Hale and Perrin; that the money so seized by the sheriff was returned to the clerk and was by him applied to the payment of said costs. The court denied the motion, and to obtain a reversal of this ruling the record is brought here by appeal.

At the threshold of the case is the question of jurisdiction. By 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 of the state." That the order complained of was not made in an action in equity, is a proposition too clear to admit of discussion. This court is, therefore, without power or authority to either affirm or reverse it. Any judgment rendered here would be a mere nullity. (See *Lowe v. Riley*, 57 Neb. 252; *Campbell v. Farmers & Merchants Bank*, 49 Neb. 143; *Nebraska Loan & Trust Co. v. Lincoln & B. H. R. Co.*, 53 Neb. 246.) The proceeding is

DISMISSED.

NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, APPELLEE, V. KATE MARTIN, APPELLANT, ET AL.

FILED JANUARY 5, 1899. No. 8587.

1. **Appeal:** ERRORS AT TRIAL. Alleged errors in matters of procedure occurring at or before the trial cannot be reviewed on appeal. In this court the correctness of the judgment rendered on the pleadings and proofs is the only question to be considered.

2. **Pleading:** ANSWER. An answer which states "that defendant has not sufficient knowledge or information as to the claim of the plaintiff, and therefore demands and calls for strict legal proof thereof," presents no issue for trial.

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

George McHugh and *Charles E. Magoon*, for appellant.

S. L. Geisthardt, contra.

SULLIVAN, J.

This action was brought in the district court of Lancaster county to foreclose two real estate mortgages executed by Kate Martin to the Clark & Leonard Investment Company and by it assigned to the plaintiff, the National Life Insurance Company of Montpelier, Vermont. From a decree of foreclosure rendered against her the defendant appeals.

She complains of the action of the trial court in denying her motion to strike from the files the petition and supplemental petition, on the ground that the evidence of verification is defective. The objection to the official certificate attesting the fact of verification is hypertechnical. It does not merit serious consideration. Besides, this being an appeal, we are not authorized to review alleged errors in matters of procedure occurring at or before the trial. The correctness of the judgment rendered on the pleadings and proofs is the only question to be considered. (*Ainsworth v. Taylor*, 53 Neb. 484; *Alling v. Nelson*, 55 Neb. 161.)

Another point urged upon our attention is that the decree is not sustained by sufficient competent evidence. No evidence was necessary, as the pleadings presented no issue for trial. The defendant in her answer states "that she has not sufficient knowledge or information as to the claim of the plaintiff, and therefore demands and calls for strict legal proof thereof." This is not a denial of any of the averments of the petition, and manifestly fails to meet the requirements of section 99 of the Code of Civil Procedure, which provides that the answer

shall contain "a general or specific denial of each material allegation of the petition controverted by the defendant." The claim of the plaintiff as stated in the petition stood confessed. In *Maxwell v. Higgins*, 38 Neb. 671, it was held that "facts pleaded in a petition will be taken as admitted where not specifically denied in the answer, and the answer avers as to such facts that the defendants, for want of knowledge, neither admit nor deny the averments of the petition." The judgment is right and is

AFFIRMED.

HENRY OLIVER, APPELLANT, V. JAMES F. LANSING ET AL., APPELLEES, AND WILLIAM OLIVER, APPELLANT.

FILED JANUARY 5, 1899. No. 10050.

1. **Judgment:** EFFECT OF REVERSAL. When a judgment of the district court is reversed in an appellate proceeding it ceases, from the date of the reversal, to be a lien on the lands of the judgment debtor.

2. ———: ———. A person who purchases real estate burdened with the lien of a judgment will hold it discharged of such lien in case the judgment be afterwards reversed.

3. ———: ———: LIEN OF SUBSEQUENT DECREE. The subsequent rendition of another judgment in the same cause will not revive the lien so as to make it effective from the date of the original judgment.

4. ———: SPECIAL FINDINGS: REVIEW. A judgment predicated on special findings of fact will be reversed if such findings are insufficient to sustain it, and its correctness is not otherwise affirmatively shown.

5. ———: ———: SPECIFIC LIEN. A finding that one of the parties to an action has obtained a judgment against the other in a collateral suit does not warrant the inference that such judgment is based on a specific claim.

6. **Special Findings:** PRESUMPTIONS ON REVIEW. There is no presumption of law that questions submitted to a trior of fact have been established beyond the limits of the special findings made by him.

7. **Co-Tenants:** LIABILITIES INTER SE: LIENS. As between themselves, co-tenants are liable for the payment of liens and incumbrances

existing against the common estate, in proportion to their respective interest therein, each being surety for the others.

8. ——: ——: ——: SUBROGATION. Where one tenant in common has paid more than his proper share of a charge upon the common property, his interest or ownership therein is not proportionally expanded, but he is, to the extent of the excessive contribution, subrogated to the rights of the lien creditor to whom the payment has been made.

9. ——: ——: ——: ——. The right acquired by such subrogation does not pass to the mortgagee under a mortgage purporting to convey the undivided interest of the owner of the right in the common property.

10. **Partition:** JUDGMENT: EQUITABLE LIEN: SET-OFF. In an action for partition a judgment lien in favor of one co-owner, upon the interest of the other, is properly offset against an equitable lien in favor of the judgment debtor, upon the interest of the judgment creditor in the joint estate.

11. ——: COSTS: ATTORNEY'S FEES. The plaintiff's attorney's fees are not taxable as costs in an action for partition where the proceedings are adversary.

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

Joseph R. Webster and *Halleck F. Rose*, for appellants.

Lionel C. Burr and *Roscoe Pound, contra.*

SULLIVAN, J.

The litigation between Lansing and Henry Oliver has vexed the courts for years. A serial history of it will be found in the cases of *Oliver v. Lansing*, 48 Neb. 338, *Oliver v. Lansing*, 50 Neb. 829, and *Oliver v. Lansing*, 51 Neb. 818. This appeal is a proceeding in the suit for partition, and brings here for review the judgment of the district court confirming the referee's report on incumbrances, and directing distribution of the fund obtained from the sale of the real estate in controversy. The main question presented for decision grows out of the conflicting claims of the plaintiff's creditors to his share of the fund. His brother, William Oliver, claims it under a mortgage executed to him during the pen-

dency of the action, while the defendant claims it by virtue of a judgment rendered in his favor by the district court of Lancaster county in a collateral suit between the original parties to this cause. To a proper understanding of the grounds upon which the rival claimants assert title it will be necessary to mention some of the steps previously taken in the progress of the case. In the answer filed to the plaintiff's demand for partition it was alleged that the plaintiff had acquired his interest in the property by purchase from the defendant and had not paid for the same. It was also charged that the plaintiff was indebted to the defendant in a large amount for expenditures made by him in improving the property. There was a prayer for an accounting and for a specific lien on the property for whatever sum should be adjudged in defendant's favor. A supplemental answer set forth that the defendant had recovered a judgment against the plaintiff in an action in the same court for the sum of $9,673.66, being purchase-money due for a part of the real estate in dispute. A reply was filed by the plaintiff, and, upon a trial of the issues joined, the court, on January 29, 1894, made the following finding:

"Sixth—The court further finds that defendant James F. Lansing, on the 26th day of June, 1893, recovered in this court a judgment against the plaintiff Henry Oliver for the sum of $9,673.66; that within twenty days thereafter plaintiff filed a supersedeas bond in said action in double the amount of said judgment, which was approved by the clerk, and said action is now pending on appeal in the supreme court; that said judgment is a lien upon plaintiff's interest and share in said real estate, but that by reason of such appeal and filing and approval of said bond is not now enforceable, but that the lien of said Lansing pending such appeal should be saved, and the amount of said judgment lien, in case said premises be partitioned without sale, should be charged, subject to the finding of the supreme court on said ap-

peal, upon the parcel set off to plaintiff in severalty, or, in case of sale, upon the share of the proceeds of said plaintiff, to be withheld on distribution from plaintiff till said appeal is determined, then to be distributed accordingly as the rights of said parties may be determined on said appeal."

Afterwards the plaintiff, claiming that the judgment mentioned in the foregoing finding had been reversed by this court, asked for the appointment of a referee to inquire into the nature and amount of incumbrances on the property and make a report concerning the same. The matter was referred to Edward P. Brown, Esq., who found and reported: (1) That on June 26, 1893, in a separate action for an accounting then pending in the district court of Lancaster county, James F. Lansing recovered judgment against Henry Oliver for the sum of $9,673.66; (2) that said judgment, on appeal to this court, was reversed on May 6, 1896; (3) that on February 23, 1897, the judgment rendered by the district court in the collateral suit was modified by reducing the amount thereof to $5,610.36; (4) that this judgment, being brought here for review on error, was reversed on June 3, 1897, and a judgment rendered in this court for $7,156.17; (5) that the last mentioned judgment was, pursuant to the mandate, entered in the district court on October 30, 1897; (6) that on January 29, 1897, Henry Oliver and Julia Oliver, his wife, executed to William Oliver a warranty deed conveying the premises in controversy as security for a *bona fide* indebtedness amounting to nearly $30,000; (7) that William Oliver took said conveyance with notice of the proceedings in this action "and subject to the decree therein pronounced;" (8) that the deed to William Oliver was duly recorded February 10, 1897. Upon these facts the referee reached the conclusion that the mortgage of William Oliver was a lien on the fund in question, subject to the lien of Lansing's judgment for $7,156.17. The trial court approved this conclusion, but its correctness is challenged by the appeal.

It is quite obvious that the Lansing judgment, considered without reference to the claim on which it was based, would be a lien on the plaintiff's interest in the property, or in the proceeds resulting from a sale of such interest, subordinate to the mortgage lien in favor of William Oliver. It is true, of course, as found by the referee, that William Oliver took his conveyance with notice of the pendency of this action and subject to the decree previously pronounced in favor of Lansing; but the permanence of the lien established by that decree was expressly declared to be dependent on the action of this court in the collateral suit. The judgment in the collateral suit was reversed. Its vitality was extinguished, and the lien which depended on its existence was lost. So the finding of the referee upon this point means nothing more than that William Oliver took his conveyance with full knowledge of Lansing's lifeless judgment. All this apparently is conceded by counsel for Lansing, but it is urged with great earnestness that the judgment finally rendered by this court in the collateral suit represents a portion of the purchase price of the property in question; and that, there being a demand for a specific lien asserted in both the cross-petition and supplemental answer, the rights acquired by William Oliver under his deed are subject to the rights of the defendant as ultimately fixed by the judgment of the trial court in this cause. The difficulty with this position is that the record contains no sufficient facts to sustain it. The defendant alleged that his claim was for purchase-money. He alleged that the judgment recovered in the collateral action was for the purchase price of the property in dispute; but the district court, on a trial of the issues, found only that he had a judgment. This finding was, in legal effect, a denial of Lansing's demand for a specific lien grounded on the peculiar character of his claim. The judgment of January 29, 1894, was a final adjudication of all the material facts submitted to the court and within the issues. It was

not an adjudication in favor of Lansing upon his asserted right to a specific lien. It merely gave contingent recognition to the lien of a general judgment previously pronounced. Neither is there in the report of the referee appointed to make inquiry touching liens and incumbrances on the partitioned estate any fact from which it may be inferred that the judgment rendered by this court in the collateral suit represents any portion of the purchase price of the lots in controversy. He finds only that the action in which the judgment was rendered was brought by Oliver against Lansing for an accounting. The judgment awarding Lansing a prior lien on the fund in court for distribution would only be warranted by a finding that the basis of the lien was a balance due on account of the sale to Oliver of an interest in the partitioned property. There being no such finding, the conclusion of the referee is unsustained by the facts, and the court therefore erred in confirming his report.

Another complaint of the appellants relates to the disposition made of certain claims which accrued to the plaintiff against the defendant during the pendency of the litigation. From the report of the referee it appears that subsequent to the entry of the decree confirming the shares of the parties and directing partition to be made the plaintiff paid, to discharge taxes and reduce incumbrances on the joint estate, the sum of $2,958.03 more than was paid by the defendant for the same purpose. Half of this amount, being $1,479.02, was credited on the judgment in favor of Lansing. The objection to this action of the trial court is that, in effect, and by indirection, it gave to Lansing a prior lien on Henry Oliver's share of the fund, to the extent of the amount so credited. But of this neither of the Olivers is in a position to complain. In the absence of an explicit finding to the contrary we assume that the mortgage to William Oliver purported to cover nothing more than Henry Oliver's undivided half-interest in the land. Lansing and Henry Oliver being joint and equal owners of the property,

each was liable for one-half the liens and incumbrances existing against it. To the lien creditors the land itself was, of course, liable; but as between the owners each was liable primarily for one-half the existing charges, and for the other half only as surety for his co-tenant. (*Watson's Appeal*, 90 Pa. St. 426; *Fisher v. Dillon*, 62 Ill. 379; *Newbold v. Smart*, 67 Ala. 326.) It is a familiar principle of equity jurisprudence that a surety who has paid off the debt of his principal is entitled to be subrogated to the securities in the hands of the creditor to whom payment has been made. By the fact of payment the surety becomes an equitable assignee of such securities and entitled to enforce them for his own indemnification. An actual assignment is not necessary. Equity treats the assignment as having been made. In 24 Am. & Eng. Ency. of Law 236 the rule is thus stated: "If one of several tenants in common pay off a lien binding the common property, there will be no merger of his demand, but he will be considered a surety for his co-tenants and subrogated to the rights of the creditor against them for their proportion of the debt." In *Fischer v. Eslaman*, 68 Ill. 78, it is said: "Where one tenant in common removes an incumbrance from the common estate, the other tenants must contribute to the extent of their respective interests, and to secure such contribution a court of equity will enforce upon such interests an equitable lien of the same character with that which has been removed by the redeeming tenant." In *Titsworth v. Stout*, 49 Ill. 78, it is said: "The redeeming tenant in common, in order to secure contribution, is substituted to the same lien which he has redeemed." Other cases to the same effect are *Rankin v. Black*, 1 Head [Tenn.] 650; *Gee v. Gee*, 2 Sneed [Tenn.] 395; *Dowdy v. Blake*, 50 Ark. 205. We have been referred by counsel to no case, and in the course of a pretty thorough investigation have found none, in which it is held that payments made by one co-tenant beyond his just proportion, to reduce incumbrances, results in an expansion of the interest or

ownership of such tenant in the common property. On the contrary, the doctrine of all the authorities seems to be that his interest, in such case, remains the same, but that to the extent he has made payments beyond his share he stands in the shoes of the creditor to whom the payments have been made. This being so there is no ground for the contention that the rights which Henry Oliver acquired against Lansing as equitable assignee of the lien creditors passed to William Oliver under the warranty deed. Had that instrument assumed to convey the entire property a different question would be presented.

The plaintiff further complains of the action of the court in denying his motion to have his counsel's fees taxed as costs. Section 841 of the Code of Civil Procedure is as follows: "All the costs of the proceedings in partition shall be paid in the first instance by the plaintiffs, but eventually by all the parties in proportion to their interests, except those costs which are created by contests above provided for." It was said in *Stanton County v. Madison County*, 10 Neb. 304, that statutes giving costs "are not to be extended beyond the letter, but are to be construed strictly." The term "costs," in its common acceptation, does not include attorney's fees, and whatever may be the rule in friendly actions for partition, we are entirely clear that there is no authority under the section quoted for taxing such fees in cases like this where the plaintiff's title or right to partition is contested. If this were not so, as was said in *Swartzel v. Rogers*, 3 Kan. 380, "the more doubtful the plaintiff's right of recovery, the greater shall be the defendant's liability to plaintiff's counsel for costs." In *Hutts v. Martin*, 134 Ind. 587, it was held that a statute providing for the taxation of all costs and necessary expenses against the partitioners was not broad enough to cover a liability for attorney's fees incurred in prosecuting an action for partition. In *Kilgour v. Crawford*, 51 Ill. 249, construing a statute providing for the allowance of coun-

sel fees in suits for partition, the court say: "Where the proceedings are amicable, and the parties defendant do not deem it necessary to employ counsel to protect their interests, it is proper that the power given by this law should be exercised, as all the parties have the benefit of the partition. But where the defendants deem it necessary to employ counsel, in order to protect their interests, and secure a just partition, or an equitable assignment of dower, we can see no reason why they should be required not only to pay the fees of their own counsel, but also a part of the fees of adverse counsel. This is not done in other legal proceedings, in some of which it might be done with much more propriety, as when, for example, a defendant is resisting the payment of an honest debt. In these partition proceedings the defendants have generally been guilty of no default or wrong. In many cases there are minor heirs or married women, which circumstance renders legal proceedings unavoidable, and even where there are not, the mere fact that the joint owners have not been able to agree upon a partition is no reason why the defendants should be made to pay the counsel of complainants. We are satisfied that the act should be construed as intending the taxation of counsel fees only in cases where the proceedings are amicable." The same rule is recognized in *Finch v. Garrett*, 102 Ia. 381, *Grubbs' Appeals*, 82 Pa. St. 29, *Fidelity Ins. Trust & Safe Deposit Co.'s Appeal*, 108 Pa. St. 342, *Metheny v. Bohn*, 164 Ill. 495, *Lang v. Constance*, 46 S. W. Rep. [Ky.] 693, and *Duncan v. Duncan*, 63 Ia. 150. The judgment of the district court is reversed to the extent that Lansing's judgment is given priority over the lien of William Oliver's mortgage on the fund in question. In all other respects the judgment is affirmed. A judgment will be rendered in this court modifying the judgment of the district court in accordance with the views herein expressed.

JUDGMENT ACCORDINGLY.

LEVI L. FISHER ET AL., APPELLANTS, V. LILLIAN DONOVAN ET AL., APPELLEES.

FILED JANUARY 5, 1899. No. 8547.

1. **Trust Funds:** DISBURSEMENTS. To create a trust fund out of which a trustee may make disbursements the trustor must have some present or future right to, or interest in, the fund directed to be set apart.

2. **Beneficiary Society:** MEMBERS: TRUSTS: CREDITORS. A member of a fraternal beneficiary society has no such interest or property in the proceeds of a certificate therein that he can impress such proceeds with a trust in favor of his creditors.

3. ———: CERTIFICATE: EXPECTANCY. A certificate in a fraternal beneficiary society is a mere expectancy, and the beneficiary has no vested right therein.

4. ———: CHANGE OF BENEFICIARY. A member holding a certificate in a fraternal beneficiary society may at his option change the beneficiary therein so long as he complies with the laws of such society and keeps within its limitations, and those of the statute under which it is organized.

5. ———: CERTIFICATE: TITLE TO FUND. Upon the death of a member holding a certificate in a fraternal beneficiary society the money arising from such certificate vests absolutely in the beneficiary properly designated by the member.

6. ———: ———: ———: RIGHTS OF CREDITORS. Creditors have no right to, or interest in, a certificate in a fraternal beneficiary society, either before or after the death of the member, and they cannot participate in the fund derived therefrom.

7. **Evidence:** FOREIGN LAWS. The contrary not appearing, the statute of a sister state will be presumed to be similar to our own.

8. **Beneficiary Societies:** CONSTRUCTION OF RULES. The rules and regulations of fraternal beneficiary societies for the creation and payment of their funds to the properly designated beneficiaries should receive such liberal construction as to carry out the benevolent purposes sought to be accomplished.

9. **Promise to Pay Debt of Another.** The promise of one party to pay the debt of another cannot be enforced unless such promise be in writing signed by the party to be charged.

APPEAL from the district court of Fillmore county. Heard below before HASTINGS, J. *Affirmed.*

The opinion contains a statement of the case.

John D. Carson, for appellants:

A trust involving personalty may be created by parol. (*Allen v. Withrow*, 110 U. S. 119; *Gilman v. McArdle*, 99 N. Y. 451; *Ellis v. Secor*, 31 Mich. 185.)

Any language showing that property or money shall be held for a purpose, or on behalf of another, will constitute a parol trust. (*Foote v. Foote*, 58 Barb. [N. Y.] 258; *Chase v. Perley*, 19 N. E. Rep. [Mass.] 398.)

A verbal trust partially performed will be enforced in equity. (*Robbins v. Robbins*, 89 N. Y. 251.)

A trustee who accepts a fund impressed with a trust is estopped to assert that he has not formally accepted the same. (*McBride v. McBride*, 51 N. W. Rep. [Mich.] 1113.)

The money received by Lillian Donovan on policies of insurance is impressed with a trust and should be applied by her to payment of debts enumerated by her husband to be paid out of the fund. (*Cobb v. Knight*, 74 Me. 253; *Phipard v. Phipard*, 8 N. Y. Supp. 729; *Boasburg v. Cronan*, 7 N. Y. Supp. 5; *Clark v. Durand*, 12 Wis. 248; *Hutchings v. Miner*, 46 N. Y. 456; *Kelley v. Mann*, 56 Ia. 625; *Collins v. Dawley*, 4 Colo. 138; *Holland v. Taylor*, 111 Ind. 121; *Grand Lodge A. O. U. W. v. Noll*, 51 N. W. Rep. [Mich.] 268; *Bloomington Mutual Life Benefit Ass'n v. Blue*, 11 N. E. Rep. [Ill.] 331.)

Charles H. Sloan, contra:

The beneficiary could only be changed in the manner provided by the rules of the societies. There was no compliance with the rules. Under the statutes and under the rules of the societies creditors of a member cannot become beneficiaries. Upon the death of a member the beneficiary becomes the absolute owner of the fund, and creditors of assured cannot participate therein. (*Hellenberg v. Order of B'Nai Berith*, 94 N. Y. 582; *Thomas v.*

Thomas, 131 N. Y. 205; *Central Bank of Washington v. Hume*, 128 U. S. 159; *Brockhaus v. Kemna*, 7 Fed. Rep. 609; *Timayenis v. Union Mutual Life Ins. Co.*, 21 Fed. Rep. 223; *In re Richardson*, 47 L. T. R. n. s. [Eng.] 514; *Ex parte Dever*, 18 L. R. Q. B. Div. [Eng.] 664; *Glanz v. Gloeckler*, 104 Ill. 573; *Pence v. Makepeace*, 65 Ind. 345; *Wilburn v. Wilburn*, 83 Ind. 55; *Harley v. Heist*, 86 Ind. 196; *Allis v. Ware*, 28 Minn. 166; *McClure v. Johnson*, 56 Ia. 620; *Olmstead v. Masonic Mutual Benefit Society*, 37 Kan. 93; *Manhattan Life Ins. Co. v. Smith*, 44 O. St. 156; *Robinson v. Duvall*, 79 Ky. 83; *Vollman's Appeal*, 92 Pa. St. 50; *Gosling v. Caldwell*, 1 Lea [Tenn.] 454; *Crittenden v. Phœnix Mutual Life Ins. Co.*, 41 Mich. 442; *Fowler v. Butterly*, 78 N. Y. 68.)

F. B. Donisthorpe, also for appellees.

SULLIVAN, J.

This action was brought to restrain the defendant Lillian Donovan, widow of Jere Donovan, deceased, from converting to her own use the proceeds of two certificates of life insurance issued to her late husband by fraternal beneficiary societies, and to impress such proceeds with a trust in favor of the plaintiffs as creditors of the insured. From a decree in favor of defendants the plaintiffs have appealed.

Jere Donovan was postmaster at Geneva, in Fillmore county. He was indebted to the plaintiffs and others for borrowed money. He represented to his creditors that in case of his death they would be paid out of the moneys to be derived from insurance upon his life. The insurance carried by him was as follows: In the Knights of Pythias, $1,000, payable to his two infant children; in the Ancient Order of United Workmen, $2,000, of which sum $1,000 was payable to his widow and $500 to each of his children; in the Modern Woodmen of America, $2,000, of which half was payable to his widow and half to his children. September 4, 1894, Mr. Dono-

van was taken sick. His sickness continued until October 25 of that year, when he died. At times during his illness he was troubled and anxious about his debts and expressed a desire that in case he did not recover they be paid out of his life insurance. On one occasion he asked Mr. Carson, an attorney, to call, and to him he gave a list of his liabilities. On another occasion, while his physician was present, he called his wife into the sick-room and said to her: "I want you to pay my debts. Will you do it?" To which she responded, "Yes." He also said, "Doctor, you hear this, don't you?" To which the doctor replied, "Yes." Nothing else was said or done. It is asserted by appellants that these facts and circumstances constituted Lillian Donovan a trustee of the fund afterwards received by her in satisfaction of the benefit certificates, and that she should be now compelled to execute the trust. Mrs. Donovan was appointed administratrix of her deceased husband's estate. After setting off to her the exemptions provided by law for the widow there remained nothing for distribution among creditors. However, she voluntarily paid several claims against the estate, and the appellants, asserting that she did this in partial execution of the trust, earnestly insist that she be now required to carry out completely the wishes expressed by her husband in his last illness.

To create a trust fund out of which a trustee may make disbursements, the trustor must have some present or future right to or interest in the property directed to be set apart. In other words, to constitute a valid trust there must be (1) a competent trustor, (2) a transfer to a competent person, (3) a fund or object capable of being transferred, and (4) a *cestui que trust* capable of taking or participating in the fund. (*Commissioners v. Walker*, 6 How. [Miss.] 143.) Had Jere Donovan such a right or interest in the certificates in question, and have his creditors, the appellants here, the right to participate in the fund? We think not. The purposes and objects

of these beneficiary organizations are vastly different from those of ordinary life insurance companies. The so-called "old line" life insurance companies, immediately on the issuance of a policy, confer on the beneficiary a valuable right which cannot be divested without the consent of such beneficiary. Such policies may be pledged or assigned by the beneficiary as security for debts of the insured. These policies often by law have a marketable or cash surrender value, making them a form of property. But not so with certificates in fraternal beneficiary societies. They are mere expectancies. The beneficiary has no vested rights in them, and the insured may at any time, at his option, change the beneficiary, provided only he keep within the limitations established by the rules of the society, and complies with the laws respecting a change of beneficiary. Neither have these certificates a cash surrender value. The supreme court of Pennsylvania, in construing a certificate similar to those in question here, say: "The testator had no property in the fund. * * * The fund in fact was never his property. He had power of appointment only, and such power did not create any property in him. The purpose of these certificates excludes the claim that there was any property in him." (*Northwestern Masonic Aid Ass'n v. Jones*, 154 Pa. St. 99.) The insured member of such societies has himself no interest in the fund. He possesses only a mere power of appointment. (*Rollins v. McHatton*, 16 Colo. 203; *Hellenberg v. District*, 94 N. Y. 580.) Jere Donovan had no property in the certificates. He had no right or interest therein upon which he could impress a trust. Upon his death the money arising from the certificates became absolutely the property of the beneficiaries, to do with as they saw fit. The widow could use the money to pay such of her husband's debts as she wished to pay, or she might retain it all for her individual use. The societies paying the money were organized to "issue certificates of indemnity calling for the payment of a certain sum, known and defined, in

case of death, * * * to the widow, orphan or orphans, or other persons dependent upon such members." (Compiled Statutes 1895, ch. 16, sec. 198.) The constitution of the Ancient Order of United Workmen provides that "Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall, in every instance, be one or more members of his family, or some one related to him by blood, or who shall be dependent upon him." (Constitution A. O. U. W., art. 6, sec. 4.) The by-laws of the Modern Woodmen of America provide: "The objects of this fraternity are to promote true neighborly regard and fraternal love, to bestow substantial benefits upon the family, widow, heirs, blood relations, affianced wife, or person dependent upon the member, and such others as may be permitted by the laws of the state of Illinois." (By-Laws M. W. A., div. 1, sec. *b*.) None of these designations include creditors, so that the insured did not have the right, even, to make a formal change designating his creditors as beneficiaries. The laws of this state governing such societies preclude creditors of a member from participating in the fund so created. The statutes of the states in which these societies were organized not being pleaded, we presume they are similar to our own. The statute or charter of the order designating beneficiaries controls. (*Britton v. Supreme Council*, 46 N. J. Eq. 102; *National Mutual Aid Ass'n v. Gonser*, 43 O. St. 1; *Caudell v. Woodward*, 96 Ky. 646.) A person not of the class for whose benefit a mutual benefit association is organized cannot be a beneficiary. (*Wolf v. District Grand Lodge*, 102 Mich. 23; *Britton v. Supreme Council, supra; Alexander v. Parker*, 144 Ill. 355; *Norwegian Old People's Home Society v. Willson*, 52 N. E. Rep. [Ill.] 41.) The beneficiaries which may be designated are but few, and creditors of the member are not among them. Even though Jere Donovan had complied with all the provisions and forms required by the societies respecting a change of beneficiary, plaintiffs could not have been named, since

creditors are not within the limitations either of the statute or of the by-laws of either society. Either the statutes of the state, or the charter or by-laws of mutual benefit societies, usually provide that the fund is established for the benefit of the widow, children, orphans, relatives, or dependents of the deceased member; and where such provision is made the beneficiary designated must be in one of the classes mentioned. (*Elsey v. Odd Fellows' Mutual Relief Ass'n*, 142 Mass. 224; *Presbyterian Mutual Assurance Fund v. Allen*, 106 Ind. 593; *Supreme Council American Legion of Honor v. Perry*, 140 Mass. 580; *Skillings v. Massachusetts Benefit Ass'n*, 146 Mass. 217.) In *Skillings v. Massachusetts Benefit Ass'n* the court say: "A person whose only relation to the deceased member is that of a creditor is not a person dependent upon him within the meaning of these statutes, and the promise to pay the plaintiff is void. Such a promise is beyond the powers of the association and contravenes the intention of the statute under which the association was organized. The plaintiff therefore cannot maintain an action on this promise, either for his own use or for that of any other person." These fraternal beneficiary societies, in their present form, are comparatively recent creations. They respond to a popular demand for protection to dependents at reasonable cost. They provide what is often called the "poor man's insurance." In most, if not all, the primary object is to provide substantial benefits, in case of the death of the member, to the widow, orphans, or dependents of such member; to provide means for the family when the main support is gone. Their purposes are laudable. They provide means to maintain the widow, and feed, clothe, and educate the orphans, and thereby relieve the state of burdens which otherwise might fall upon it. The provisions for the creation and payment of these sacred funds to the properly designated beneficiaries should receive such liberal construction that the widow, the orphan, or other dependent may receive the intended benefit.

In determining who is entitled to receive the benefits of the provisions of societies of this kind it is the duty of the court to construe the statute and their rules and regulations liberally, and in such manner as to carry out the beneficent purposes sought to be accomplished. (*Ballou v. Gile*, 50 Wis. 614; *Supreme Council American Legion of Honor v. Perry, supra.*) It is true Mrs. Donovan did assent to her husband's request to pay his creditors, but since he failed to provide the trust fund out of which payment might be made, the plaintiffs cannot recover from her as trustee. After her husband's death, there being no proper change of beneficiary, half the proceeds of the certificates in question became absolutely the money of Mrs. Donovan, and the promise she made was, at most, but a promise to pay her husband's debts out of her own property. There is no claim that the promise was in writing, and it is a familiar doctrine that a promise to answer for the debt, default, or misdoings of another is within the statute of frauds, and, to be binding, must be in writing signed by the party to be charged therewith. (Compiled Statutes, ch. 32, sec. 8.) Mrs. Donovan cannot be held in this action, either as trustee or individually, for plaintiffs' demands. The decree of the trial court is therefore

AFFIRMED.

BROWNELL & COMPANY V. JOHN A. FULLER ET AL.

FILED JANUARY 5, 1899. No. 9876.

Replevin: VERDICT: VALUE OF PROPERTY: REVIEW. In an action of replevin, wherein plaintiff was in possession of the personal property in dispute at the time of the trial, a judgment of the district court for a return of the property, or for its value of a certain fixed sum, must be reversed where there was no finding in the verdict with reference to such value.

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

Lane & Murdock and *Congdon & Parish*, for plaintiff in error.

B. N. Robertson, contra.

RYAN, C.

This action of replevin was instituted in the district court of Douglas county by Brownell & Co., a corporation, against John A. Fuller and Daniel Smith for the possession of a certain boiler and engine. It has once been in this court, and for a complete statement of the facts reference may be had to the opinion filed on that occasion. (*Fuller v. Brownell*, 48 Neb. 145.) After the cause was remanded there was another trial, in which there was a judgment in favor of Fuller, of which plaintiff in its turn seeks a reversal by proceedings in error. Plaintiff in the district court gave bond as required by statute, and thus was in possession of the property in dispute at the time of the trial. The court instructed the jury to find for the defendant Fuller that at the commencement of the action he had the right of property and the right of possession of the property described in the petition. This instruction closed with this language: "You will further find the value of said property as shown by the evidence, together with interest thereon at seven per cent per annum from the 13th day of January, 1891, to May 3, 1897." After receiving this instruction the jury returned the following verdict: "We * * * do find for said J. A. Fuller, and do find at the commencement of this action said defendant had the right of property and the right of possession of the boiler and engine in controversy herein, and do assess his damages at the sum of $500, together with interest thereon at the rate of seven per cent per annum from January 13, 1891,—total amount, $754 & 33 cents." There was a remittitur of $34.73, whereupon there was a judgment in favor of the defendant Fuller, "That he recover from plaintiff his

damages, assessed at $219.60, or in case return of said property cannot be had, that he recover of said plaintiff the value thereof, assessed at $500, and interest thereon, assessed at $219.60, and costs of suit."

It is required by section 191*a*, Code of Civil Procedure, that in cases like this the judgment shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property and costs of suit. The instruction of the court therefore properly required the jury to find the value of the property as shown by the evidence; but the jury failed to do this, but found the damages to be $500. The court seems to have assumed that this was a finding equivalent to a finding of the value of the property, and accordingly its judgment was for a return of the property or, in case a return could not be had, that defendant recover of plaintiff the value of said property, assessed at $500. There was in the verdict no attempt to fix the value of the property, and the judgment in that respect was for that reason without the support of a finding necessary to sustain it. It therefore cannot stand. (*Foss v. Marr*, 40 Neb. 559; *Gordon v. Little*, 41 Neb. 250.) The judgment of the district court, because of the error indicated, is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

KILPATRICK-KOCH DRY GOODS COMPANY V. REUBEN ROSENBERGER.

FILED JANUARY 5, 1899. No. 8619.

Replevin: JUSTICE OF THE PEACE: JURISDICTIONAL AMOUNT. Whether or not a justice of the peace in a replevin action should, because of want of jurisdiction, certify the same to the district court for trial depends upon the appraisement provided for by section 1038, Code of Civil Procedure.

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

W. W. Morsman, for plaintiff in error.

Horton & Blackburn, contra.

RYAN, C.

This action of replevin was brought by Rosenberger & Co. before W. A. Foster, a justice of the peace of Douglas county. Afterwards, by intervention, Kilpatrick-Koch Dry Goods Company sought to establish a right of possession to the personal property in dispute. The appraisers fixed the value of the property at $190.78, and accordingly a bond was executed as provided by law. Upon the trial of the case the justice of the peace found that the value of the property exceeded $200, and thereupon, without doing more, certified the cause to the district court. In the district court exceptions were filed to its jurisdiction of the subject-matter, and these exceptions were sustained. It is conceded that the question involved is whether section 1038, Code of Civil Procedure, describes the appraisement by which the jurisdiction of a justice of the peace in cases of this kind is to be determined. That section is as follows: "For the purpose of fixing the amount of the undertaking, the value of the property shall be ascertained by the oath of two responsible persons, whom the officer shall swear truly to assess the value thereof." In *Hill v. Wilkinson*, 25 Neb. 103, it was held that the appraisement under the provisions of this section is the appraisement by which the jurisdiction of the justice of the peace is to be determined, and the same view was announced in *Bates v. Stanley*, 51 Neb. 252. Under the provisions of section 1039, Code of Civil Procedure, therefore, the district court properly held that the case was not one which should have been certified up, as this was, and its judgment is accordingly

AFFIRMED.

DES MOINES INSURANCE COMPANY, APPELLANT, V. JOHN J. DAVIS ET AL., APPELLEES.

FILED JANUARY 5, 1899. No. 8588.

Conflicting Evidence: REVIEW. Findings of fact of the district court upon fairly conflicting evidence will not be disturbed on appeal in the supreme court.

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

Bochmer & Rummons, for appellant.

A. R. Talbot, contra.

RYAN, C.

This was an action in the district court of Lancaster county to subject certain real estate, of which the title was held by Sophia W. Davis, to the payment of two deficiency judgments against her husband, John J. Davis. One of these judgments was for $190 and was rendered March 31, 1894. The other was for $240, of the same date. It was alleged in the petition that the foreclosure decrees upon which the sales left due the sums alleged were entered at the September term, 1892. There is in the record no information as to the nature or date of the original indebtedness secured by the mortgages upon which foreclosures were had. There was, therefore, no evidence which would serve to estop Mrs. Davis' assertion of whatever rights were hers because of having permitted her husband to deal with her property and obtain credit upon the faith of being its real owner. The property, through an intermediary trustee, was conveyed by the husband of Mrs. Davis to her between the date of the entry of the decrees and the rendition of the deficiency judgments. She based no claim of protection on any other fact than that the property had been acquired by her husband by the use of her means derived inde-

pendently of him or his property. The title was taken in his name to enable him to handle it more readily in the frequent exchanges contemplated, but as between the husband and wife she was always recognized as entitled to the ownership. The property she sold to Mr. Allen, who in some matters had acted as her attorney with reference to the management of some cases in court. The trustee through whom she derived the title from her husband was also Mr. and Mrs. Davis' counsel in legal matters. There was no attempt to disguise the fact that the instrumentalities she employed were such as she would probably have used if she had intended to obtain title to the property of her husband to the prejudice of his creditors. Notwithstanding these unfavorable conditions the evidence was direct and convincing that her equitable rights were such that the legal title she had acquired and conveyed were entitled to protection, and the district court properly so held. Its judgment is accordingly

AFFIRMED.

SAMUEL K. DAVIS V. FIRST NATIONAL BANK OF GRINNELL, IOWA.

FILED JANUARY 5, 1899. No. 8568.

Pleading: UNDENIED ALLEGATIONS. All material allegations of new matter contained in an answer are admitted and must be taken as true if no reply is made to them. Following *National Lumber Co. v. Ashby*, 41 Neb. 292.

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

G. M. Johnston, for plaintiff in error.

J. E. Cobbey, contra.

RYAN, C.

This action was brought in the district court of Gage county upon the transcript of a judgment rendered by the district court of Poweshiek county, Iowa, and a recovery was had herein as prayed. In the petition filed in the district court of Gage county it was alleged that the judgment in Iowa had been rendered by a court having general equity and common-law jurisdiction. There was no averment as to jurisdiction of the person of the defendant in the Poweshiek county district court. In the answer in this case in the district court of Gage county it was alleged that the action in Poweshiek county, Iowa, was upon an alleged negotiable promissory note claimed to have been executed by defendant and others; that at the time of the execution of said note, and at all times since, none of the purported makers was a resident of Iowa; that said note was not payable at any particular place in Iowa in which a maker of said note was a resident, and there was a denial that said action in Iowa was brought where any defendant, being a maker of said note, resided. In this connection it was alleged in the answer that the provisions of section 2586, 2 McClain's Annotated Code of Iowa, governed as to the place where suit must be brought in that state, and that the provisions of said section applicable are in this language: "But in all actions upon negotiable paper, except when made payable at a particular place, in which any maker of such paper, being a resident of the state, is made defendant, the place of trial shall be limited to the county wherein some of the makers of such paper reside." It was, therefore, in the answer denied that the district court of Poweshiek county, Iowa, had jurisdiction of the subject-matter of the action or of the person of the defendant. There was no reply to the averments of the answer herein, and these averments of facts disclosing the want of jurisdiction of the district court in Iowa were therefore admitted to be true. (*National Lumber Co. v.*

Ashby, 41 Neb. 292.) There was in this case, under the facts and statute pleaded in the answer, a tacitly confessed want of jurisdiction in the district court of Poweshiek county, Iowa, to render a judgment against the defendant, and such a judgment rendered, as we must assume, without jurisdiction furnished no sufficient evidence to sustain a judgment in any of the courts of this state. The judgment of the district court is therefore reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

ELIAS BAKER V. JOHN PETERSON.

FILED JANUARY 5, 1899. No. 8594

1. **Pleading:** UNDENIED ALLEGATIONS. The averments of a petition not denied in the answer must be accepted as true where there is involved no question of value or the amount of damages.

2. **Clerk of District Court:** GARNISHMENT: PLEADING. Where by his answer the defendant concedes that he received and receipted for certain money as clerk of the district court, and has paid a portion of it to his successor in office, he is still presumed to retain the balance *in custodia legis*, notwithstanding the fact that he may actually have paid it out on an ineffectual garnishment.

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

Sawyer, Snell & Frost, for plaintiff in error:

After the claim of plaintiff in the foreclosure suit was paid in full, the surplus turned over to the clerk of the district court belonged to defendant. The fund was not *in custodia legis*, but was subject to garnishment in the hands of the officer. (*Oppenheimer v. Marr*, 31 Neb. 811; *Leroux v. Baldus*, 13 S. W. Rep. [Tex.] 1019; *Weaver v. Davis*, 47 Ill. 240; *King v. Moore*, 41 Am. Dec. [Ala.] 44; *Dunsmoor v. Furstenfeldt*, 26 Pac. Rep. [Cal.] 518; *Weaver*

v. Cressman, 21 Neb. 675; *Langdon v. Lockett*, 41 Am. Dec. [Ala.] 78; *Hoffman v. Wetherell*, 42 Ia. 89; *Gaither v. Ballew*, 69 Am. Dec. [N. Car.] 763; *Clark v. Boggs*, 41 Am. Dec. [Ala.] 85; Rood, Garnishment sec. 32; Waples, Attachment 221; Wade, Attachment sec. 421.)

Benjamin F. Johnson, contra.

RYAN, C.

The judgment in this case was rendered by the district court of Lancaster county upon its determination of the insufficiency of the answer on a general demurrer thereto. We shall therefore briefly summarize the facts pleaded in the petition and in the answer. For his cause of action Peterson, the plaintiff, alleged that on February 23, 1895, the defendant was clerk of said district court; that on March 23, 1894, there was a decree of foreclosure therein whereby certain lands owned by plaintiff were ordered sold; that on May 1, 1894, pursuant to said decree, there was a sale by the sheriff, at which sale there was paid an excess of $399.80 above the amount necessary to satisfy the decree and costs, which sum, plaintiff alleged, was his as the holder of the fee of the land sold. There were with respect to this excess the following averments in the petition: "That on the said 23d day of February, 1895, said sheriff paid to defendant Baker as clerk of district court the said sum of $399.80, and the same was receipted for by defendant Baker as clerk of said district court." This part of the petition was followed by statements that of the excess referred to but $199.40 had been paid, and that, too, by Baker's successor in office, and for the balance, with interest, which, upon demand, Baker had refused to pay, there was a prayer for judgment. There was in the answer no denial whatever. The affirmative matters pleaded were that on April 29, 1895, Baker had been summoned as garnishee as a supposed debtor of Peterson, against whom a judgment had been rendered by a justice of the peace of Lancaster

county; that Baker answered as such garnishee, and was required by said justice of the peace to pay into his court the sum for which this suit against him was afterward brought, and that in compliance with this order in garnishment Baker paid said money to said justice of the peace. By the language quoted it was clearly stated that Baker, upon a decree rendered by the court of which he was clerk, as such clerk received and receipted for the sum for the recovery of which this action was begun. This is consistent with and somewhat emphasized by the further averment that he paid to his successor in office a portion of the amount for which he had receipted. By the failure to deny these averments in the answer their truthfulness was admitted. (Code of Civil Procedure, sec. 134.) It was in view of these conceded facts that the answer alleged the defendant's discharge because of compliance on his part with the order of garnishment. In *Anheuser-Busch Brewing Ass'n v. Hier*, 52 Neb. 424, it was held that an equitable action would not lie to reach money in the hands of the clerk of the district court, and it was said that this immunity was because of the same considerations which forbade interference with such money by garnishment; in each case the reason being that the policy of the law was to protect officers and avoid collision of authority and conflict of title. In *Scott v. Rohman*, 43 Neb. 618, there was an attempt to reach by garnishment a judgment rendered in the district court wherein had been rendered the judgment of which satisfaction was sought, and it was held that, under these circumstances, the reasons for immunity from garnishment had no controlling force, and accordingly the garnishment was held valid. There is in this case no justification for the modification of the rule necessary to guard the jurisdiction of the district court and to protect its officers in the discharge of duties required of them as such. If the possession of the clerk had been independently of his duties as such, his answer should have disclosed that fact in this case. Viewed in the light of the

uncontradicted averments of the petition, however, the answer admitted that the defendant had received and receipted for the money as an officer of the court, and in that capacity had turned over part of it to his successor, and for the balance there was no averment of facts sufficient to show that the money was not still *in custodia legis*. We think the demurrer to the answer was therefore properly sustained, and accordingly the judgment of the district court is

AFFIRMED.

G. B. DARR v. M. F. MUMMERT.

FILED JANUARY 5, 1899. No. 8603.

1. **Construction of Contract to Sell Land.** By a contract in writing signed by A and B the former agreed to sell and convey to the latter certain described real estate, provided the latter made certain specified payments of money at certain specified times. The contract contained no agreement on the part of B to purchase the real estate or make the payments mentioned. *Held*, (1) That by the contract A gave B the option to purchase said real estate; (2) that B's failure to make the payments specified did not invest A with a cause of action against him on the contract.

2. **Action on Contract to Sell Land:** PETITION. The petition set out in the opinion and *held* not to state a cause of action.

ERROR from the district court of Dawson county. Tried below before GREENE, J. *Reversed.*

C. W. McNamar, for plaintiff in error.

G. W. Fox, contra.

RAGAN, C.

M. F. Mummert brought this suit in the district court of Dawson county against G. B. Darr. Darr interposed a general demurrer to Mummert's petition, which the court overruled. Darr refused to plead further, and judg-

ment was entered against him, to review which he has filed here a petition in error.

The only question in the case is whether the petition states facts sufficient to constitute a cause of action. The petition, so far as material here, was in the words and figures as follows:

"The plaintiff complains of the defendant, for that on or about the 1st day of November, 1893, plaintiff and the defendant, for the considerations named in the real estate contract hereinafter copied, made in writing a real estate contract, of which the following is a copy: 'This agreement, made this 1st day of November, A. D. 1893, between M. F. Mummert, of Bushnell, McDonough county, Illinois, of the first part, and George B. Darr, of Lexington, Dawson county, Nebraska, of the second part, witnesseth: That in consideration of the covenants and agreements herein specified the said party of the first part hereby agrees to sell unto the said party of the second part the following described real estate, situated in Dawson county, and state of Nebraska, to-wit: The northwest quarter (¼) of section twenty-three (23), in township ten (10) north, of range twenty-two (22) west of the 6th P. M., in Dawson county, Nebraska, as designated by the records of said Dawson county, for the sum of $2,000, $400 of which has been paid in hand, the receipt of which is hereby acknowledged. Now if the said party of the second part shall pay to the party of the first part punctually the several sums set forth, and at the dates set forth below, to-wit, $400 on or before the 1st day of November, 1895, $1,200 on or before the 1st day of November, 1897, at the office of the Lexington Bank, Lexington, Nebraska, with exchange, and with interest at the rate of eight per cent per annum from date hereof until the whole sum is fully paid, and regularly and seasonably pay all taxes that may be lawfully assessed against said premises, and in case said party of the second part or his legal representatives shall pay the several sums of money aforesaid, at the several times above limited, and

shall strictly and literally perform all and singular the aforesaid agreements after their true tenor and intent, then the said first party will convey, or cause to be conveyed, to said party of the second part by warranty deed the above described premises, except taxes of 1893 and thereafter.' Said real estate contract was so made in duplicate, and when so made the plaintiff delivered one of the said duplicates to the defendant and the defendant delivered the other of said duplicates to the plaintiff, and the $400 cash payment mentioned in said contract was paid by defendant to plaintiff. When said contract was so made and delivered the plaintiff was the owner of the land described therein. At the time of the making and delivery of said contract as aforesaid the defendant, under said contract and with the assent of plaintiff, took possession of said real estate, and ever since then he and one E. B. Smith, to whom defendant assigned said contract, have had possession thereof, and have had the exclusive use thereof. No part of the $400 payment mentioned in said contract and due on or before the 1st day of November, 1895, as therein provided, has been paid, nor has any part of the interest thereon been paid, and there is now due from the defendant to the plaintiff on said real estate contract the sum of $400, with eight per cent interest per annum from the 1st day of November, 1893. No part of the interest on the $1,200 payment mentioned in said real estate contract has been paid, and there is now due from the defendant to the plaintiff on said real estate contract, as interest on said $1,200 payment, the sum of $192. The plaintiff therefore asks judgment against the defendant for the sum of $592, with eight per cent interest on $400 thereof from the 1st day of November, 1893, and for costs of suit."

What contract between these parties does the writing copied into the petition evidence? It is a contract and agreement on the part of Mummert to convey the real estate described to Darr, if the latter should make certain payments at certain times. Darr did not promise

to make these payments, or any of them; did not promise to purchase the real estate. The effect of the agreement of the parties was that Mummert gave Darr the option of purchasing the real estate on certain conditions. The petition sets out what the contract between the parties was, but fails to allege that Darr has broken any contract made with Mummert, and therefore it fails to state a cause of action. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

DAVID R. CAMERON V. FREDERICK NELSON.

FILED JANUARY 5, 1899. No. 8567.

1. **Trust Relating to Land:** ORAL AGREEMENT: STATUTE OF FRAUDS. A conveyed to B certain land by deed of warranty purporting to convey the whole estate. *Held*, That a contemporaneous agreement whereby B was to have the beneficial interest in only one-half, and was to hold the legal title to the whole, sell the land as A's agent, and pay to A one-half the proceeds, was an attempt to create a trust relating to land, and unenforceable because not in writing.

2. ———: ———: ———. The promise to account for one-half the proceeds, being dependent upon the trust, could not be enforced.

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

Greene & Breckenridge, for plaintiff in error.

Duffie & Van Dusen, contra.

IRVINE, C.

In 1894 Nelson was the owner of certain land in Sheridan county, incumbered by a small mortgage, on which there was interest delinquent. He conveyed it to Cam-

eron by warranty deed purporting to pass the whole estate. Cameron thereafter traded the land for Omaha property of such value that a considerable profit resulted. Nelson brought this suit to recover one-half that profit, claiming that the bargain was that Cameron gave him a piano for a half interest in the land, and that, while the deed passed the legal title to the whole, there was an express oral agreement that, in the language of the petition, "Cameron should hold the legal title thereof and should sell the same as the agent of this plaintiff, and upon a sale being made, would promptly turn over to the plaintiff one-half of the proceeds of said sale, less the amount of incumbrance upon said property." There was ample evidence tending to support that allegation, and while it was contradicted by defendant's witnesses, the jury found for the plaintiff. The defendant brings the case here, alleging as error the various rulings whereby plaintiff was permitted to establish such an arrangement by proof of an oral agreement.

Counsel for defendant discuss the question with needless asperity. The case undoubtedly falls near the line of demarcation between a trust and a merely personal debt, and its decision is not free from difficulty. Without multiplying citations it may be said that the cases throwing light on the subject may be roughly classed as follows: Cases where the attempt is to enforce such an agreement against the land itself. There it is the uniform holding that if a trust may be enforced at all it must be under circumstances raising a resulting or constructive trust; that the verbal agreement contravenes the statute of frauds. Next there are cases where two men join in the purchase of land, taking title in one, who is to resell and divide profits. Such contracts are usually enforced, although not in writing, but it will be seen there is in such cases a resulting trust from contributing to the purchase-money. Next there are cases where the establishing of the debt does not involve the establishing of any interest in the land itself, as where the action con-

cerns only the purchase-money after execution of the conveyance. Of course the promise in such case does not seek to create a trust and is enforceable. From a disposition to prevent injustice the courts have sometimes indulged in sophistical reasoning to bring a hard case within this class. To the class just mentioned belongs *Harris v. Roberts*, 12 Neb. 631, cited by the plaintiff. It matters not whether we think that the court was there right in treating the case as one affecting the purchase-money; it was so treated, and decided on that ground. *Linscott v. McIntire*, 15 Me. 201, is quite like the present case, and was treated as concerning only the price of the land. *Hess v. Fox*, 10 Wend. [N. Y.] 436, was also somewhat similar in its facts, but the court there considered only that part of the statute of frauds relating to sales of lands, and not that relating to the creation of trusts. *Randall v. Constans*, 33 Minn. 329, was essentially like this case and the Minnesota statute is essentially like ours, and it was held that the contract could not be enforced.

As an induction from all the cases it may be said that where it is practicable to enforce the oral promise without establishing any interest in the land itself, the statute does not apply; but where the right to recover depends upon the establishment of an interest in the land, the attempt is to raise an oral trust and must fail. So here, if the petition alleged and the proof established that the conveyance to Cameron was absolute, and that he merely promised, as part of the consideration, that in case of a sale he would pay Nelson a portion of the proceeds, it could not be said that there was any attempt to create a trust in the land, although possibly under our statute there might then be a trust "relating to" land. But the petition charges, and the proof all tends to show, that the agreement relied on was that only a beneficial interest in one-half should pass to Cameron; that he should be trustee for Nelson as to the other half; and that the agreement to pay a portion of the proceeds of sale, while actually expressed, was only such as followed

from the trust in the land. It is impossible, under the pleadings and proofs, to adopt a different theory. So considered we have concluded that the case falls within the statute. This conclusion is in part influenced by a difference in language existing between our statute and the statute of Charles II, which in substance has been the basis of most decisions. Section 7 of the latter statute merely enacts that "all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or else by his last will in writing, or else they shall be utterly void and of none effect." (Statutes at Large, 29 Car. II, ch. 3.) Our statute provides that "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same." (Compiled Statutes, ch. 32, sec. 3.) The English statute was aimed against technical trusts in land, or, in the words of the statute, "of lands." It has received on the whole a rather strict construction. Ours, evidently for the very purpose of extending its application beyond that of the English, applies not only to trusts of lands, but to all concerning land or in any manner relating thereto. Assuredly that set up in the present case relates to land.

REVERSED AND REMANDED.

ALEXANDER MCGAVOCK ET AL. V. WILLIAM B. MORTON.

FILED JANUARY 5, 1899. No. 8560.

1. **Contracts.** A concurrence of minds is essential to the creation of a contract, unless in cases of estoppel.

2. ——: ALTERATION. Therefore, a written instrument signed by one party with the intention that the other shall later sign it, which is changed in any manner altering its legal effect, and by that other signed in its altered condition, does not become binding on the former, unless he learn of and ratify the change; and this although the alteration be made by a stranger.

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

Francis A. Brogan and *Guy R. C. Read,* for plaintiffs in error.

George A. Magney, contra.

IRVINE, C.

McGavock and Doll, the plaintiffs in error, were sued by Morton on a contract alleged to have been made by McGavock and Doll with the city of South Omaha, whereby the defendants guarantied the payment by one Davis of laborers employed by him in grading certain streets for the city. It was alleged that the claims of certain of these laborers had been assigned to Morton. The contract sued on was tripartite. Davis agreed to do certain grading according to certain specifications, and was named as party of the second part. The city agreed to pay at a certain rate and in a certain manner, and was named as party of the first part. McGavock and Doll, who were named as parties of the third part, agreed with the city that Davis would perform his contract, and also agreed as follows: "Said parties of the third part hereby guaranty that the said party of the second part will well and truly perform the covenant

hereinbefore contained to pay all laborers employed on said work, and if said laborers are not paid in full by said party of the second part, that the said party of the third part hereby agrees to pay for said labor, or any part thereof, which shall not be paid by said second party within ten days after the money for such labor becomes due and payable, and this provision shall entitle any and all laborers performing labor on the improvements to be done under this contract, to sue and recover from said third parties, or either of them, the amount due or unpaid to them, or either of them, by said second party," etc. The answer contained a general denial and several special defenses. Among the latter was a count specifically alleging that after the defendants had signed the contract, but before it had become operative by acceptance of the city, it had been, without the knowledge or consent of defendants, altered, as hereafter stated. It seems that there existed a contract between the city and Douglas county whereby the latter agreed to pay a portion of the cost of the improvement to which the contract related. It is asserted that this contract was void, but we need not consider that question. The contract sued on provided for paying Davis as follows: "And the said party of the second part further agrees that he will not be entitled to receive payment for any portion of the aforesaid work or materials until the same shall have been fully completed in the manner set forth in this agreement, to the satisfaction and acceptance of the city engineer and committee on streets and alleys and city council. And that he then will receive payment according to the above schedule of prices, in warrants upon the city treasury for the amount herein provided for when the money is received by the city of South Omaha from the county commissioners of Douglas county, as per agreement between the city council and county commissioners of January 27, 1890." There was evidence tending to show that after the contract had been drawn by the city engineer it was

signed in his office by defendants, and that it then did not contain the foregoing words beginning "when the money is received by the city of South Omaha." Further, that thereafter those words were inserted by the engineer and the contract then approved by the council. By its terms it was not to become operative until so approved.

If this state of facts existed it was a complete defense to the action. The change was material. As the sureties signed the contract payment was to be made in warrants when the work was completed to the satisfaction and acceptance of the engineer, the committee on streets and alleys, and the council; as the council accepted the contract, nothing was to be paid until the county should pay the city. This substantially changed the legal effect of the contract between the city and Davis, and so changed the obligations of the defendants. It was one thing to agree to pay wages if the principal did not within ten days after they fell due and when the principal was to receive money to meet his obligations when the work was done, and quite another thing to agree to so pay when the principal was not to receive anything until the happening of an independent contingency. Indeed, all the discussion in the briefs as to materiality, and a further discussion as to whether the change was an alteration or a spoliation, are beside the issue, because the theory is not that the contract was altered after it was made, but that the change was made after execution by one side and before execution by the other,—in other words, that because of the change at that time, regardless of who made it, there was never a consensus. The proposition made by the defendants, by signing the contract as it first was tendered, was not accepted by the city when it approved a substantially different contract. Any change which altered the legal effect of the proposal, even if made by a stranger, would under such circumstances prevent the concurrence of minds essential to make a contract.

The court in one instruction stated to the jury the nature of the petition alone; that of the answer was nowhere stated. In another instruction the jury was told to find for the plaintiff if he had substantially proved the averments of his petition. It is true that the requirement that the petition be proved would to the technical mind suggest the necessity of proving a contract as therein alleged. But jurymen have not usually such technical minds. The non-existence of a contract by reason of such circumstances as were here relied on was a matter which should have been distinctly placed before the jury, and an instruction appropriate for doing so was tendered by defendants and refused. The evidence was conflicting as to when the change was made, whether before or after the defendants signed, and they were entitled to have that issue submitted to the jury under instructions calling attention thereto.

Lest what has been said as to the tendering of an appropriate instruction should in the further progress of the case be misunderstood, it may be well to say that we mean appropriate under the condition of the evidence then existing. It omitted altogether the element of knowledge of the change or ratification thereof by the defendants. Of course, if they learned of the alteration and assented thereto after the signatures were affixed, the defense would be unavailing; but there was no evidence whatever to show such a state of facts, and there was evidence to the contrary. Therefore the instruction omitting that feature was properly asked as applicable to the evidence then before the jury.

REVERSED AND REMANDED.