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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

SEPTEMBER TERM, 1899—JANUARY TERM, 1900.

VOLUME LIX.

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In behalf of the people of Nebraska.

SUPREME COURT OF NEBRASKA

DURING THE

PERIOD AND PREPARATION OF THIS REPORT.

CHIEF JUSTICES AND JUDGES.

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T. L. NORVAL,†

T. L. NORVAL,* } JUDGES.
J. J. SULLIVAN,
SILAS A. HOLCOMB,†

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ORVILLE D. HARRIS,§
HUGH G. PATTON,||

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* Until January 4, 1900.
† After January 4, 1900.
‡ Until May 1, 1900.
§ Until March 1, 1900.
|| After March 1, 1900.

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J. S. STULL.....Auburn

Second District—

PAUL JESSEN.....Nebraska City

Third District—

A. J. CORNISH.....Lincoln
LINCOLN FROST.....Lincoln
E. P. HOLMES.....Lincoln

Fourth District—

B. S. BAKER.....Omaha
I. F. BAXTER.....Omaha
CHARLES T. DICKINSON.....Tekamah
LEE S. ESTELLE.....Omaha
JACOB FAWCETT.....Omaha
W. W. KEYSOR.....Omaha
W. W. SLABAUGH.....Omaha

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S. H. SORNBORGER.....Wahoo

Sixth District—

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GEORGE W. STUBBS.....Superior

Eighth District—

GUY T. GRAVES.....Pender

Ninth District—

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DOUGLAS CONES†.....Pierce

* Resigned December 16, 1899.
† Appointed. Qualified December 18, 1899.

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Eleventh District—

C. A. MUNN.....Ord

J. R. THOMPSON.....Grand Island

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H. M. SULLIVAN.....Broken Bow

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REPORTER'S NOTES.

The opinions in the present volume were verified, the catch-words of the syllabi were inserted, and the briefs (with the exception of one amendment) were abstracted, as far as page 623, exclusive, by the predecessor of the present reporter. Such labor after and inclusive of page 623 is the work of this administration, as is the proof-reading, tabulating, indexing and digesting.

The present rule is to follow quotations from records, reports and text-books *verbatim et litteratim et punctim* with the verity of a Chinese copyist. In the opinion proper a uniform rule of orthography, punctuation, etc., has been aimed at. Hence variations in forms of words et cætera.

See page xlvii for table of Nebraska cases overruled.

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

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1899.

PRESENT:

HON. T. O. C. HARRISON, CHIEF JUSTICE.
HON. T. L. NORVAL, } JUDGES.
HON. J. J. SULLIVAN, }

STATE OF NEBRASKA, EX REL. DAWSON COUNTY, V. FARMERS & MERCHANTS IRRIGATION COMPANY.

FILED SEPTEMBER 21, 1899. No. 10,572.

1. Statutes: UNIFORMITY OF OPERATION: SPECIAL LEGISLATION. A law which is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, is not objectionable as wanting uniformity of operation, or as being in the nature of special legislation.

2. ——: ——: ——: IRRIGATION COMPANIES: CONSTITUTIONAL LAW. Section 58, article 2, chapter 93*a*, Compiled Statutes, 1897, which assumes to exempt irrigation companies from the operation of the general law requiring railroad corporations, canal companies etc., to erect and maintain bridges and crossings on the highways where their roads, canals or ditches cross such highways, is special legislation, and, being in violation of the constitution, is void.

3. ——: INVALID PORTIONS: IRRIGATION. Section 58, aforesaid, is not so intimately connected with the remainder of the act as to be incapable of separation from it.

4. ———: ———. When a separable part of a statute is adjudged to be null, the remainder continues in force, unless the unconstitutional part was an inducement to the adoption of the measure.

ERROR from the district court of Dawson county. Tried below before H. M. SULLIVAN, J. *Reversed.*

George C. Gillan and *Warrington & Stewart,* for plaintiff in error.

E. A. Cook, contra:

Section 58, article 2, chapter 93*a*, Compiled Statutes, exempting irrigation companies from the operation of the general law requiring certain corporations to maintain crossings at public highways, is not unconstitutional as granting special privileges to respondent. The legislation is not special, but it applies alike to persons having lands subject to irrigation, and to which water may be supplied. Its provisions are co-extensive with the boundaries of the state. Where a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, it is not objectionable as wanting in uniformity of operation. See *County of Lancaster v. Trimble,* 33 Nebr., 121; *State v. Berka,* 20 Nebr., 375; *State v. Graham,* 16 Nebr., 74; *State v. Robinson,* 35 Nebr., 403.

SULLIVAN, J.

This was an application by the plaintiff in error to the district court for a writ of mandamus to compel the Farmers & Merchants Irrigation Company to repair and maintain the bridges crossing its irrigation canals on the public roads in Dawson county. The relator bases its claim to the writ upon section 110, chapter 78, Compiled Statutes, 1897, which is as follows: "Any railroad corporation, canal company, mill owner, or any person or persons who now own, or may hereafter own or operate, any railroad, canal, or ditch that crosses any public or

private road shall make and keep in good repair good and sufficient crossings on all such roads, including all the grading, bridges, ditches, and culverts that may be necessary, within their right of way." The respondent contends that the section quoted, so far as it relates to irrigation companies, was impliedly repealed by chapter 69, Session Laws of 1895. Section 58 of this act provides that the owner of any system of irrigation shall construct suitable wagon bridges, of sound timber and not less than sixteen feet in width, across its ditches on the public roads, and that the county board of the proper county shall examine such bridges when completed, and, if found satisfactory, shall thereafter control and maintain them. See Compiled Statutes, 1897, ch. 93*a*, art. 2, sec. 58. The power of the legislature to enact section 58 is denied on the ground that it attempts to secure to irrigation companies immunity from burdens which, under similar conditions, rest upon all other persons, companies and corporations, and that it is, therefore, within the constitutional inhibition against special legislation. Counsel for respondent has endeavored, in an able argument, to vindicate the law by appealing to the principle of classification. It has been said, frequently, in the opinions of this court, that where a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, it is not objectionable as wanting uniformity of operation, or as being in the nature of special legislation. See *State v. Graham*, 16 Nebr., 74; *State v. Berka*, 20 Nebr., 375; *County of Lancaster v. Trimble*, 33 Nebr., 121; *State v. Robinson*, 35 Nebr., 401; *Van Horn v. State*, 46 Nebr., 62. "To this general statement," it is said in *Livingston Loan & Building Ass'n v. Drummond*, 49 Nebr., 205, "it is perhaps necessary to add a qualification. The legislature may not arbitrarily and without any possible reason create a class to be affected by legislation where the result would be an infringement upon the constitutional prohibition."

The rule established by the authorities is that while

it is competent for the legislature to classify, the classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances, that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. See Cooley, Constitutional Limitations [5th ed.], 481.

In *State v. Sloane*, 49 N. J. Law, 356, the court, after remarking that the character of a law is to be determined from a consideration of its purpose and the objects upon which it is intended to operate, said: "If these objects are distinguished from others by characteristics evincing a peculiar relation to the legislative purpose, and showing the legislation to be reasonably appropriate to the former and inappropriate to the latter, the objects will be considered, as respects such legislation, to be a class by themselves, and legislation affecting such a class to be general. But if the characteristics used to distinguish the objects to which the legislation applies from others are not germane to the legislative purpose, or do not indicate some reasonable appropriateness in its application, or if objects with similar characteristics and like relation to the legislative purpose have been excluded from the operation of the law, then the classification would be incomplete and faulty, and the legislation not general, but local or special."

In *State v. Sheriff of Ramsey County*, 48 Minn., 236, a law declaring the emission of dense smoke in a city to be a nuisance, but exempting from its operation "manufacturing establishments using the entire product of combustion, and the heat, power, and light produced thereby, within the building wherein the same are generated, or within a radius of three hundred feet therefrom," was held unconstitutional, the court, through Vanderburgh, J., saying: "No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against the nuisance occasioned by dense smoke, and it

can make no practical difference in what business the owners or occupants of the buildings in which such smoke is produced are engaged, or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or, further, whether steam power is used in manufacturing, or is applied to other uses as a grain elevator or hoisting apparatus in a warehouse."

In *Low v. Rees Printing Co.*, 41 Nebr., 127, the "Eight Hour Law" was held to be special legislation and in violation of the constitution, because, among other reasons, it excepted from its operation persons engaged in farm and domestic labor. One fatal infirmity of the statute was that it arbitrarily excluded from its benefits persons to whose condition, situation and circumstances it was entirely appropriate. "Such law," said the court in *Randolph v. Wood*, 49 N. J. Law, 88, "must embrace all and exclude none whose condition and wants render such legislation equally necessary or appropriate to them as a class."

Applying now to the case before us the test suggested by the authorities cited, it seems perfectly plain that section 58 of the irrigation act can not be sustained without disregarding entirely the constitutional interdict against special legislation. Prior to 1895 all owners of ditches crossing highways were charged by section 110 of the road law with the duty of keeping public bridges across their ditches in repair. The legislature, by section 58, assumed to exempt irrigation companies from this burden, while leaving all other ditch owners still subject to it. Upon what ground can this classification be justified? Why should these companies be put in a class by themselves and be given immunity from the burdens which all others, under similar conditions, are required to bear? Their ditches are not, by the section in question, segregated from other private ditches on account of any peculiar characteristics which they possess. The legislation is manifestly as appropriate to the class excluded as

to the class included; and the only reason we can discover for diverse legislation with respect to them is the arbitrary and insufficient one of ownership. The obvious purpose of the legislature in dealing with both classes was to secure to the public safe and substantial bridges across private ditches, and there was no more reason for exempting some proprietors from the expense of maintaining their bridges, because engaged in the business of irrigation, than there would be for exempting others who used their ditches to drain wet lands or to protect inclosures. Where the actual situation, both as to the character of the bridges and the occasion and necessity for their construction and maintenance, are precisely the same, legislation would seem to be palpably partial which subjects one class of proprietors to serious burdens from which another class is altogether exempt. Peculiarly pertinent in this connection are the remarks of Mitchell, J., in *Johnson v. St. Paul & D. R. Co.*, 43 Minn., 222. In an opinion holding that the Minnesota fellow-servant act, although general in its scope, is applicable only to employés who are exposed to the peculiar hazards incident to the operation of railroads, it is said: "If a distinction is to be made as to the liability of employers to their employés, it must be based on a difference in the nature of the employment, and not of the employers. One rule of liability cannot be established for railway companies, merely as such, and another rule for other employers under like circumstances and conditions." While we are not unmindful of the rule of construction which requires the judiciary to resolve all just doubts in favor of legislative acts, we feel constrained, both by reason and authority, to hold that section 58 of the irrigation law of 1895 (Session Laws, 1895, p. 265, ch. 69, sec. 58), being an attempt to confer a special privilege on a particular class, comes under the ban of the constitution, and is, therefore, null. The section is not so connected with the remainder of the act as to be incapable of separation from it. Neither can it be said that it constituted an induce-

ment to the adoption of the measure. The remainder of the law is, therefore, unaffected by this decision. See *State v. Moore*, 48 Nebr., 870; *State v. Stewart*, 52 Nebr., 243. The judgment of the district court denying the relator's application for a peremptory writ of mandamus is reversed.

REVERSED AND REMANDED.

GERMAN NATIONAL BANK OF HASTINGS, APPELLEE, V. FIRST NATIONAL BANK OF HASTINGS, APPELLANT, ET AL.

FILED SEPTEMBER 21, 1899. No. 10,645.

1. **Action to Recover Assets of Debtor.** A suit by a judgment creditor under section 532, Code of Civil Procedure, to recover assets of his debtor not reachable by execution, can be maintained only where the debtor had himself an actionable demand at the time the suit was instituted.

2. **Agent's Unauthorized Sale of Corporate Property:** RATIFICATION. A sale of corporate assets, made by an agent in excess of his authority, will be, ordinarily, ratified by the acts of the corporation in dealing with the purchaser as the owner of the property.

3. ———: RATIFICATION: DIRECTORS. The sale of corporate property and the disposition of the proceeds thereof, being distinct acts, a director may be qualified to vote upon a proposition to ratify the sale, although disqualified from voting upon a question affecting the application of the purchase-money.

4. ———: ———: EVIDENCE. Ratification of the unauthorized act of a corporate officer may be inferred from silence, inaction and other circumstances indicating acquiescence and consent.

5. **Review:** QUESTIONS NOT RAISED BELOW: ATTORNEYS. The authority of counsel to file a pleading for one of the parties to an action can not be first raised in this court.

6. **Corporations:** UNAUTHORIZED ACTS OF AGENT: RATIFICATION. The rule that when a principal, with knowledge of all the facts, adopts or acquiesces in acts done by his agent in excess of his authority, he can not afterwards disavow such acts, applies to corporations as well as to natural persons.

7. **Contracts:** RATIFICATION. A principal will not be permitted to ac-

cept and confirm so much of a contract as may be beneficial to him, and reject the remainder.

8. ———: RIGHTS OF PARTIES: EQUITY: TRUSTS. Equity will not lend its aid to one who, in violation of an agreement, seeks to appropriate to his own use property which, according to the agreement, should be distributed among all the parties thereto.

9. **Trusts:** ENFORCEMENT OF JUDGMENT. One holding a judgment as the trustee of an express trust is entitled to enforce it, for the beneficial owners, according to the terms of the trust.

10. **Judgments:** SEPARATE INTERESTS OF PLAINTIFFS: EXECUTIONS. It would seem that a judgment can not be enforced piece-meal by each of the owners, whose claims have been merged therein, issuing an execution for the collection of his part.

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

The opinion contains a statement of the case.

J. B. Cessna and *Capps & Stevens*, for appellant:

One of many creditors of an insolvent corporation can not sue alone to recover corporate assets wrongfully converted by defendants, without alleging that the corporation refused to sue. The corporation must be a party plaintiff. See *Davenport v. Dows*, 85 U. S., 626; *McMullen v. Ritchie*, 64 Fed. Rep., 253; *Hawes v. Oakland*, 104 U. S., 450; *O'Conner Mining & Mfg. Co. v. Coosa Furnace Co.*, 10 So. Rep. [Ala.], 290; *Doud v. Wisconsin P. & S. R. Co.*, 25 N. W. Rep. [Wis.], 533; *Patterson v. Lynde*, 106 U. S., 520; *Moulton v. Connell*, 27 S. W. Rep. [Tenn.], 672; *Hornor v. Henning*, 93 U. S., 231; *Stone v. Chisolm*, 113 U. S., 302; *Pollard v. Bailey*, 20 Wall. [U. S.], 520; *Dimpfell v. Ohio & M. R. Co.*, 110 U. S., 209; *City of Detroit v. Dean*, 106 U. S., 541; *Bill v. Western Union Telegraph Co.*, 16 Fed. Rep., 14.

The petition, not showing that suit was brought in behalf of plaintiff and all other creditors of the corporation, fails to state a cause of action. See *Pullman v. Stebbins*, 51 Fed. Rep., 10; *Hornor v. Henning*, 93 U. S., 228; *Stone v. Chisolm*, 113 U. S., 309; *Childs v. Carlstein*, 76 Fed.

Rep., 86; *Crease v. Babcock*, 10 Met. [Mass.], 525; *Cleveland Rolling Mill Co. v. Texas & S. L. R. Co.*, 27 Fed. Rep., 250; *Hollings v. Brierfield Coal & Iron Co.*, 150 U. S., 371; *Day v. Buckingham*, 58 N. W. Rep. [Wis.], 254; *Sleeper v. Goodwin*, 31 N. W. Rep. [Wis.], 335; *Cooper v. Adel Security Co.*, 30 S. E. Rep. [N. Car.], 348; *Bethune v. Wells*, 21 S. E. Rep. [Ga.], 230; *Swan Land & Cattle Co. v. Frank*, 148 U. S., 605; *Van Pelt v. Gardner*, 54 Nebr., 701; *Farmers Loan & Trust Co. v. Funk*, 49 Nebr., 353; *Smith v. Hurd*, 12 Met. [Mass.], 371; *National Exchange Bank v. Peters*, 44 Fed. Rep., 13; *Howe v. Barney*, 45 Fed. Rep., 668; *Craig v. Gregg*, 83 Pa. St., 19; *Evans v. Brandon*, 53 Tex., 56; *Allen v. Curtis*, 26 Conn., 455; *Brinckerhoff v. Bostwick*, 88 N. Y., 52; *Davenport v. Dows*, 18 Wall. [U. S.], 626; *Wallace v. Lincoln Savings Bank*, 15 S. W. Rep. [Tenn.], 448.

All defendants in a judgment are necessary parties to a proceeding thereon. Where a judgment has been assigned, the assignee is a necessary party to a suit in equity to enforce the judgment as against assets belonging to defendant. Plaintiff, one of many *cestuis que trust*, can not split a joint judgment, and enforce action for his benefit, without making the trustee and joint beneficiaries parties. See *Curtin v. Atkinson*, 29 Nebr., 612; *Andres v. Kridler*, 42 Nebr., 784; *Grain v. Aldrich*, 38 Cal., 514; *Gibson v. Cooke*, 20 Pick. [Mass.], 15; *Dean v. Chandler*, 44 Mo. App., 338; *Wayman v. Cochrane*, 35 Ill., 111; *Wann v. McNulty*, 2 Gil. [Ill.], 355; *Burditt v. Porter*, 21 Atl. Rep. [Vt.], 955; *Sammis v. Wightman*, 12 So. Rep. [Fla.], 536; *Chew v. Brimagen*, 13 Wall. [U. S.], 497; *Heavenridge v. Mondy*, 34 Ind., 28; *Varney v. Bartlett*, 5 Wis., 276; *Hobson v. McCambridge*, 22 N. E. Rep. [Ill.], 823; *McCormick v. Fulton*, 19 Ill., 570; *Atkinson v. Foster*, 25 N. E. Rep. [Ill.], 528; *Triplett v. Scott*, 12 Ill., 137; *Wilson v. Keisel*, 35 Pac. Rep. [Utah], 491.

Plaintiff's execution issued for part of the Slaker judgment was void. See *Bain v. Chrisman*, 27 Mo., 293; *Hunt v. Loucks*, 38 Cal., 372.

Directors of a corporation may ratify an act without

taking a formal vote. See *Allis v. Jones*, 45 Fed. Rep., 148; *Scofield v. Parlin*, 61 Fed. Rep., 804; *Murray v. Nelson Lumber Co.*, 143 Mass., 250; *First Nat. Bank of Springfield v. Fricke*, 75 Mo., 178; *Beach v. Miller*, 22 N. E. Rep. [Ill.], 464.

Ratification may be assumed from absence of dissent. A corporation may ratify acts of its agents, and ratification may be inferred from informal acquiescence in such acts. See *Follansbe v. Kilbreth*, 17 Ill., 522; *Twin-Lick Oil Co. v. Marbury*, 91 U. S., 587; *Jessup v. Illinois C. R. Co.*, 43 Fed. Rep., 483; *Paige v. Fazackerly*, 36 Barb. [N. Y.], 392; *Currie v. Bowman*, 35 Pac. Rep. [Ore.], 848.

A principal can not ratify a portion of a contract, and reject the remainder. See *Gow v. Collin*, 66 N. W. Rep. [Mich.], 676; *Nelson v. Bevins*, 14 Nebr., 153., *McKeighan v. Hopkins*, 19 Nebr., 33; *Joslin v. Miller*, 14 Nebr., 91; *Tooker v. Sloan*, 30 N. J. Eq., 394; *Baer v. Lichten*, 24 Ill. App., 311; *Clark v. Hyatt*, 23 N. E. Rep. [N. Y.], 891.

A. M. Post, also for appellant:

Plaintiff, when suing as a creditor or stockholder for the enforcement of a corporate right, is required to state with particularity the efforts made by him to induce the desired action by the managing board, and to show that he exhausted available means to secure redress through the agency of the corporation itself. See *Doud v. Wisconsin P. & S. R. Co.*, 25 N. W. Rep. [Wis.], 533; *Brewer v. Boston Theatre*, 104 Mass., 378; *Dunphy v. Travelers' Newspaper Ass'n*, 146 Mass., 495; *Boyd v. Sims*, 11 S. W. Rep. [Tenn.], 948.

Plaintiff's claim, with those of other creditors, had been merged in the judgment in favor of Slaker, who is a necessary plaintiff in a suit in equity to enforce the judgment in the interest of creditors. See *Minnesota Thresher Mfg. Co. v. Heipler*, 52 N. W. Rep. [Minn.], 33; *Allen v. Brown*, 44 N. Y., 228.

Although Slaker might have prosecuted a suit for an accounting without the presence of parties beneficially

interested in the judgment, the right in that regard is not reciprocal, since to a suit by one of the judgment creditors for an accounting all parties interested therein are necessary parties plaintiff, unless, of course, they refuse to join as such, in which they may be defendants, the reason therefor being stated in the petition. See *Keeler v. Keeler*, 11 N. J. Eq., 458; *Gregory v. Stetson*, 133 U. S., 579.

Ratification, although in practice generally established by proof of an estoppel, operates retroactively, and being equivalent to authority in the first instance is provable even under the general allegation of a contract duly executed by an agent or trustee, and need not be specially pleaded. See *Bigler v. Baker*, 40 Nebr., 325; *Hoyt v. Thompson*, 19 N. Y., 207; *Hubbard v. Town of Williamstown*, 61 Wis., 397; *Long v. Osborn*, 59 N. W. Rep. [Ia.], 14; *Hoosac Mining & Milling Co. v. Donat*, 16 Pac. Rep. [Colo.], 157.

Tibbets Bros. & Morey and *Frank Irvine, contra:*

Plaintiff properly sued in its own behalf. See *Hoagland v. Van Etten*, 22 Nebr., 681; *Tatum v. Rosenthal*, 30 Pac. Rep. [Cal.], 137; 5 Ency. Pl. & Pr., 534.

The suit need not be brought by the corporation, nor need the petition show that the corporation refused to act. See *Hudson v. Plets*, 11 Paige [N. Y.], 180; *City of Cincinnati v. Hafer*, 49 O. St., 60.

Misjoinder or defect of parties was waived, and objection otherwise invalid. See *Culbertson Irrigating & Water Power Co. v. Wildman*, 45 Nebr., 663; *Beeler v. First Nat. Bank*, 34 Nebr., 348; *Stephens v. Harding*, 48 Nebr., 659; *Mills v. Miller*, 2 Nebr., 299; *Lederer v. Union Savings Bank*, 52 Nebr., 133; *Pottinger v. Garrison*, 3 Nebr., 221; *Harral v. Gray*, 10 Neb., 186; *Dorrington v. Minnick*, 15 Nebr., 397; *Buck v. Reed*, 27 Nebr., 67; *Phœnix Mutual Life Ins. Co. v. Brown*, 37 Nebr., 705; *Ainsworth v. Taylor*, 53 Nebr., 484; *Troup v. Horbach*, 57 Nebr., 644.

The judgment and execution were a sufficient basis for the suit. See *Harlan v. Harlan*, 14 Lea [Tenn.], 107;

Snavely v. Harkrader, 30 Gratt. [Va.], 487; *McCollum v. Hubbert*, 13 Ala., 282; *Commercial Nat. Bank v. Gibson*, 37 Nebr., 750.

The hardware company did not ratify the sale. See *Butts v. Wood*, 37 N. Y., 317.

SULLIVAN, J.

At a former term a judgment in favor of the First National Bank of Hastings was reversed, and the cause remanded to the district court for further proceedings. See *German Nat. Bank of Hastings v. First Nat. Bank of Hastings*, 55 Nebr., 86. Thereupon the plaintiff filed an amended petition, and brought John Slaker and the Burger-Alexander Hardware Company into the case as parties defendant. The hardware company answered, alleging that it had ratified the sale to Carson Hamot, and had also ratified the application of the proceeds of the sale upon its indebtedness to the defendant bank. The second amended petition was framed on the theory that Clark and Oliver had converted the stock of hardware, and that the appellant was, therefore, liable, either for the value of the property or for the proceeds of the sale. The court found against the First National Bank, and made no finding as to Clark and Oliver. As the bank could not possibly be liable for conversion unless Clark and Oliver were also liable, this action of the court can be accounted for only on the hypothesis that there was a ratification of the sale, but not of the application of the proceeds. The sale to Hamot was an act entirely distinct from the disposition of the purchase price. The directors and stockholders of the hardware company might, of course, have been quite willing to sanction the sale, but unwilling to give the whole sum realized therefrom to a single creditor. It would seem that the learned trial court, having this obvious distinction in mind, found against the plaintiff on the charge of conversion, but nevertheless gave judgment in its favor on the assumption that the sale had been ratified, and that the defend-

ant bank had, without right or authority, became possessed of the vendor's money. The evidence undoubtedly justifies the conclusion that there was a ratification of the sale, but it is, in our opinion, plainly insufficient to warrant a finding that the payment to appellant was not ratified. It appears that at the time the Burger-Alexander Hardware Company effected a consolidation with the Denver Hardware Company there was an understanding among the officers of the former corporation that the stock retained in Hastings should be sold at the first favorable opportunity, and the proceeds of the sale applied in liquidation of the company's indebtedness. It also appears that the sale to Hamot was for a fair price; that the stock was turned over to him without objection from any one; that the directors of the hardware company distinctly recognized the validity of the sale by authorizing, on October 12, 1891, the repurchase of an iron safe which was part of the property sold to Hamot; that the appellant, upon receiving the proceeds of the sale, surrendered notes of the company to the amount of $9,600 and the same were canceled, and new notes given for the balance remaining due; that such balance was consolidated with the claim of the German National Bank and the claims of other creditors; that the company gave a new note to John Slaker for the aggregated amounts; that Slaker, who was cashier of the appellee, executed a writing acknowledging that he held such note in trust, and agreeing to undertake the collection of the same, and to make a *pro rata* distribution of any sums collected; that Slaker afterwards reduced the trust note to judgment, and that the plaintiff, as a basis for this action, caused an execution to be issued thereon for the amount of its claim. It further appears that the assets of the hardware company were thought to be sufficient to pay its debts until the failure of the Denver Hardware Company rendered the stock of that corporation practically worthless; that appellant's right to the proceeds of the sale to Hamot was not questioned by any officer or stockholder

of the hardware company prior to the bringing of this action, or for a period of about three years.

Let us now consider the legal consequences of the conceded facts. This suit, it must be remembered, is not in the nature of a creditors' bill to recover assets disposed of in fraud of the rights of creditors. It is a suit brought by the plaintiff under section 532 of the Code of Civil Procedure to enforce, for its own benefit, a right of action which it is claimed the Burger-Alexander Hardware Company has against the First National Bank of Hastings, Oswald Oliver and A. L. Clark. The contention of the plaintiff is not that there was a fraudulent transfer of assets to the appellant, but that there was no transfer at all, and that the hardware company might therefore sue for the value of the property sold to Hamot, or else for the purchase price paid over to the defendant bank. "This action," say counsel, "as it now stands, is an action, on the part of a creditor, to subject to its claim assets of a debtor not reachable by execution." This being the character of the case, it is evident the plaintiff's rights are precisely the same as those of the hardware company. The plaintiff can not succeed unless its debtor had an actionable demand against the appellant when this suit was instituted. That the sale of the stock of hardware was ratified by the authorized purchase of the iron safe admits of no doubt whatever. There could be no more unequivocal recognition of the validity of Hamot's title than by treating with him as the owner of the property. It can not be supposed that the company would purchase and pay for an article which it already owned. It is true that the presence of Oliver, as a director, at the October meeting was necessary to constitute a quorum, but we are unable to perceive any reason why he might not be counted, nor why he might not vote upon the resolution to buy the safe. The ratification of the sale affected in no way the disposition of the money derived therefrom. Taking into account the fact that a sale of the stock of hardware was in contemplation for six or eight months

before it was made, that a fair price was realized, and that neither officer nor stockholder of the company has to this hour made any attempt to repudiate the transaction, there is, indeed, small reason for the claim that the transfer was not ratified by the owner of the property. And equally inadequate, it seems to us, are the reasons advanced to show that the payment of the proceeds of the sale to the appellant was not confirmed by acquiescence. Under circumstances that called for an expression of dissent, if the payment was not approved, the corporation remained silent. When, through its president, it took up and canceled its notes to the amount of $9,600 held by the defendant bank, it must surely have recognized the bank's right to the proceeds of the sale; and when it executed renewal notes for the indebtedness thus reduced, it must have done so on the assumption that a partial payment had been made. When sued on the Slaker note, the corporation, being itself before the court, admitted the validity of these renewals, and thus ratified the transaction in which they had their origin. At no time has there been an attempt by the hardware company, or any one connected with it, to assert a claim to the money received by the bank from Carson Hamot. Even now the company in its answer insists that the application of the proceeds of the sale was properly made. This pleading, it is true, is signed by counsel for the First National Bank, but the plaintiffs and the trial court dealt with it as the answer of the corporation, and we must so consider it. Had the Burger-Alexander Hardware Company been a copartnership, no one would doubt that the agent's unauthorized act in making the payment to the bank had been fully ratified. No one would contend that it could now maintain an action to recover from the bank the money so paid. But the doctrine that when a principal, with knowledge of all the facts, adopts or acquiesces in acts done by an agent in excess of his authority, he can not afterwards disavow such acts, applies as well to corporations as to natural persons. See

Rich v. State Nat. Bank of Lincoln, 7 Nebr., 201; Evans, Agency [Ewell's ed.], 70*; 17 Am. & Eng. Ency. Law, 162; Cooley, Torts [1st ed.], 127*. "The law is well settled," says Williams, J., in *Kelsey v. National Bank*, 69 Pa. St., 426, "that the principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own, * * * and the maxim which makes ratification equivalent to a precedent authority, is as much predicable of ratification by a corporation as it is of ratification by any other principal, and it is equally to be presumed from the absence of dissent." We think the conclusion of the trial court that there was no ratification by the hardware company of the payment to the First National Bank is, under the evidence, altogether unwarranted, and that the judgment in favor of the plaintiff must be, therefore, reversed.

But there is another reason why the plaintiff must fail in this action. When Slaker consolidated the claim of the German National Bank with the claims of other creditors, and agreed to collect the note given for the aggregated amounts, and make ratable distribution among the beneficial owners, he did an act which his principal was bound to accept or reject as an entirety. It has, after due deliberation, elected to claim under the Slaker judgment, and in so doing has, in contemplation of law, ratified the entire transaction. A principal will not be permitted to accept and confirm so much of a contract made by an agent as may be beneficial to him, and reject the remainder. See *Rogers v. Empkie Hardware Co.*, 24 Nebr., 653; *Kansas Mfg. Co. v. Wagoner*, 25 Nebr., 439; *United States School Furniture Co. v. School District*, 56 Nebr., 645. After the plaintiff had impliedly agreed that the Slaker judgment should be enforced for the common benefit of all the creditors whose claims had been merged therein, it could not be permitted to usurp the functions of the trustee, break away from its contract, issue an execution, and appropriate the assets of the hardware company to its exclusive use. Certainly it is not the business of a

court of equity to lend its aid to the plaintiff under such circumstances. A creditor is not entitled to preference over other creditors when his superior diligence is the result of his having broken his contract with them.

The validity of the execution issued at the instance of plaintiff, and without authority from Slaker, who was the trustee of an express trust, has been much discussed. But, in view of the conclusion reached, the point is not decided. It would seem, however, that a judgment can not be enforced piece-meal, and that one of several beneficial owners is not entitled to an execution on his portion. See *Davis v. Ferguson*, 148 Mass., 603; *Todd v. Botchford*, 86 N. Y., 517; *Weiss v. Chambers*, 50 Mich., 158; *Bank of Sheboygan v. Trilling*, 75 Wis., 163. The judgment is reversed, and the petition dismissed.

REVERSED AND DISMISSED.

THOMAS W. SKINNER ET AL. V. FIRST NATIONAL BANK OF PAWNEE CITY.

FILED SEPTEMBER 21, 1899. No. 8,963.

1. **Chattel Mortgages:** SEVERAL CREDITORS. A chattel mortgage given by a debtor to several creditors, who, by the terms of the instrument, are to prorate in the proceeds of the mortgaged property, is the legal equivalent of a separate mortgage to each of such creditors.

2. ——: ——: VOLUNTARY ASSIGNMENTS. Such mortgage is not an assignment, and is unaffected by the provisions of the statute in relation to voluntary assignments for the benefit of creditors.

3. **Attachment:** RIGHTS OF DEFENDANT. An attachment defendant who has incumbered the attached property beyond its value is entitled to be heard on a motion to discharge the attachment.

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

Conley & Fulton, Lindsay & Raper, and *F. Martin,* for plaintiffs in error.

J. H. Broady and *Story & Story, contra.*

SULLIVAN, J.

On Saturday evening, February 16, 1895, Meek, Skinner & Co., a partnership engaged in the hardware business in Pawnee City, executed a chattel mortgage on its stock of merchandise, and a bill of sale for its notes and book accounts, in favor of sixty-five of the firm creditors. By the terms of the instruments all creditors who should accept the security were to share *pro rata* in the proceeds of the property mortgaged. Both instruments were filed for record at 9:20 P. M. of the day on which they were made. At this time only two of the sixty-five creditors had knowledge of the transaction. These promptly accepted the security and one of them was put in possession of the mortgaged property. On the following day another of the creditors was informed of the action taken by the partnership, and he immediately signified his acceptance of the mortgage. The First National Bank of Pawnee City was one of the sixty-five creditors, but it declined to accept the security, and on Monday morning commenced an action against Meek, Skinner & Co., and caused an attachment to be levied upon all the property described in the chattel mortgage and bill of sale. The grounds upon which it is sought to justify the attachment are (1) that the mortgage and bill of sale were intended to hinder, delay and defraud creditors, and (2) that they constituted an assignment which was ineffective for want of conformity with the statute in relation to voluntary assignments. The defendants moved to discharge the attachment. The court denied the motion, rendered judgment in favor of the bank, and ordered a sale of the attached property. The main question presented by the petition in error is the correctness of the ruling sustaining the attachment. The evidence on the

hearing of the motion showed that the claims which the defendants intended to secure were valid claims, and that they turned over substantially all their property for the purpose of having it sold, and the proceeds applied *pro rata* among their creditors. Every circumstance indicates that it was the purpose of the defendants to pay their creditors as fast as possible, and not to hinder or delay them in the collection of their debts. We fail to find in the record anything whatever to warrant the conclusion that the mortgage in question was the product of a fraudulent design. The plaintiff, however, contends that in the absence of actual fraud the attachment was justified on the ground that the mortgage was an illegal assignment, and therefore constructively fraudulent. We need not consider whether constructive fraud will support an attachment, for that question is not before us. The mortgage to the sixty-five creditors was, in all respects, the legal equivalent of a separate mortgage to each of such creditors. We so decided in the case of *Sloan v. Thomas Mfg. Co.*, 58 Nebr., 713, 79 N. W. Rep., 728. The principle of that decision was previously recognized in *Jones v. Loree*, 37 Nebr., 816; *Smith v. Phelan*, 40 Nebr., 765, *Meyer v. Union Bag & Paper Co.*, 41 Nebr., 67, and *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Nebr., 863.

One other question remains to be considered. It is argued that because defendants had mortgaged the property to secure debts exceeding its value, and had parted with the possession, they had no such interest as would entitle them to demand a dissolution of the attachment. This precise point was fully considered in *McCord v. Bowen*, 51 Nebr., 247, and the conclusion reached, after an extended review of the authorities, that an attachment defendant may contest the attachment, notwithstanding the fact that the debt secured exceeds the value of the mortgaged property. We adhere to the rule laid down in that decision. The order overruling the motion to dissolve the attachment and the order directing a sale of the attached property are reversed. There is no error in the

judgment rendered on the pleadings and it is, therefore, affirmed.

JUDGMENT ACCORDINGLY.

HEIDIMAN-BENOIST SADDLERY COMPANY ET AL. V. JOSEPH SCHOTT.

FILED SEPTEMBER 21, 1899. No. 8,955.

1. **Chattel Mortgages:** POSSESSION BY MORTGAGOR: FRAUD. The fact that a mortgagor of chattels remains in possession thereof after making the mortgage, is only presumptive evidence of fraud, which may be overcome by proper proof.
2. ———: FRAUD: INTENTION. Whether the mortgage is fraudulent depends on the intention of the parties, and is not a question of law for the court, but a question of fact for the jury.
3. **Replevin:** JUDGMENT FOR PLAINTIFF. In an action of replevin the plaintiff is entitled to a verdict and a judgment for the property or the value of the property, which was wrongfully withheld from him by the defendant when the suit was instituted.
4. ———: DAMAGES. In replevin the plaintiff can not recover damages for property which was not in defendant's possession, or under his control at the beginning of the suit.

ERROR from the district court of Holt county. Tried below before KINKAID, J. *Affirmed upon filing of remittitur.*

H. M. Uttley, for plaintiffs in error.

R. R. Dickson, contra.

SULLIVAN, J.

Joseph Schott brought this action against the plaintiffs in error to recover possession of a stock of merchandise. Some of the property described in the order of delivery was seized by the sheriff, and turned over to the plaintiff. But the greater portion of it could not be found. At the trial, the right of possession was claimed

by both parties under chattel mortgages executed to them by the original owner, J. F. Pfunder, of the city of O'Neill. The plaintiff's mortgage was made and recorded December 13, 1893. Three days later the defendants obtained their mortgages. At the same time they took possession of Pfunder's store, and proceeded to sell the mortgaged stock in the usual course of the retail trade. After they had been in possession for eight months, or thereabouts, this suit was commenced against them. The jury found the issues in favor of the plaintiff; they found the value of the property taken on the writ to be $135, and the value of the property sold and disposed of to be $280. The court denied a motion for a new trial, and rendered judgment confirming plaintiff's possessory title and awarding him as damages the value of the property dissipated before the commencement of the suit. The defendants prosecute error. They insist, first, that the court should have given the jury a peremptory direction to return a verdict in their favor, because the evidence conclusively shows that the mortgagor remained in possession of the stock, and dealt with it as his own for the space of three days. It does not appear by the mortgage, or otherwise, that Pfunder was disposing of the property for his own benefit by the plaintiff's authority, or with his consent. Whether the mortgage was fraudulent as to defendants, who were creditors of Pfunder, was a question of fact for the jury to determine from a consideration of all the facts and circumstances proven on the trial. That the mortgagor continued in possession of the store and continued to dispose of the stock in the ordinary way was a circumstance tending to prove fraud; but it was by no means conclusive. The validity of the mortgage depended on the intention of the parties, and that, according to the provisions of our statute, was not a question of law for the court. See Compiled Statutes, 1897, ch. 32, sec. 20; *Turner v. Killian*, 12 Nebr., 580; *Lepin v. Coon*, 54 Nebr., 664.

It is next contended that the verdict and the judgment

are not supported by sufficient evidence. This contention must be sustained. The action, being primarily for possession, must be brought against one having the custody or control of the property. If the defendant has parted with its possession, the remedy must be against him in some other form of action. In Cobbey, Replevin, section 64, it is said: "Replevin will not lie against one who is not detaining the property when the writ is sued out. It is the condition of things when the suit is commenced which furnishes the ground for the action. It is strictly a possessory action and it lies only in behalf of one entitled to possession against one having, at the time the suit is begun, actual or constructive possession and control of the property." With a qualification not material to this case, the rule stated by the learned author was recognized and approved by this court in *Depriest v. McKinstry*, 38 Nebr., 194, where it was said that the plaintiff in replevin must allege and prove, not only that the property was in the defendant's possession or control when the suit was instituted, but also that it was wrongfully withheld. The adjudications elsewhere are to the same effect. See *Moses v. Morris*, 20 Kan., 208; *State v. Jennings*, 14 O. St., 73; *Willis v. De Witt*, 3 S. Dak., 281; *Hall v. White*, 106 Mass., 599; *McHugh v. Robinson*, 71 Wis., 565.

It is argued in the brief filed on behalf of plaintiff that section 193 of the Code of Civil Procedure authorizes the practice adopted by the trial court in this case. The section is as follows: "When the property claimed has not been taken, or has been returned to the defendant by the sheriff for want of the undertaking required by section one hundred and eighty-six, the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as are right and proper; but if the property be returned for want of the undertaking required by section one hundred and eighty-six, the plaintiff shall pay all costs made by taking the same." This section permits the plaintiff to recover the value of chattels which were properly the subject of the suit. It doubtless

warrants a judgment in his favor for the value of any part of the property not found by the officer charged with the execution of the writ. But it does not justify a recovery without proof that the material averments of the petition are true. It does not change the rule that a litigant is entitled to affirmative relief only to the extent that the evidence sustains the facts alleged in his pleading. The judgment will be affirmed if the plaintiff shall file in this court within thirty days a remittitur for $280; otherwise it will be reversed.

JUDGMENT ACCORDINGLY.

JACOB ZIMMERMAN V. KEARNEY COUNTY BANK.

FILED SEPTEMBER 21, 1899. No. 8,693.

1. **Witnesses:** IMPEACHMENT: STATEMENTS OUT OF COURT. A witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to some matters relevant to the issue.

2. ——: ——: ——. Such declarations are not substantive evidence of the fact declared, unless made against interest by one who is a party to the record.

3. ——: ——: ——. Such declarations are received to aid the court or the jury in estimating the character and credibility of the witness.

4. ——: ——: ——. To lay the foundation for such testimony the attention of the witness should be directed, with reasonable certainty, to the time, place and circumstances of making the declarations, so that he may refresh his recollection and reconcile, if he can, his declarations with his evidence.

REHEARING of case reported in 57 Nebr., 800. *Judgment below reversed.*

Ed L. Adams and *F. G. Hamer*, for plaintiff in error.

J. L. McPheely, contra.

SULLIVAN, J.

At the January term an opinion was filed affirming the judgment of the district court. See *Zimmerman v. Kearney County Bank*, 57 Nebr., 800, 78 N. W. Rep., 366. Afterwards a rehearing was allowed and the cause again submitted. The insistence of defendant in the brief now before us is that we were wrong in holding that there was no error in the exclusion of evidence offered on the trial. It appears from the record that the plaintiff took the deposition of W. H. Paddock and read to the jury the examination in chief. This testimony was to the effect that the firm of Finch & Paddock had sold the note in suit to the plaintiff, and had no longer any interest therein, and that Rogers and Chapin, the president and cashier of the bank, had no knowledge at the time of the purchase that the note was usurious, or that there existed any other defense to its enforcement. On cross-examination Mr. Paddock testified as follows:

"Q. Now, Mr. Paddock, hadn't you tried in person to collect this note in suit of the defendant since the time you claimed to have sold it?

"A. No, sir.

"Q. Didn't you in the early part of September, 1893, in Holdrege, Neb., in front of the United States National Bank, ask Zimmerman for the money on this note and at that time state to him that you and Finch were still the owners of this note and that you knew defendant had sold a farm and had the money for it and demanded of him payment of this note?

"A. No, sir; I did not demand the money for the note, nor I didn't tell him that Finch and Paddock owned it. I met Zimmerman in September, 1893, as stated, in front of the bank and asked him why he did not pay Rogers and Chapin this note. Jacob Zimmerman said to me that he had sold a farm and part of the money which he had received from the sale of the farm was in certificates of deposit in one of the banks in Kearney, Nebraska,

and the certificates were time certificates and could not get the money until they matured.

"Q. Mr. Paddock, didn't you at the time of this conversation propose to Zimmerman, the defendant, that you would cash the time certificates and give him credit on the note?

"A. No, sir.

"Q. Now in this connection didn't Zimmerman tell you that the Kearney County Bank claimed to own this note, and you answered that it did not, but that you owned it and you would cash those certificates and give him a receipt and have the amount credited on the note?

"A. No, sir; he did say the Kearney County Bank claimed to own the note, but I did not say that Finch and Paddock owned the note, or that we would cash these certificates and give him credit on the note.

* * * * * * *

"Q. Now, Mr. Paddock, didn't you in September or October, 1892, and after you claimed to have sold this note to plaintiff, have a conversation with the defendant Zimmerman in Minden, Nebraska, on the north side of the square near Thorne's Block in which you told Zimmerman that Finch & Paddock, or we, referring to Finch & Paddock, owned this note in question?

"A. Never told Zimmerman after July 18, 1892, that we, or Finch & Paddock, owned the note in question in Minden or any other place."

These questions and answers were offered by the defendant as part of Paddock's testimony, but were, on plaintiff's objection, excluded by the court. The defendant then offered to prove that Paddock had, at the times and places referred to in the foregoing questions, stated to Zimmerman that Finch & Paddock were the owners of the note; that it had not been sold to the bank, but was merely held by it for collection. These offers were rejected on the theory, as we understand it, that they were not admissible as original evidence for the defendant and were, therefore, not admissible for the purpose of im-

peachment. That a witness may be impeached by showing that he made statements out of court contrary to those made in court in regard to some matter relevant to the issue is believed to be the doctrine of all courts administering our system of jurisprudence. The cases in which the rule is recognized and enforced are almost as thick as leaves in Vallombrosa. Many of them are collected in 29 Am. & Eng. Ency. Law, 789. Others will be found in the note to *Allen v. State*, 73 Am. Dec. [Ga.], 760. Such declarations can not, of course, be received as substantive evidence of the fact declared, unless made by one who is a party to the record. They are not competent to prove any of the facts in controversy, but are received to discredit the testimony of the witness by showing him to be untruthful. It has often been held that a witness may not be impeached by showing that his testimony concerning some fact does not coincide with a previously expressed opinion in regard to the same matter; and the authorities everywhere hold that the extra-judicial statement of a witness will not be received to impeach him upon a point entirely collateral to the issue. But these rules have no application whatever to the question here presented for decision. The testimony of Paddock touching the sale of the note to the plaintiff was relevant to the issue. The imputed statements were plainly contradictory of such testimony and should have been given to the jury to aid them in estimating the character and credibility of the witness. That an adequate foundation was laid for the impeaching evidence is shown beyond cavil by the fact that even Paddock distinctly remembered one of the occasions on which the alleged contradictory declarations were made. The rule is grounded in common sense, and only requires that the attention of the witness be directed with reasonable certainty to the time, place and circumstances, so that he may refresh his recollection and reconcile, if he can, his declarations with his evidence. See *Kelsey v. Layne*, 28 Kan., 218; *Pendleton v. Empire Stone Dressing Co.*, 19 N.

Y., 13; *Evansville & T. H. R. Co. v. Montgomery*, 85 Ind., 494. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

HARRISON, C. J.

I adhere to the former opinion in this case.

INTERSTATE SAVINGS & LOAN ASSOCIATION, APPELLEE, V. HATTIE B. STRINE ET AL., APPELLANTS.

FILED SEPTEMBER 21, 1899. No. 8,724.

1. **Foreign Building and Loan Associations: USURY.** Foreign building and loan associations doing business in this state are, on their usurious contracts, subject to the penalties of the statute against usury.

2. **Conflicting Evidence: REVIEW.** A finding of the trial court on substantially conflicting evidence will not be disturbed.

REHEARING of case reported in 58 Nebr., 133. *Judgment below reversed.*

Daniel F. Osgood, for appellants.

Benjamin F. Johnson, contra.

SULLIVAN, J.

An opinion was filed at the last term reversing the judgment of the district court, and remanding the cause with instructions. A rehearing was allowed on the application of the appellee, and the cause has been argued and again submitted. The principal contention of the loan association is that the usury law is not applicable to either domestic or foreign corporations of the class to which it belongs. That building and loan associations, incorporated under the laws of this state, are not affected by the statute against usury is settled beyond controversy. But in *National Mutual Building & Loan Ass'n v.*

Keeney, 57 Nebr., 94, we held that foreign associations are not within the proviso of section 9 of the act of 1891 (Session Laws, 1891, p. 207, ch. 14, sec. 9), that being the clause under which the exemption is claimed. Counsel for the plaintiff has presented a very able argument against the injustice and impolicy of discriminating against building and loan associations organized under the laws of other states; but he has entirely failed to convince us that the legislature intended to except such corporations from the operation of the law against usury. The legislative policy may be unwise, but the legislative meaning is not doubtful. The conclusion heretofore reached upon this question is manifestly sound and will be adhered to.

In the former opinion it was said that there was some conflict in the evidence as to whether the mortgaged property was the homestead of the Strines at the time the mortgage was executed, and the cause was remanded with instructions to the district court to determine that question. Our attention is now directed to the fact that the trial court, as shown by the record, made the following finding: "The court further finds that said premises, at the time of the execution of said above described mortgage by the defendants, was not their homestead." It being thus settled that the property was not the homestead of the appellants when the loan was made, and the security given, there should be entered in the district court a decree of foreclosure in favor of the plaintiff for $374.30. All costs, except those incurred in enforcing the decree, should be taxed to the plaintiff.

JUDGMENT ACCORDINGLY.

JOHN B. MOORE V. FRANK F. PARKER.

FILED SEPTEMBER 21, 1899. No. 8,944.

1. **Forcible Entry and Detainer:** PETITION. A complaint in an action of forcible entry and detainer which accurately describes the premises, and distinctly charges an unlawful and forcible detention thereof by defendant is sufficient.

2. ———: EVIDENCE OF TITLE: LAND-OFFICE RECEIPT. The duplicate receipt of the receiver of a United States land office is evidence of title upon which the holder can maintain a possessory action for the premises therein described.

3. **Evidence:** LETTER OF OFFICER. A certified copy of a letter written by a public officer stating in a general way what the records of his office disclose is not competent evidence of the facts stated.

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

Edward W. Peterson, for plaintiff in error.

Ira Thomas and *H. H. Bowes, contra.*

SULLIVAN, J.

This action was brought by Frank F. Parker against John B. Moore, under the provisions of sections 1019-1032, Code of Civil Procedure, to recover possession of 160 acres of land in Burt county. After a trial in the county court the cause was appealed to the district court, where the plaintiff had judgment in his favor for restitution of the premises and costs. The defendant prosecutes error, alleging that the complaint does not state a cause of action, and that the evidence is insufficient to support the finding and judgment. The complaint is not defective in any essential particular. It accurately describes the premises, and distinctly charges an unlawful and forcible detention of the same by the defendant. The statute requires nothing more. See Code of Civil Procedure, sec. 1023. That the evidence fully sustains the conclusion of the trial court we entertain no doubt

whatever. The property in dispute is part of the public domain, and the plaintiff's right to possess and occupy it was shown by the duplicate receipt of the receiver of the local land office. This, for the purposes of the case, was proof of title equivalent to the production of a patent. See Code of Civil Procedure, sec. 411. The only evidence given by defendant in support of his asserted right of possession was that he had gone peaceably upon the land; that he had occupied it for about six years; that he had improved it with the intention of acquiring the title, and had made an unsuccessful effort to enter it under the homestead act. He also attempted to show that at the time of the trial his right to the land was involved in a pending appeal from the commissioner of the general land office to the secretary of the interior; but the proof tendered to establish that fact was plainly incompetent. The document offered was not a copy of the record of any official action taken by the commissioner. It was merely a certified copy of an answer to an inquiry from defendant's counsel and stated, in a general way, what the records of the commissioner's office disclosed touching defendant's appeal from the decision of the register and receiver of the land office at O'Neill. There was no competent evidence tending to show that Moore had any legal or equitable rights in the premises, and the judgment of the district court is, therefore,

AFFIRMED.

HAINES MEYERS V. JOHN R. SMITH.

FILED OCTOBER 5, 1899. No. 10,567.

1. **Opening Judgment:** REMEDIES: EFFECT OF REVIEW. The provisions of the Code of Civil Procedure in regard to vacation of judgments and granting of new trials are not exclusive. The right to an independent equitable action also exists, and such action may, under certain circumstances, be prosecuted after removal and review of the judgment suit in the court of last resort.

2. ———: ———: PETITION. The petition in this case examined, and *held* to state a cause of action for equitable relief against a judgment at law.

3. ———: ———: FALSE TESTIMONY. In an equitable action to vacate a judgment on the ground of the reception of false testimony or perjury, committed during the trial of the cause in which it was rendered, the general rule is that the action must be predicated upon perjury of the successful party, or his witnesses, or on matter in the evidence produced for him.

4. ———: NEWLY-DISCOVERED EVIDENCE. Alleged newly-discovered evidence, consisting of statements of the successful party and the main witness in an action of criminal conversation averred to have been made after the trial and out of court, being cumulative or impeaching in their character, determined not sufficient to uphold a decree of vacation of the judgment and the granting of a new trial.

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

The opinion contains a statement of the case.

J. H. Broady, for plaintiff in error:

A judgment affirmed by the court of last resort can not be opened in a suit in equity. See *Codde v. Mahiat,* 66 N. W. Rep. [Mich.], 1093; *Gray v. Barton,* 62 Mich., 186.

A court of equity can not set aside a judgment at law because of the perjury of a witness who testified in the action at law. See *United States v. Throckmorton,* 98 U. S., 61; *Mayor v. Brady,* 115 N. Y., 599; *Cotzhausen v. Kerting,* 29 Fed. Rep., 821.

A court of equity will not set aside a judgment at law on account of matters which were presented and considered in the case wherein such judgment was rendered. See *Bateman v. Willoe,* 1 Sch. & Lef. [Irish], 201; *Dixon v. Graham,* 16 Ia., 310; *Cottle v. Cole,* 20 Ia., 482; *Borland v. Thornton,* 12 Cal., 440; *Riddle v. Baker,* 13 Cal., 295; *Railroad Co. v. Neal,* 1 Wood [U. S.], 353; *Greene v. Greene,* 2 Gray [Mass.], 361.

Edwin Falloon, contra:

Perjured litigants cannot reap the fruit of their own

iniquity. A judgment obtained by false testimony of plaintiff may be set aside in an independent suit in equity. See *Monro v. Callahan*, 55 Nebr., 75; *Stowell v. Eldred*, 26 Wis., 504; *Klaes v. Klaes*, 72 N. W. Rep. [Ia.], 777; *Heathcote v. Haskins*, 38 N. W. Rep. [Ia.], 419; *Baldwin v. Sheets*, 39 O. St., 624.

A judgment obtained by perjury of a party may be vacated after it has been affirmed in the supreme court. See *Monro v. Callahan*, 55 Nebr., 75.

HARRISON, C. J.

In an action of criminal conversation Haines Meyers obtained a judgment against John R. Smith in the sum of $3,000, and in an error proceeding the judgment was affirmed, both on its first submission and rehearing. The first opinion is reported in 52 Nebr., 70, and the one on rehearing in 54 Nebr., 1. It was filed February 17, 1898. On February 28, 1898, a petition was filed in the district court of Richardson county for John R. Smith, the prayer of which was that a temporary injuction be granted against the enforcement of Haines Meyers of his judgment, also that upon final hearing the judgment be vacated. The temporary injunction was granted and issues joined, a trial of which resulted in a decree by which the judgment, the subject of attack, was set aside and a new trial ordered of the action for criminal conversation. The petition in the case at bar stated as a ground for the relief sought that the judgment against which the action was directed had been obtained through the fraud and perjured testimony of the successful party and his wife. The trial court set forth in the decree in the present case that it had been made to appear that the verdict and judgment in the action at law was obtained through false and perjured testimony. In this error proceeding a reversal of the decree is asked.

It is objected that the petition does not state a cause of action, and three reasons are stated to sustain the contention. First, that the Code has provided a remedy, and

this action was not commenced within the time prescribed or had become barred. See Code of Civil Procedure, secs. 602, 609, 318. To this it must be said that the petitioner disclaims any proceeding under the Code, and asserts the right to an independent equitable action, and that this suit is such an one. It is true that by our Code actions at law and in equity are blended and there is but one form of action. But that the proceedings provided in the Code for the vacation of judgments are but cumulative and concurrent with an equitable action was recognized in *Munro v. Callahan*, 55 Nebr., 75, which was a suit very similar to this at bar, and we have discovered no reason for changing the views then expressed. On this point see, also, 11 Ency. Pl. & Pr. 1185, 1186 and note. A second reason is that it was shown in the petition that the original case had been removed to the court of last resort, there reviewed and affirmed, and that after such proceedings a bill in equity will not lie. But in this case the allegations were of matters discovered subsequent to the time at which any advantage could be taken of them in the law case and prior to its review, and, in a proper case, that this was true would confer jurisdiction. The case of *Munro v. Callahan, supra*, although no particular mention is made of the subject, seems to uphold the doctrine we have just stated. The third reason is that the petition, in its substance or statements which set forth the matters of the merits of the suit, was insufficient. We are satisfied from an examination of the pleading that, while in some respects it is not entirely satisfactory, it states a cause of action.

It is further claimed that the evidence was insufficient to establish the allegations of the petition and to call for relief. The averments of the petition were to the effect that in the action of criminal conversation the alleged injured husband and the wife had planned to bring about the action to extort money from the party against whom the suit was brought, and had succeeded in the trial by reason of their perjured testimony, and more particularly

that of the wife. The wife gave the only testimony of the acts of criminal intercourse with her by the defendant in the action, but there was some corroborative testimony. See *Smith v. Meyers*, 52 Nebr., 70. It has been stated that there have been but few cases in which judgments have been vacated and new trials awarded on the ground that the judgment was the result of the perjury of the successful party or his witnesses, or false evidence in his behalf (*Munro v. Callahan, supra*); and, as a general rule, a bill for relief in such cases will not be entertained. See 11 Ency. Pl. & Pr., 1183. The remedy will not generally be afforded on account of the perjury of witnesses other than those of the successful party. See *Munro v. Callahan, supra; Laithe v. McDonald*, 12 Kan., 340. But here, from the very nature of the case, the success or defeat of the plaintiff in the lawsuit depended mainly on the testimony of the wife. She was the main or principal witness, and it was further charged that her testimony was a part of a scheme between her and the husband, the plaintiff, to obtain the judgment in his favor. Under such facts the petition was sufficient, based on the alleged perjury in her testimony relative to the main facts—the acts of criminal intercourse. We will state here that the opinion in *Munro v. Callahan, supra*, but dealt with the question of the sufficiency of the petition in that action to withstand a general demurrer, and to sustain the judgment rendered, and must be read with such facts borne in mind.

There is the further disputed matter in the case at bar of whether the evidence adduced was sufficient to support the decree rendered. It was sought to show that the husband had made statements out of court, and subsequent to the trial, wholly at variance with his testimony, and which made it apparent that the suit for criminal conversation was without real foundation, and was but a part of a plan to get money of the party sued. There was also an effort made to show that the wife had made statements, after the trial, which tended to contra-

dict her testimony, and further to show her complicity in the scheme of money-getting through the lawsuit. A witness was produced who testified that he believed he was a second cousin to Haines Meyers, the plaintiff in the action; that his mother claimed so; that he had two children, and intended to take them to a picnic, and, pursuant to such intention, went to where he expected they would be, and on inquiry there was told they were at the house of Haines Meyers, and here we will copy from the record:

"Q. You were told that they were at Meyers' house?

"A. Yes, sir, and I rapped on the door and she [Mrs. Meyers] come to the door and said come in. I told her I had made arrangements to go to the picnic and I could not, and she made some remark about it. I had a team hitched to take the children, and she said, 'Let the team go and come in. There won't be nothing going on down there; come in, you will have just as good a time here.' The team was coming back there. I told her I could not, and I jokingly said, 'You might come Smith on me,' or some such words as that, and she said—

"Q. Did you say Smith or John R. Smith?

"A. I would not say whether I said Smith or John R. Smith, but I said Smith. She said she had nothing to do with J. R. Smith, it was his money she wanted."

This was the statement of the woman made in answer to a joking remark, which contained a broad insinuation, was not under oath, and in its nature, to the extent it may be said or construed to have referred to acts of criminal intercourse with Smith, while it tended somewhat to establish that the testimony she had given was untrue, it was but impeaching testimony. The portion of the remark which alluded to money was but cumulative to evidence on the same point introduced during the trial of the action for criminal conversation; and was also impeaching in its character. The competent evidence of the remarks of the husband stated to have been made after the termination of the original suit were

wholly cumulative, and not of independent facts. All this would but furnish further evidence for the consideration of a jury on the issues already tried. There was in it no direct or positive evidence to establish perjury, and it was insufficient. See *Burgess v. Lovengood*, 2 Jones Eq. [N. Car.], 457; *Ames v. Snider*, 55 Ill., 498. Newly-discovered evidence, merely impeaching or cumulative, is not sufficient in a motion for a new trial (11 Ency. Pl. & Pr., 807-811 and notes), and it can not be held adequate to call for relief in an action in equity. What we have said must not be taken as a statement that there might not be admissions or declarations of parties to suits, made after the judgment, which would not be sufficient to cause the judgments to be vacated, and new trials granted; but we do decide that the ones of which there was evidence herein were not adequate. The decree is reversed, and the cause remanded.

REVERSED AND REMANDED.

HAINES MEYERS V. JOHN R. SMITH.

FILED OCTOBER 5, 1899. No. 10,830.

Petition to Open Judgment: ALLEGATIONS: FALSE TESTIMONY. A petition in equity which prayed that a judgment or decree be vacated, and a new trial granted in a prior action, on the ground that the decree was based upon the false or perjured testimony of the successful party, and that since the trial he has made statements out of court at variance with or contradictory to his testimony, which alleges no positive knowledge of such statements, which, if made as pleaded, were but impeaching in their nature, and would not afford direct or positive proof of perjury, is open to attack by general demurrer, and contains no sufficient statement of a cause of action.

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

Broady & Pettis and *J. L. Barnes*, for plaintiff in error.

Edwin Falloon, contra.

HARRISON, C. J.

Haines Meyers instituted an action in the district court of Richardson county of criminal conversation against John R. Smith; and was given a verdict and judgment in the sum of $3,000, and in an error proceeding to this court the judgment, on a hearing, also rehearing, was affirmed. For report of first opinion see 52 Nebr., 70, and the second in 54 Nebr., 1. Smith then commenced an action in the same district court, in which he sought, and was granted, the result of a trial, a decree by which the judgment in the prior suit was vacated; and a new trial of the issues awarded on the ground that the judgment had been procured through false testimony. The decree is the subject of attack in error proceeding to this court and has been argued and submitted. Meyers, after the decree was rendered by which his judgment was vacated, filed a petition in the district court, in which he alleged that said decree was procured by the false testimony or perjury of the party it favored, and it was prayed that the decree be canceled; and the action in which it had been rendered dismissed. To this petition a general demurrer was filed, which on hearing was sustained, and the cause dismissed. That these things were done constitutes the burden of the complaint of a petition in error filed in this court, and the matter has been submitted for decision. The allegation of the petition was of the information and belief of the plaintiff that the party who had obtained the judgment or decree against which this action was directed had made a statement out of court about the time or soon after the trial which was wholly different to, and contradictory of, his testimony during the trial. The statement was set forth in the pleading, the subject of attack by demurrer, and was clearly impeaching in its nature and made without oath. If shown in evidence, it would not establish anything, direct or positive, as to the question of perjury of the witness. These things being true, the petition was

clearly insufficient in a statement of a cause of action for equitable relief to consist of the vacation of a judgment and the granting of a new trial. See *Meyers v. Smith,* 59 Nebr., 30. The judgment of the district court is

AFFIRMED.

GEORGE H. DOWNING, APPELLANT, V. A. F. LEWIS ET AL., APPELLEES.

FILED OCTOBER 5, 1899. No. 10,840.

1. **Contracts in Restraint of Trade:** INJUNCTION. The contract in suit, one of the class known as contracts "in restraint of trade," being limited as to time and territory, and its stipulations reasonable, *held* valid and enforceable by injunction.
2. ———: ———: PUBLIC POLICY. The said contract determined not so contrary or obnoxious to public policy as to render it invalid.
3. ———: GOOD-WILL. The question of the ownership or interest of one of the parties to a contract of sale of a business and good-will determined not placed in issue by the pleadings.
4. **Sales:** HUSBAND AND WIFE. A married woman who joined with her husband in a contract of sale *held* to have by her acts acquiesced in the payment of the consideration to him.

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

The opinion contains a statement of the case.

Marston & Marston, for appellant:

The contract is enforceable. There was no stifling of competition. The only restraint of trade was limited to a short period and to a single locality. See *Brown v. Kling,* 35 Pac. Rep. [Cal.], 995.

E. C. Calkins, W. D. Oldham and *H. M. Sinclair, contra:*

The contract is one in restraint of trade; and, under the facts proved, should be declared void as against public policy. See *Taylor v. Blanchard,* 13 Allen [Mass.],

370; *Callahan v. Donnolly*, 45 Cal., 152; *Lange v. Werk*, 2 O. St., 519; *Berlin Machine Works v. Perry*, 71 Wis., 495; *State v. Nebraska Distilling Co.*, 29 Nebr., 700; *Nester v. Continental Brewing Co.*, 161 Pa. St., 473; *Texas Standard Oil Co. v. Adone*, 83 Tex., 650; *Hooker v. Vandewater*, 4 Denio [N. Y.], 349; *More v. Bennett*, 140 Ill., 69; *India Bagging Ass'n v. Kock*, 14 La. Ann., 164; *Central Ohio Salt Co. v. Guthrie*, 35 O. St., 666; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St., 173; *Western Woodenware Ass'n v. Starkey*, 84 Mich., 76; *Wright v. Ryder*, 36 Cal., 342; *Chapin v. Brown*, 83 Ia., 156; *Richardson v. Buhl*, 77 Mich., 632; *Hazlehurst v. Savannah, G. & N. A. R. Co.*, 43 Ga., 13; *West Virginia Transportation Co. v. Ohio River Pipe Line Co.*, 22 W. Va., 600; *Pittsburg Carbon Co. v. McMillin*, 119 N. Y., 46; *People v. North River Sugar Refining Co.*, 54 Hun [N. Y.], 354; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.*, 154 Mass., 92.

HARRISON, C. J.

August 6, 1895, there was sold to the appellant the business and good-will of the Lewis Laundry, located in the city of Kearney. The agreement of sale and purchase was embodied in a written instrument, which was signed by the appellees herein, who it appears were husband and wife. It was of the expressed covenants on the part of the appellees that they would not, for themselves nor for other persons, engage in the laundry business in the city of Kearney during five years from August 11, 1895. The present action was commenced by appellant, the basis of the complaint being an alleged violation on the part of appellees of the stipulation of the contract to which we have just referred. The prayer of the petition was that the appellees be enjoined from further violations of their agreement. To the pleading appellees made objections, which were treated as in effect a general demurrer, and as a result of a hearing the restraining order which had been allowed was vacated, and

the cause dismissed. An appeal was perfected to this court, and on hearing the judgment was reversed and the cause remanded to the district court for further proceedings. The opinion rendered is reported in 56 Nebr., 386. After the suit was again lodged in the district court, separate answers were filed for appellees, to which there were replies; and of the issues joined there was a trial which resulted in a judgment of dismissal of the action; and the plaintiff again appeals.

By the former decision in the case on appeal to this court, it was established that the agreement between the parties is valid, and capable of enforcement by injunction. Ordinarily, the adjudication to which we have referred would be the law of the case on the points necessarily involved in the litigation and covered by the decision. But it is insisted herein that the answers and evidence cast additional light on the subject, and call for a further consideration of the involved matters. We have concluded to further discuss at least some, if not all, of them.

At the close of the trial, which occurred after the cause was returned to the district court from this, the following findings were made:

"The court finds that the contract, as alleged and set out in the petition, was signed by the defendants, and further finds that the defendants were acquainted with the terms of said contract at the time they signed the same, and that the same was signed voluntarily by them.

"2. That at that time they expected to leave the city of Kearney and did not expect to engage in the business of laundering in said city.

"3. The court further finds that at the time said contract was made, and long prior thereto, the plaintiff Downing was engaged in the laundry business in said city, and was running what was known as the Kearney Steam Laundry, and that his purpose in purchasing the business and good-will of the defendants, and his only purpose, was to do away with the competition which

they in their business made to his business, and to secure their patrons.

"4. The court further finds that the defendant Mary J. Lewis received no consideration for said sale or for said contract, but that the money went to her husband, and he alone was conducting the business at that time.

"5. The court further finds that none of the machinery or other appliances of the business used by the defendants were delivered to the plaintiff, and that neither the plaintiff nor any one in his stead took charge of said business or operated said business after said purchase."

The answer of Albert F. Lewis was as follows:

"1. That at the time of the signing by him of the contract set out in the said petition he supposed it was limited to the conducting of a laundry business by the defendants in the city of Kearney.

"2. That there was no stipulation in said contract that the defendants should not work for other people in said city.

"3. That at the time of the making and signing of said contract the plaintiff was engaged in the business of operating a laundry in said city of Kearney, in competition with the laundry of the defendant.

"4. That he signed said contract because of the threats on the part of the plaintiff to lower the price of laundry work in the city of Kearney.

"5. That he did not read said contract before signing the same, and did not know what it contained.

"6. That no property was sold or passed from the defendants to the plaintiff under the said contract.

"7. That said contract is against public policy and void.

"8. That he denies each and every other allegation in the said petition contained not herein admitted or denied."

That of Mary J. Lewis stated: "That she is a married woman, and the wife of the defendant A. F. Lewis; that at the time of the signing by her of the contract set out

in the petition of the plaintiff the same was not read by her, and she did not know what it contained; that she did not know that it had in it a provision that she should not work in the laundry business in the city of Kearney, Nebraska, for the time stated in said contract, or for any person in said city engaged in the laundry business; that she was told by her husband to sign the same, and did so, but that she received no part or portion of the consideration named in the contract; that said contract is not binding upon her, for the reason that it is against public policy and void; that she denies each and every other allegation in the said petition contained not herein specifically admitted or denied."

The evidence and findings make it clear that the appellees understood the contract when they signed it; also that they then expected to remove from the city of Kearney, and it further appears from the evidence that the appellant very much desired to increase his business in order that his "plant" might be run nearer to its capacity. His was a steam laundry; and, at the time of the transaction in controversy, it was not doing its full work because of lack of sufficient custom. The contract between the parties, to the extent it in terms prohibited the engagement of the appellees in the laundry business, was limited as to both time and territory, and in such respects reasonable. These things established as between the immediate parties to it, the agreement was valid and within the rules of law governable.

One of the main reasons against the recognition of contracts of the nature of the one herein questioned, such agreements being generally denominated "contracts in restraint of trade," is that the public will be deprived of the benefit of the industry of the party who is to be retired from business for a stated time in a certain ascertained locality, and of the benefits of the continuance of the party in business is the competition it may afford with others engaged in like enterprises, and undoubtedly in any case which involves one of these stipulations, if it

appears that the result will be to an appreciable degree harmful to the public good, policy requires that the stamp of disapproval be placed upon it, and the courts will not hesitate to declare it invalid. In the matter before us it appeared that the list of prices charged for services rendered by the Lewis Laundry was, so Albert F. Lewis testified, a duplicate of the like list of the steam laundry. They were then running at the same charges to the public, no difference to customers, except as the work done by one might be better than that done by the other, or as what was done by the one might please a customer more than the laundering of the other. There were no particular facts shown which, singly or in combination, would demand of the court that in the interest of the public it declare the contract invalid. Any such contract must to some extent destroy competition, but to be void it must unreasonably disturb such relations of the community as to be an infringment on the rights of the public, and this we think not true in this case, although it appeared that there were at the time of the contract but the two laundries in the city of Kearney. The fact that for the time being the effect of the agreement was to leave but the one laundry in the city was not in or of itself sufficient to render it void and unenforceable, and herein there were no concomitant circumstances shown of such nature that, together with the fact that to recognize the contract would possibly for a time require the people of the city to depend upon but the one laundry, furnished reason for adjudging the stipulation in question without validity.

It is argued for Mary J. Lewis that she did not own any interest in the laundry which was sold, and was not bound by its sale, notwithstanding she signed the agreement. To this it must be said that no such issue was raised by the pleadings. It is true that there was evidence to the effect that she was not the owner of the laundry business nor materially interested therein; but this can not avail, since it was not of the matters properly presented for trial.

It is also urged for Mrs. Lewis that she did not receive any part of the consideration for the agreement. Mrs. Lewis signed the contract as one of the owners of the Lewis Laundry, and, as we have seen, no issue was made upon this point; hence she must be held to have been interested with her husband in the business. She was present when the agreement was executed, and signed it, and at the time she did so, as the trial court determined, she was acquainted with its terms, and she stated in her testimony that after she had signed the contract she left the office to which the parties had gone to complete the agreement; that she did not receive any money, but she supposed her husband did receive the consideration named; and it appears further that it was paid to her husband. From this it must be held that she knew the husband was to get the money and was willing that payment be made to him, and in this view of the matter she can not now, for the purpose of avoiding her agreement, say she did not receive the consideration. The judgment of the trial court is erroneous, and is reversed and the cause remanded, not for another trial, but for a decree in favor of appellant for the relief asked in his petition.

REVERSED.

FIRST NATIONAL BANK OF CHADRON V. KATE TOOTLE ET AL.

FILED OCTOBER 5, 1899. No. 10,611.

Sales: FRAUD OF BUYER: ELECTION OF REMEDIES. A vendor of property who is induced to deliver possession thereof to the vendee by or through the fraudulent representations of the latter may, at his election, ratify the sale and recover the consideration, by action on the contract or the account, or may rescind the contract and reclaim the article or articles sold; but he may not pursue both remedies. They are not concurrent, and by selecting one with knowledge of the facts the right to the other is waived. See *First Nat. Bank of Chadron v. McKinney*, 47 Nebr., 149.

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

Albert W. Crites, for plaintiff in error.

Allen G. Fisher and *G. A. Eckles, contra.*

HARRISON, C. J.

Charles F. Yates, who during a portion of the year 1889 was engaged in mercantile business in Chadron under the name and style of Yates & Co., ordered and received from the defendant, a wholesale dealer in dry goods and notions at St. Joseph, Missouri, certain articles of merchandise for retail trade in his store at Chadron. Yates executed and delivered to the plaintiff in error, the bank, one or more chattel mortgages on his stock of goods, and on June 14, 1889, at which time he failed in business, possession of the stock in the store was taken by the bank under its mortgage. The defendant in error commenced this action to obtain possession of the stock of goods, alleging that the sales to Yates had been induced by his false and fraudulent representations in regard to his financial condition, and that on ascertainment of the falsity of said representations the sales of the goods had been rescinded. A trial of the issues in the district court of Dawes county resulted in a judgment in favor of the bank, which, on error to this court, was reversed and the cause remanded. A rehearing was granted in this court, and on re-examination the decision at the former hearing was approved and followed. The opinion rendered on the first submission of the cause is reported in 34 Nebr., 863, and the one on rehearing in 42 Nebr., 237. After the return of the case to the district court a second trial occurred, as a result of which the defendant in error was accorded a judgment and the bank has prosecuted this error proceeding to this court. For a more extended statement of the case we refer to the opinion in 34 Nebr., 863. The second trial in the district court was without a jury.

One of the contentions for plaintiff in error is that prior to the institution of this action the defendant in error had caused a suit to be commenced against Yates on the account of the goods sold to him, or had ratified and approved the action of attorneys who had begun such a case; and further, that defendant in error then possessed knowledge of the truth or falsity of the representations which Yates had made in the purchase of the goods, that defendant in error had elected the remedy on the account and to treat the sale of the merchandise as valid, and could not afterwards claim to rescind the sale, and sue for a recovery of the goods. The rule of law which governs on this point is as follows: "A vendor who is induced to part with possession of property through the fraud of a purchaser has his election to rescind the contract, and reclaim the property sold, or to ratify the sale and pursue his ordinary remedy by an action *ex contractu;* but such remedies are not concurrent, and by electing to pursue one with knowledge of the facts, he waives his right to the other." See *First Nat. Bank of Chadron v. McKinney,* 47 Nebr., 149. And that the suit first commenced is afterwards dismissed does not relieve the party of the consequence of his election; he is concluded thereby. See *Cooper v. Smith,* 67 N. W. Rep. [Mich.], 516; *Thomas v. Watt,* 62 N. W. Rep. [Mich.], 345.

It is undisputed that an action was commenced on the account of charges for the merchandise sold to Yates, the issuance of a writ of attachment was procured therein, and the bank, plaintiff in error herein, was served with a writ of garnishment. One member of the firm, now defendant in error, was interrogated relative to the suit and attachment and answered as follows: "Q. State what, if anything, you know about an attachment brought in the name of plaintiffs against Yates & Co. of Chadron, Neb. A. I have no knowledge of any such attachment being brought. We never authorized the bringing of any attachment suit, and never ratified such attachment suit. I ordered a replevin suit for whatever goods

were sold to Yates & Co., that they had not sold, and which could be found in their store at Chadron. I did know at that time that we could not bring an attachment suit and replevin suit on account of the sale of the same goods at the same time. Immediately after the failure, after we made as diligent investigation as we could into the financial condition of Yates & Co., at the time of their failure and at the time of their making the above named written statement, we at once rescinded the sale of the goods and brought this replevin suit for the amount of goods obtained above testified to by me." He also testified that he was the credit-man of or for the firm. It will be noticed that this testimony, especially the portion in regard to the suit and attachment, was a statement of the conclusions of the witness and not of what was done by or for the firm; and in respect to two or three particulars the testimony is of the personal knowledge of the witness. On the other hand, there was testimony that a telegram was shown to a witness by the attorneys who represented the plaintiff in the attachment suit which ordered the action commenced. There was also in evidence the following letter:

"ST. JOSEPH, MO., June 14, 1889.

"*Mess. F. M. Dorrington & Sons, Attys., Chadron, Neb.*—DEAR SIRS: We are just in receipt of your telegram saying that Yates was in debt $20,000, and had stock $10,000 under chattel mortgage for $12,000 to bank, and that you had garnished bank for us, which is a step in the right direction. We think you should keep on the aggressive and you may yet make our full account. We will send itemized sworn account by next mail, but you need not wait for it. We here send statement made by Yates to us before we shipped his goods. We think with this statement you can jail him for obtaining goods under false pretenses. Do not hesitate to do so if you think the laws will bear you out in it.

"Yours truly, TOOTLE, HOSEA & CO."

From all of which we gather that the firm knew the suit on the account had been instituted; also had then information from which the conclusion had been drawn that Yates had obtained the goods with a fraudulent purpose or by false representations. A contrary finding would be against a clear preponderance of the evidence and manifestly wrong. These things being true, the defendant in error must be held to have elected to treat the sale as valid, and it could not subsequently commence and maintain this replevin suit. There is but one brief on file, that of plaintiff in error.

There are some other questions discussed, but their examination and decision at this time are not necessary to a disposition of the cause, and we will not further notice them. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

FERDINAND VAN HOUSEN V. HERMAN BROEHL.

FILED OCTOBER 5, 1899. No. 8,848.

1. **Pleading:** DEMURRER TO ANSWER. If an answer raises material issues upon the allegations of the petition, a general demurrer will be overruled; and this is true if one defense is not well pleaded, or open to attack by the demurrer, and others or another is sufficient.
2. **Answer:** FINDINGS: VERDICT. Where, of two pleas in an answer, one is sufficient and the other not, and, of the findings to support the verdict rendered, the one on the good plea is essential, it may sustain the verdict.
3. **Conflicting Evidence:** REVIEW. A finding on conflicting evidence which has sufficient thereof in its favor will not be disturbed on error to the supreme court.
4. **Immaterial Evidence:** HARMLESS ERROR. The admission of incompetent and immaterial evidence will not work the reversal of a judgment, if no prejudice resulted to the rights of the complainant.
5. **Instructions:** HARMLESS ERROR. Alleged errors of the giving or refusals of instructions are not available if it is clear they were not harmful to the plaintiff in error.

REHEARING of case reported in 58 Nebr., 348. *Judgment below affirmed.*

George B. France, for plaintiff in error.

Harlan & Taylor, *contra.*

HARRISON, C. J.

The plaintiff instituted this action to recover an amount alleged due him upon a promissory note which, it was further pleaded, had been executed and delivered to him by the defendant. In the answer the execution and delivery of the note were admitted; but it was pleaded that the plaintiff had, prior to the commencement of the suit, sold or disposed of the note, and that he was the owner was denied. It was also stated in the answer that at the time of the execution of the note, to secure its payment, the maker had made and delivered to the payee a mortgage on certain personal property; that the note had been by the payee sold to, and was owned by, one Henry Van Housen, Sr., to whom, subsequent to the time he became the owner of the note, the payee delivered the property described in the mortgage, "with the express agreement and understanding that said property was to be accepted in full payment of the note and the mortgage was to be canceled of record." During the trial there was for the plaintiff an objection to the reception of any evidence on behalf of defendant on the ground that the answer did not state a defense, or there was a general demurrer *ore tenus* to the answer. This was overruled, and the trial proceeded, and resulted in a verdict and judgment for the defendant. The plaintiff prosecuted error to this court. The matter was submitted, and in an opinion filed March 22, 1899, the judgment was reversed. For report of the decision see *Van Housen v. Broehl*, 58 Nebr., 348. A motion for a rehearing was sustained, and the case has been again presented.

In the former opinion it was determined that inasmuch

as there was not a statement in the answer that the property delivered to the alleged owner of the note and mortgage had been by him accepted in full payment, the attempted plea of accord and satisfaction was incomplete, lacked a material averment, and the answer did not state a defense. With the conclusion embodied in the former decision relative to the necessary averments of the plea of accord and satisfaction we are satisfied, but the answer also raised an issue of the ownership of the plaintiff of the note upon which the action was predicated, and the point thus placed in dispute was a material one. That the note was not owned by the plaintiff, but was the property of another person was matter of defense. See *Johnson v. Chilson*, 29 Nebr., 301. It follows that the answer in the case at bar stated a defense, and that it was not error of the trial court to overrule the objection, or what was in effect a general demurrer to the pleading. It follows that the assignment in regard to the error of the trial court in deciding against this attack on the answer must be declared without avail. One of the essential findings underlying the verdict for defendant was that the note had been transferred by its named payee, the plaintiff, and did not belong to him, and while the evidence on this point was conflicting, there was sufficient to sustain the decision of the jury and it will not be disturbed.

It is argued that there were admissions of incompetent and immaterial evidence. If there were any errors in the matters of this nature to which our attention has been challenged they were wholly without prejudice to the rights of complainant, and could not work a reversal of the judgment. See *Gibson v. Sullivan*, 18 Nebr., 558.

It is also urged that the trial court erred in one instruction given, and in its refusals to charge the jury in requests preferred for the plaintiff. An examination of these, in connection with the issues as framed and presented by the pleadings and evidence, convinces us that there was nothing done or omitted which prejudiced the

rights of the plaintiff. The judgment of the district court is

AFFIRMED.

FERDINAND C. FISKE V. SCHOOL DISTRICT OF THE CITY OF LINCOLN.

FILED OCTOBER 5, 1899. No. 8,688.

Schools and School Districts: SCHOOLHOUSE: CONTRACTS. Adherence to views expressed in the former opinion (*Fiske v. School District*, 58 Nebr., 163) announced, the judgment reversed, and the cause remanded.

REHEARING of case reported in 58 Nebr., 163. *Judgment below reversed.*

Stewart & Munger, for plaintiff in error.

Ricketts & Wilson, contra.

HARRISON, C. J.

In this action the plaintiff sought a recovery for services alleged to have been rendered to the defendant in preparing plans, drawings and specifications for school buildings pursuant to the terms of a contract between the parties. To the petition filed in the district court a general demurrer was presented, and on hearing sustained and the suit dismissed. In an error proceeding to this court the matter was submitted, and an opinion was filed February 23 of the current year and the judgment of the trial court was reversed. The conclusions then announced were as follows: "1. A board of education has power to contract with an architect to prepare general drawings and specifications for a schoolhouse, as a preliminary to determining whether a building, and, if so, what kind, shall be constructed, although, for want of funds devoted to building purposes, it may at that time

have no power to erect the building. 2. Such preliminary steps are not a part of the work of construction." The opinion is reported in 58 Nebr., 163. On motion a rehearing was allowed, and there has been a second hearing and submission of the cause.

For a statement of the case we refer to the former opinion. It need not be repeated here. It will be noticed that the controverted questions relate mainly, if not entirely, to the right of the plaintiff to recover for preliminary plans, drawings and specifications which were not used or followed in the constructions of any buildings. It is strenuously insisted that the rules announced in the opinions in the cases of *School District v. Stough*, 4 Nebr., 357, *Gehling v. School District No. 56*, 10 Nebr., 239, *School District No. 16 v. School District No. 9*, 12 Nebr., 241, *State v. Sabin*, 39 Nebr., 570, *Mizera v. Auten*, 45 Nebr., 239 and *Andrews v. School District*, 49 Nebr., 420, and the principles underlying them, are governable in the present controversy and fatal to the claims of the plaintiff. It is asserted that the cases cited directly establish, or by fair inference state, that the authority of school district boards or officers to contract in regard to erection of buildings, or any subject which will or does involve the expenditure of money, is limited by statute and must be within the statutory terms; that it must be within the funds provided or on hand to meet the proposed expenditures, and that the party who contracts with the board or officers does so at his peril; and must take notice of its or their requisite authority or the lack thereof. The foregoing cases, all except one, treated of acts of school district boards or officers in regard to school buildings or the furniture therefor, and which acts were clearly without or in excess of authority. The exception is the one reported in 12 Nebr., 241, in which it was held that to state a cause of action against a school district a petition must disclose that the indebtedness declared upon was one which the district could lawfully incur. The projected buildings were never erected, the preliminary plans and

drawings could not be said to be a part of any construction of buildings, and if not, the expense of them was not any part of a building, or necessarily to be paid from a building fund. They were ordered for the use of the district and were necessary, as much so as many other articles or services which come within the general expenses of a school district, and must be paid for, and from the general fund. There is a fund from which all such expenses are paid, and we may call it a "general fund." It is so recognized and designated in the general school law, and payments directed to be made from it. See Compiled Statutes, ch. 79, subdiv. 4, sec. 13. There was a legitimate expense and charge against the district and funds from which it could be properly paid. The facts of this case, as stated in the petition, place it clearly without the direct terms or the principle of the cases cited, to which we have hereinbefore referred. We adhere to the views expressed in the former opinion, and the judgment of the district court must be reversed, and the cause remanded.

REVERSED AND REMANDED.

PAUL F. CLARK V. MISSOURI, KANSAS & TEXAS TRUST COMPANY.

FILED OCTOBER 5, 1899. No. 8,947.

1. **Mortgages:** RIGHT OF MORTGAGOR TO POSSESSION. A mortgagor of real estate is ordinarily entitled to the possession thereof until confirmation of foreclosure sale, and by reason thereof has a proprietary interest in the rents and profits.

2. ———: EXECUTION: SALE OF MORTGAGOR'S INTEREST: RENTS. When the title and interest of the mortgagor are sold under an execution, the purchaser, by the confirmation of such sale and the execution of a deed pursuant thereto, is entitled from the date thereof to recover the rents from the mortgagee in possession. See *Orr v. Broad*, 52 Nebr., 490.

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

The opinion contains a statement of the case.

Charles S. Allen and *Joseph R. Webster*, for plaintiff in error:

A mortgage of land is a mere lien, and conveys no right to possession, or to rents. At execution sale of mortgagor's interest in the realty the purchaser acquired mortgagor's right to possession and to rents, and is not estopped to assert it. See *Newton v. McKay*, 30 Mich., 382; *Kidd v. Teeple*, 22 Cal., 262; *Freeman v. Campbell*, 42 Pac. Rep. [Cal.], 35; *Dutton v. Warschauer*, 21 Cal., 624; *Seckler v. Delfs*, 25 Kan., 159; *Hogsett v. Ellis*, 17 Mich., 373; *Hazeltine v. Granger*, 44 Mich., 503; *Thomson v. Shirley*, 69 Fed. Rep., 484; *Johnson v. Sherman*, 15 Cal., 293; *Taliaferro v. Gay*, 78 Ky., 498; *Sexton v. Breese*, 32 N. E. Rep. [N. Y.], 133; *Hardin v. Hardin*, 34 S. Car., 80; *Teal v. Walker*, 111 U. S., 252; *Russell v. Ely*, 2 Black [U. S.], 575; *Argall v. Pitts*, 78 N. Y., 239; *Howell v. Leavitt*, 95 N. Y., 617; *Godwin v. Stebbins*, 2 Cal., 105; *Jackson v. Robinson*, 4 Wend. [N. Y.], 436; *Jackson v. Fuller*, 4 Johns. [N. Y.], 215; *Den v. Adams*, 12 N. J. Law, 99; *Jackson v. Deyo*, 3 Johns. [N. Y.], 422; *Jackson v. Aldrich*, 13 Johns. [N. Y.], 106; *Scherrer v. Ingerman*, 11 N. E. Rep. [Ind.], 10; *Nash v. Baker*, 40 Nebr., 294; *Wilmott v. Barber*, 15 L. R., Ch. D. [Eng.], 96; *Oliver v. Lansing*, 48 Nebr., 338; *Montgomery v. Pickering*, 116 Mass., 227; *Tarkington v. Purvis*, 128 Ind., 187.

Defendant can not withhold rents to pay taxes, insurance or improvements. See *Carter v. Brown*, 35 Nebr., 670; *Cook v. Bertram*, 86 Mich., 356; *McLellan v. Omodt*, 37 Minn., 157; *Wheeler v. Merriman*, 30 Minn., 372; *Mahoney v. Bostwick*, 30 Pac. Rep. [Cal.], 1020.

Thomas Ryan, contra:

A purchase of rental property at execution sale has been held to be purchase of the right to redeem only, and

not to carry the right to rents and profits as against a mortgagee in possession. See *Morton v. Covell*, 10 Nebr., 428.

Action for use and occupancy can not be founded upon a wrongful entry and adverse holding. See *Jordan v. Mead*, 19 La. Ann., 101; *Richmond & Lexington Turnpike Road Co. v. Rogers*, 7 Bush [Ky.], 532; *Hall v. Jacobs*, 7 Bush [Ky.], 595; *Watson v. McEachin*, 2 Jones [N. Car.], 207; *Butler v. Cowles*, 4 O., 213; *Mitchell v. Pendleton*, 21 O. St., 664; *Dalton v. Landahn*, 30 Mich., 349; *Pierce v. Pierce*, 25 Barb. [N. Y.], 243; *Stockett v. Watkins*, 2 Gill & J. [Md.], 326; *Edmonson v. Kite*, 43 Mo., 176; *Nance v. Alexander*, 49 Ind., 516; *Espy v. Fenton*, 5 Ore., 423; *Lankford v. Green*, 52 Ala., 103; *Quimby v. Stebbins*, 55 N. H., 420.

A mortgagee may retain possession till his debt is paid, and is only required to apply upon the debt the excess of the rents over taxes, insurance, repairs and like charges. See *Comstock v. Michael*, 17 Nebr., 288; *Kemp v. Small*, 32 Nebr., 318; *Morrow v. Jones*, 41 Nebr., 867; *White v. Atlas Lumber Co.*, 49 Nebr., 82; *Barnett v. Nelson*, 54 Ia., 41; *Cook v. Kraft*, 3 Lans. [N. Y.], 512; *Moshier v. Norton*, 100 Ill., 63; *Harper's Appeal*, 64 Pa. St., 315; *Brown v. Simons*, 44 N. H., 475; *Brevoort v. Randolph*, 7 How. Pr. [N. Y.], 398; *Eagle Ins. Co. v. Pell*, 2 Edw. Ch. [N. Y.], 631; *Harper v. Ely*, 70 Ill., 581; *Fowley v. Palmer*, 5 Gray [Mass.], 549; *Stinchfield v. Milliken*, 71 Me., 567; *McConnel v. Holobush*, 11 Ill., 61; *Walton v. Withington*, 9 Mo., 545; *Reitenbaugh v. Ludwick*, 31 Pa. St., 131; *Chapman v. Porter*, 69 N. Y., 276; *Harrison v. Wyse*, 24 Conn., 1; *Tharp v. Feltz*, 6 B. Mon. [Ky.], 6; *Kellogg v. Rockwell*, 19 Conn., 446; *Hennesy v. Farrell*, 20 Wis., 46; *Brinkman v. Jones*, 44 Wis., 498; *Wood v. Whelen*, 93 Ill., 153; *Toomer v. Randolph*, 60 Ala., 356; *Downs v. Hopkins*, 65 Ala., 508; *Greer v. Turner*, 36 Ark., 17; *Anthony v. Rogers*, 20 Mo., 281; *Dawson v. Drake*, 30 N. J. Eq., 601; *Hubbell v. Moulson*, 53 N. Y., 225; *Martin v. Fridley*, 23 Minn., 13; *Fee v. Swingly*, 6 Mont., 596; *Roberts v. Sutherlin*, 4 Ore., 219.

Mortgagee was not wrongfully in possession. Its possession was legally obtained from the only person it knew as a holder of the title, and that was sufficient. See *Union Mutual Life Ins. Co. v. Lovitt*, 10 Nebr., 301; *Fulton v. Levy*, 21 Nebr., 482; *Morrow v. Jones*, 41 Nebr., 880; *Hennesy v. Farrell*, 20 Wis., 47; *Cooke v. Cooper*, 18 Ore., 142; *Spect v. Spect*, 88 Cal., 442; *Russell v. Ely*, 2 Black [U. S.], 575.

The right to maintain ejectment is a test of the right to recover rents in a suit at law. See *Gillett v. Eaton*, 6 Wis., 30*; *Tallman v. Ely*, 6 Wis., 244*; *Brinkman v. Jones*, 44 Wis., 498; *Reading v. Waterman*, 46 Mich., 107; *Chase v. Peck*, 21 N. Y., 581; *Hubbell v. Moulson*, 53 N. Y., 225; *Madison Avenue Baptist Church v. Oliver Street Baptist Church*, 73 N. Y., 82; *Phyfe v. Riley*, 15 Wend. [N. Y.], 248; *Parsons v. Welles*, 17 Mass., 419; *Moulton v. Leighton*, 33 Fed. Rep., 143; *Kilgour v. Gockley*, 83 Ill., 109; *Martin v. Fridley*, 23 Minn., 13; *Spect v. Spect*, 88 Cal., 437; *Cooke v. Cooper*, 18 Ore., 142.

The action should be one to redeem from the mortgage, and for an accounting. See *Fulton v. Levy*, 21 Nebr., 483; *Chase v. Peck*, 21 N. Y., 581; *Hubbell v. Moulson*, 53 N. Y., 225; *Tallman v. Ely*, 6 Wis., 244*; *White v. Atlas Lumber Co.*, 49 Nebr., 82.

The mortgagee, like a receiver, should only be held for rent actually received, not for estimated rental value. See *Comstock v. Michael*, 17 Nebr., 288; *Kemp v. Small*, 32 Nebr., 318; *Morrow v. Jones*, 41 Nebr., 867; *Quinn v. Brittain*, 3 Edw. Ch. [N. Y.], 314*; *Brown v. South Boston Savings Bank*, 148 Mass., 300; *Murdock v. Clarke*, 59 Cal., 683; *Hidden v. Jordan*, 28 Cal., 302.

NORVAL, J.

Paul F. Clark brought suit in the court below, alleging in his petition that on February 28, 1891, he was the owner in fee of lots C, D, E and F, Bigelow's subdivision of lots 11 and 12, block 27, in the city of Lincoln; that the defendant forcibly and wrongfully took possession

of the premises and held the same from July 15, 1891, to February 15, 1895, and that the rental value of the property was $400 per month, or $17,200, for which sum he prayed judgment. The defendant, for answer, denied the allegations of the petition, and averred, in substance, that during the time stated in the petition defendant was the owner of certain mortgages on the said premises executed by one M. I. Bond, the former owner, from whom, it is alleged, the defendant received possession and to whom it accounted for rents received. The defendant alleges it paid taxes, premium for policies of insurance, and made repairs and improvements aggregating more than $7,000. The plaintiff replied by a general denial. The cause was tried to the court, without the assistance of a jury, and at the request of plaintiff special findings of fact were made, which are, in substance, as follows:

1. That on February 24, 1891, plaintiff, by purchase at sheriff's sale, became the *bona fide* owner in fee simple of the premises, subject to the mortgage liens of the defendant hereafter described.

2. That on August 1, 1889, the defendant negotiated and made a loan of $30,000 on the property to one M. I. Bond, the then owner thereof; that it subsequently, and before plaintiff purchased the premises, made said Bond another loan thereon, for $22,000, each of which loans was secured by a mortgage upon the lots in controversy.

3. That the defendant, by consent and permission of Mrs. Bond, on October 20, 1891, entered into possession of the premises and held the same until February 15, 1895, without the knowledge, consent or acquiescence of plaintiff.

4. That Mrs. Bond was in possession of the property from the time of the completion of the hotel in 1890 until October 20, 1891; plaintiff received his sheriff's deed on August 2, 1891, and instituted a forcible detainer suit against Mrs. Bond to recover possession of the property, which resulted in a judgment of ouster being rendered against her on October 20, 1891; that the defendant was not a party to that litigation.

5. That plaintiff never demanded from defendant the possession of the property or the payment of rents.

6. That the defendant held possession as mortgagee from October 20, 1891, to February 15, 1895, collected the rents, and applied the same to its own use.

7. That the fair and reasonable rental value while the defendant held possession was the sum of $12,000.

8. That the sum of $4,178.56 was expended by the defendant in repairs, taxes and insurance, leaving a balance in its hands unaccounted for of $7,821.44, and for which amount the defendant is liable to account to the plaintiff.

9. That plaintiff had no knowledge or notice of any agreement between Mrs. Bond and the defendant whereby she gave possession to the defendant.

The judgment pronounced was that the defendant apply the balance, $7,821.44, upon the mortgages given it by Mrs. Bond. Plaintiff moved for judgment in his favor on the special findings for the amount of the rents, which was overruled, and he has brought the record to this court, presenting said ruling for review.

It is the established doctrine in this state that a mortgagor of real estate is ordinarily entitled to the possession thereof until confirmation of foreclosure sale, and by reason thereof he has a proprietary interest in the rents and profits. See *Ort v. Broad*, 52 Nebr., 490. It appears from the findings of the trial court that the defendant, as the mortgagee, entered into possession of the mortgaged premises with the consent and permission of Mrs. Bond, the mortgagor, and collected the rents and applied the same on the mortgage debts, taxes, insurance and repairs. We consider it plain that under the facts, as found, Mrs. Bond could not have recovered rents from the defendant, since her consent to its acquiring possession of the property created an exception to the general rule above stated relative to the rights of mortgagors. Did the granting of permission of the mortgagee to take possession of the premises prevent the plaintiff from re-

covering the rents? This question has been settled in the negative by the decision in *Orr v. Broad*, 52 Nebr., 490, in an opinion by Chief Justice HARRISON. In that case the plaintiff purchased the mortgaged premises at an execution sale, which sale was confirmed and the sheriff executed a deed to him. The mortgagee at the time of the sale was in posession of the premises by direction of the mortgagors, who had assigned in writing to the mortgagee the rents and profits of the mortgaged premises to accrue in the future. Under these conditions it was held that the purchaser at the execution sale could recover the rents from the mortgagee. The court, in the opinion, used this apposite language: "The plaintiff who purchased at the execution sale, by the confirmation thereof and the deed made pursuant thereto, was vested with such title and right as were in the judgment debtor at the time the lien of the judgment attached to the land. See Code of Civil Procedure, secs. 499, 500; *Reynolds v. Cobb*, 15 Nebr., 381; *Courtnay v. Parker*, 16 Nebr., 311, 21 Nebr., 582; *Lamb v. Sherman*, 19 Nebr., 681; *Yeazel v. White*, 40 Nebr., 432. These were the legal title and right to possession. His title and right thus acquired were liable to extinguishment by the foreclosure of the mortgages, a sale under the decree and confirmation thereof. See *Harrington v. Latta*, 23 Nebr., 84; *Lincoln Rapid Transit Co. v. Rundle*, 34 Nebr., 559; but until the occurrence of the last mentioned event he had the legal title and right to possession. Accompanying the legal title and right to possession the right to the rents and profits passed to the plaintiff; hence, from the date, November 19, 1891, the date of the confirmation of the execution sale, and deed of the sheriff to the plaintiff, the legal title was in him, he had the right of possession, and to collect the rents and profits of the real estate." The case before us is governed by the doctrine above stated. It is true in that case the purchaser at the execution sale demanded possession of the property from the mortgagee, while no such demand was made by Clark; but such dis-

tinction seems to have been unimportant, for in *Orr v. Broad* no demand for the possession was made until a year after the date of the sheriff's deed, and yet Orr was allowed rents from the date of such instrument. That Mrs. Bond consented to the defendant going into possession can not militate against the plaintiff herein, since at the time such consent was given Mr. Clark was the owner of the fee, and Mrs. Bond had no interest whatever in the property. The defendant was a trespasser from the time it entered into possession, and no demand or notice to quit was necessary to make it liable to the plaintiff for the rents and profits of the premises. See *Godwin v. Stebbins*, 2 Cal., 105; *Jackson v. Robinson*, 4 Wend. [N. Y.], 436; *Murphy v. Williamson*, 85 Ill., 151. *Morton v. Covell*, 10 Nebr., 423, cited by counsel for defendant, is not parallel with the case in hand. There the mortgagee was in possession of the property at the date of the execution sale under an agreement with the mortgagor providing therefor, while at the time Clark became the purchaser the mortgagee was not in possession. Moreover, Mrs. Bond had no title or interest in the premises when she consented to the defendant taking possession, her title having terminated by the sheriff's deed prior to the surrender.

In the brief of defendant it is argued that an action in assumpsit will not lie against the defendant, as the relation of landlord and tenant did not exist between it and the plaintiff. We do not controvert this doctrine. It is sufficient to say that the action is tort and not assumpsit. See *Lundgren v. Crum*, 47 Nebr., 242. If the plaintiff had been in lawful possession as mortgagee, then it would have been entitled to deduct from the rents the amounts necessarily expended for taxes, insurance and repairs; but it can not withhold moneys to pay these items, since it was a trespasser, seizing the property without the consent of Clark, the then owner of the premises. See *Mahoney v. Bostwick*, 30 Pac. Rep. [Cal.], 1020.

For the reasons stated the judgment of the district

court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

NEBRASKA NATIONAL BANK V. HENRY W. PENNOCK.

FILED OCTOBER 5, 1899. No. 10,695.

1. **Bill of Exceptions:** NEW TRIAL. The validity of a bill of exceptions does not depend upon the time within which a motion for a new trial is filed.

2. **Time to File Motion for New Trial.** A motion for a new trial, to be of any avail, must be filed at the term of court the verdict or decision is entered, and, except for newly-discovered evidence, within three days after the rendition of such verdict or decision.

3. ———: JOURNAL ENTRIES. The delay of the clerk of the court in spreading the verdict or decision on the court journal will not have the effect to extend the time within which to file a motion for a new trial.

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

Warren Switzler, for plaintiff in error.

J. R. Webster and *Henry W. Pennock, contra.*

NORVAL, J.

This is the second appearance of the cause in this court, the opinion on the former hearing being reported in 55 Nebr., 188. Subsequent to the entry of the judgment of reversal a new trial was had in the court below, which terminated in a judgment in favor of the plaintiff in the sum of $91.41. The bank prosecutes a petition in error.

The defendant below has filed a motion to quash the bill of exceptions for the reason that the motion for a new trial was not filed by the plaintiff in the court below within three days after the decision was rendered. This motion is not well taken and must be overruled. The

validity of a bill of exceptions in no manner depends upon the time the motion for a new trial is filed. Indeed, a bill of exceptions may be allowed, although no motion for a new trial should be made in the cause.

The amended transcript shows the cause was tried in the court below without the intervention of a jury, and the decision and judgment were rendered on February 13, 1899, and that the motion for a new trial was not filed until February 17, or four days later. By section 316 of the Code of Civil Procedure it is provided: "The application for a new trial must be made at the term the verdict, report or decision is rendered, and, except for the cause of newly-discovered evidence material for the party applying which he could not with reasonable diligence have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented." Except for the causes enumerated in the foregoing section a motion for a new trial must be filed within three days after the entry of the decision or verdict. The provisions of the statute are not directory merely, but are wholly mandatory, and a motion for a new trial filed out of time is of no avail and can not be considered, unless an earlier filing was unavoidably prevented, or the motion is based upon the ground of newly-discovered evidence. See *Fox v. Meacham*, 6 Nebr., 530; *Roggencamp v. Dobbs*, 15 Nebr., 620; *Aultman v. Leahey*, 24 Nebr., 286; *Davis v. State*, 31 Nebr., 240; *McDonald v. McAllister*, 32 Nebr., 514. Plaintiff not having brought itself within the exception contained in the statute by showing the filing of the motion for a new trial within three days was "unavoidably prevented," its motion is unavailing and the grounds stated therein can not be considered.

It is, however, contended that, as the judgment was not entered on the journal of the trial court until February 14, the motion was filed in time. This position is unsound. The statute requires, with certain exceptions, that the motion for a new trial shall be filed "within

three days after the verdict or decision was rendered," and not three days after the clerk has spread the decision upon the court records. As the alleged errors assigned in the motion for a new trial can not be reviewed, and no others have been brought to our attention by the petition in error or in the briefs filed, the judgment must be

AFFIRMED.

WILLARD H. DAVIDSON, ADMINISTRATOR, APPELLEE, v. GRETNA STATE BANK ET AL., IMPLEADED WITH CHARLES W. KEY, APPELLANT.

FILED OCTOBER 5, 1899. No. 8,981.

1. **Corporations:** PAYMENT OF DEBT BY STOCKHOLDER: ACCOUNTING: CONTRIBUTION. Where a stockholder of a state bank advances his own funds to pay the debts of the bank in pursuance of an agreement of the stockholders that each should contribute in proportion to the number of shares of stock held by him, the advancing stockholder may maintain an action against the other stockholders for an accounting and contribution, without having first exhausted the assets of the bank.

2. **Bill of Exceptions:** OMISSIONS: REVIEW. Where a bill of exceptions discloses that important evidence introduced and considered has been omitted therefrom, the findings of the trial court on a question of fact will not be reviewed, even though the certificate of authentication may state that all the evidence is included in the bill.

3. **Harmless Error.** Error which is not prejudicial to the party complaining will not work a reversal.

APPEAL from the district court of Sarpy county. Heard below before SLABAUGH, J. *Affirmed.*

Gregory, Day & Day, for appellant.

H. C. Lefler, Wright & Stout and *John F. Stout, contra.*

NORVAL, J.

It appears from the pleadings in this cause that in 1889 the Gretna State Bank was incorporated under the

laws of this state, and that the bank subsequently became insolvent, and a receiver was appointed by this court to wind up its affairs, and pay its debts. At the time it became insolvent its capital stock was $10,000, all but about $500 of which had been paid up. The stockholders were plaintiff's intestate, James Davidson, the defendants Charles W. Key, William M. Saterfield, Paul Boob, John Grabow and A. U. Hancock. Key owned fifty-four shares, amounting to $5,400. On November 1, 1891, upon application of the stockholders Key, Davidson, Saterfield and Boob, with the consent of the creditors, the receiver was discharged, on the bank, as principal, and the said stockholders, other than Hancock, and one Ida D. Hancock, as sureties, entering into a bond to the state in the sum of $50,000, conditioned that the bank should within four months pay all of its indebtedness, and to hold all creditors harmless by reason of the discharge of the receiver, and the turning of the assets over to the bank. Thereupon Key was appointed by the stockholders to take charge of the bank assets, and to close up the business of the concern. He entered upon the duties of the trust, and disposed of the property of the bank, but failed to pay all of its debts. The petition of the plaintiff in the district court alleges the facts already stated, and in addition thereto, in substance, that, at the time the bank failed, plaintiff's intestate only owned three of the one hundred shares of the capital stock, and that Key owned fifty-four shares, Saterfield five shares, and Boob two and one-half shares, and that Hancock and Grabow were insolvent; that it was agreed, at and prior to the giving of the said bond, between the stockholders Key, Davidson, Saterfield and Boob, that they would contribute to the payment of the debts of the bank in proportion to the amount of the capital stock then owned by them respectively, and that Davidson was compelled to, and did, pay out of his own funds on said indebtedness several thousand dollars over and above his proportionate share. This suit was brought by the

administrator of Davidson's estate against the bank, Key and other stockholders, for an accounting and contribution. The bank and Key filed separate answers, alleging, *inter alia*, that James Davidson, deceased, while president of the bank, sold seventeen shares of stock at the par value of $17,000 to A. U. Hancock, who was the vice-president of the bank, and then indebted to it in the sum of $2,142, and received in payment for said shares a draft drawn by the bank upon the First National Bank of Omaha, and the amount thereof was charged as an indebtedness of Hancock to the Gretna State Bank; and that said sale was in fraud of the creditors and other stockholders of said bank. Key in his answer also set up a claim of several thousand dollars for services alleged to have been rendered by him in settling the affairs of the bank. The averments in these answers were controverted by the reply of the plaintiff. Upon the trial the court found that the solvent stockholders who executed the bond heretofore mentioned had contributed to the payment of the debts of the bank as follows: Charles W. Key, $1,510.79; W. M. Saterfield, $1,184.33; Paul Boob, $592.16; and James Davidson, $9,387.39; that the latter had contributed $8,496.42 more than his proportionate share of the bank debts, and that Saterfield and Boob had each paid their proportion of such debts; that Hancock and Grabow, two of the stockholders, were insolvent, and that Davidson was entitled to contribution from Key for the amount of excess which the former had paid over and above his proportionate share, to-wit, the sum of $8,496.42, that being the amount which it was found that Key had paid less than his proportion. A judgment for said amount was rendered against him in favor of the plaintiff. Key has prosecuted this appeal.

The first argument advanced for a reversal is that this suit could not be maintained by the plaintiff, and *Farmers Loan & Trust Co. v. Funk*, 49 Nebr., 353, and *State v. German Savings Bank*, 50 Nebr., 734, are cited to sustain the contention. Those decisions are not in point, as the

present suit was not instituted by a creditor of the bank to enforce the constitutional liability imposed upon stockholders of state banks, but for an accounting between the stockholders, and to enforce contribution for moneys advanced to pay bank debts in pursuance of an agreement entered into between the stockholders. The suit was properly brought.

It is also urged that the findings of the trial court are contrary to the evidence. This question can not be presented because all the testimony adduced on the trial is not embraced in the bill of exceptions. That document discloses that several exhibits introduced on the trial are not incorporated in the bill, and with this condition of the record we are precluded from considering the evidence to ascertain if it justified the findings of the trial court. See *Missouri P. R. Co. v. Hays*, 15 Nebr., 231; *Chamberlain v. Brown*, 25 Nebr., 434; *Greene v. Greene*, 49 Nebr., 546; *Alling v. Fisher*, 55 Nebr., 239.

We quite agree with counsel for appellant that the trial court committed an error in making its computation of the amount of recovery, as the findings of fact disclose. The holders of sixty-four and one-half shares were solvent, Key owned fifty-four shares and Davidson three shares. The indebtedness of the bank was found to be $12,674.67, which was equivalent to $196.50⅔ per share. Key's portion was $10,611.36, of which he paid $1,510.79, leaving a balance of $9,100.57. Davidson's proportion of the indebtedness was $589.52, which sum deducted from $9,387.39, the amount found by the court to have been paid by him, leaves $8,797.87, to be recovered from the other solvent stockholders. It appears from the findings that Saterfield and Boob, the other two solvent stockholders, had each overpaid their proportionate share, so that plaintiff was entitled to receive from Key $8,797.87, instead of $8,496.42, for which last-named sum judgment was rendered in the trial court. Appellant can not complain of this error, as it is in his favor, and plaintiff has not appealed.

AFFIRMED.

ALFRED R. DUFRENE, APPELLEE, V. DAVID D. SMEATON ET AL., APPELLANTS.

FILED OCTOBER 5, 1899. No. 8,976.

1. **Appeal:** TIME TO FILE TRANSCRIPT: JURISDICTION. To confer jurisdiction upon this court to review a cause on appeal a transcript of the judgment or final order must be filed with the clerk of this court within six months from the entry in the district court of such judgment or final order.

2. ——: ——: ——: CONSENT OF PARTIES. Consent of parties can not confer jurisdiction of the subject-matter.

APPEAL from the district court of Douglas county. Heard below before POWELL, J. *Dismissed.*

Gregory, Day & Day, for appellants.

Dexter L. Thomas and *Howard B. Smith, contra.*

NORVAL, J.

This appeal is prosecuted from a final order rendered by the court below on June 25, 1896. The appeal must be dismissed for want of jurisdiction, since no transcript was filed in this court until December 26, 1896, which was more than six months after the entry of the final order sought to be reviewed. See *Verges v. Roush,* 1 Nebr., 113; *Glore v. Hare,* 4 Nebr., 131; *Horn v. Miller,* 20 Nebr., 98; *Chapman v. Allen,* 33 Nebr., 129; *Withnell v. City of Omaha,* 37 Nebr., 621. The filing of a transcript of the judgment or final order in the appellate court within the time prescribed by statute is a jurisdictional matter which can not be waived by the parties.

DISMISSED.

CHARLES T. JENKINS V. STATE OF NEBRASKA.

FILED OCTOBER 5, 1899. No. 10,596.

Contempt: ORDER OF COURT: DISOBEDIENCE. A party is guilty of contempt who willfully disregards, or refuses to comply with, an order of court directing him to restore the subject-matter of litigation, if the court possessed jurisdiction to enter the same, although the proceedings may have been never so erroneous.

ERROR to the district court for Butler county. Tried below before SEDGWICK, J. *Affirmed.*

Charles T. Jenkins and *Burr & Burr*, for plaintiff in error:

The order directing plaintiff in error to pay money into court was rendered without jurisdiction and is void. It was, therefore, not a contempt of court to disobey the order. See *Runyon v. Bennett*, 29 Am. Dec. [Ky.], 431; *Board of Commissioners v. Gorman*, 19 Wall. [U. S.], 661; *First Nat. Bank v. Rogers*, 97 Am. Dec. [Minn.], 241; *Northwestern Express Co. v. Landes*, 6 Minn., 564*; *City of Macon v. Shaw*, 14 Ga., 162; *Payfer v. Bissell*, 3 Hill [N. Y.], 239; *Hyatt v. Clever*, 73 N. W. Rep. [Ia.], 831; *Kreglo v. Fulk*, 3 W. Va., 74; *Creighton v. Keith*, 50 Nebr., 813; *Rhode Island v. Massachusetts*, 12 Pet. [U. S.], 718; *Spoors v. Coen*, 44 O. St., 497; *Reynolds v. Stockton*, 43 N. J. Eq., 211; *Ruhland v. Supervisors*, 55 Wis., 664; *Fleming v. Hight*, 101 Ind., 466; *Cape May S. L. R. Co. v. Johnson*, 35 N. J. Eq., 425; *Mayor v. Conover*, 5 Abb. Pr. [N. Y.], 251; *People v. Weigley*, 155 Ill., 491; *State v. Second Judicial District*, 50 Pac. Rep. [Mont.], 852.

The order directing money to be paid into court was void, as being an attempt to collect money without an execution. See *State v. Jaynes*, 19 Nebr., 697; *Segear v. Segear*, 23 Nebr., 307; *Mallory Mfg. Co. v. Fox*, 20 Fed. Rep., 409; *"Blanche Page,"* 16 Blatchf. [U. S.], 1.

Other references: *Hovey v. Elllott*, 167 U. S., 409; *Robertson v. Davidson*, 14 Minn., 427.

C. J. Smyth, Attorney General, W. W. Stowell and *George P. Sheesley*, for the state.

References: *Hagan v. Lucas*, 10 Pet. [U. S.], 400; *Dennistoun v. Draper*, 5 Blatchf. [U. S.], 336; *Ford v. Bushor*, 12 N. W. Rep. [Mich.], 690.

NORVAL, J.

Charles T. Jenkins, an attorney residing in the city of Lincoln, was found guilty of contempt of court by the district court of Butler county, and sentenced to pay a fine. The record is before us for review. It is disclosed that one Arthur Myatt instituted a replevin action in the county court of Butler county against Charles T. Jenkins and J. B. Morrison to recover possession of certain wheat in stack. The property was seized under the writ, and possession thereof, upon Myatt's giving the required bond, was delivered to him. He procured the wheat to be threshed, and the grain, not being in good condition, instead of being stored in elevators as was intended, was sold to F. P. Van Wickle, of Surprise, for $407.40. By agreement or consent of the parties the proceeds of the sale were left in the hands of Van Wickle, or rather his agent, Mr. Metzger, to await the termination of the litigation. Subsequently the replevin action was tried, and Jenkins obtained judgment for the return of the wheat, or its value. Three days thereafter he caused an execution to be sued out on said judgment, and to be delivered to A. J. Stanwood, constable. On the same day Jenkins and the officer went to said Metzger, agent of Van Wickle, and demanded the proceeds of the wheat, Jenkins falsely stating to Metzger that he had an order from the county court to pay over the money to him, and exhibited at the time a paper which he claimed to be such order. Metzer thereupon asked that a half hour be given in which to communicate with Myatt by wire, which request was refused, as was also the request that he be given five minutes for consultation and considera-

tion of the demand for the proceeds of the wheat. Jenkins also threatened that, if the money was not paid over at once, they would close up the business of Van Wyckle under the said alleged order from the county court. Metzger, although at first hesitating, was induced by the matters just suggested to and did pay over to Jenkins the proceeds of the wheat. The next day, and within the time required by law, Myatt filed an appeal bond in the replevin cause, and perfected his appeal in the district court. In proceedings had therefor in said last named court in the replevin action, and upon averment and proper proof of said matters, an order was entered requiring Jenkins to forthwith restore the proceeds of the wheat, the subject-matter of the action. Jenkins paid $200, and refused to pay the balance of the money. The contempt proceedings against him followed.

Whether the order of the district court that Jenkins restore the money was based upon sufficient evidence is a question not presented by this record. The court had jurisdiction of the parties and the subject-matter, and even though the order was erroneously made, it constituted no reason why Jenkins should defy, or refuse to obey, the order of the court. If said order had been void, then Jenkins would not have been guilty of contempt in disobeying it. See *Calvert v. State*, 34 Nebr., 616. But, as already stated, the court had jurisdiction, and the order was not void. At most it was merely erroneous, and Jenkins had no right to disregard or disobey it on that ground. He should have instituted appropriate proceedings to obtain a review of the order, if he deemed it to have been erroneously entered.

It is argued that the order which was made the basis of the contempt proceedings was made to enforce a money judgment, and that the accused is not liable to punishment as for contempt in refusing to comply with such order. This contention is not well founded, inasmuch as the defendant was not adjudged guilty of contempt for refusing to pay a money judgment against him,

but because he disobeyed an order of court to restore the subject-matter of the litigation.

We have examined and considered the various errors assigned, and discover no sufficient reason for disturbing the judgment, and it is accordingly

AFFIRMED.

JOHN K. SOWARD V. GEORGE H. MOSS.

FILED OCTOBER 5, 1899. No. 8,746.

1. **Vendor and Vendee:** ORAL CONTRACTS: STATUTE OF FRAUDS. A contract for the sale of lands is void unless the contract, or some note or memorandum thereof, is in writing, signed by the owner, or his agent authorized in writing.
2. **Deeds:** DELIVERY. A deed placed in the hands of the grantor's agent to be held until the consideration is paid is not a delivery to the vendee.

REHEARING of case reported in 58 Nebr., 119. *Reversed.*

W. L. Hand, for plaintiff in error.

B. O. Hostetler, contra.

NORVAL, J.

This case is on rehearing. For former opinion see 58 Nebr., 119. A reconsideration of the cause has convinced us that the former decision was wrong, and we will now briefly state the reasons for the conclusion we have finally reached.

The action was to recover the purchase price of certain real estate. The statute of frauds is relied upon as a defense. Upon this question upon the former hearing it was said: "Another argument is that the evidence shows that the contract by these parties was an oral one; that Moss was not bound to convey, and, therefore, Soward is not bound. There are two answers to this contention: (1) The proposition of Soward to purchase

the land was in writing. Moss accepted this proposition and authorized Blue to notify Soward that he had accepted it. The letter then written by Blue to Soward, informing the latter of Moss' acceptance of the proposition of purchase, was, in effect, Moss' letter in writing accepting the proposition. (2.) If the letter written by Blue to Moss was out of the way, still Moss actually made a conveyance of the real estate to Soward, and delivered it to his appointed agent. Moss then performed the contract, and bound himself by his deed; and, since the deed was made and delivered to Soward, the statute of frauds is no defense for Soward in an action against him to recover the purchase price." We are now satisfied that we misapprehended the facts on the former hearing. In the above quotation we inadvertently stated, or assumed as proven, that Blue had written a letter to Moss; but Blue did write one to Soward. Blue was not the agent of Moss, but represented Soward in the transaction, presenting the proposition of the latter to Moss and communicating to Soward the oral answer of Moss. In so doing he was Soward's agent. Even though Blue was the agent of Moss, yet he could not bind the latter, since he possessed no written authority from Moss to represent him. By section 5, chapter 32, Compiled Statutes, it is provided: "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made." And section 25 of the same chapter declares: "Every instrument required by any of the provisions of this chapter to be subscribed by any party may be subscribed by his agent, thereunto authorized by writing." Under the provisions of the foregoing quoted sections the authority of an agent to sell real estate must be in writing, to make the acts of the agent binding on the principal, where there has been no subsequent ratification of the agent's acts. See *Stadleman v. Fitzgerald,*

14 Nebr., 290; *Morgan v. Bergen*, 3 Nebr., 209. As no written authority was given by Moss to Blue to make the sale in question, the contract is not binding upon the former unless there has been a ratification by him, which proposition we will now consider.

Moss executed a deed to the land and transmitted the same by mail to the First National Bank of Danville, Illinois, to be by it delivered to Soward on his paying to the bank the purchase price. The bank received the deed, but it was never delivered to Soward; and the bank had no authority to make the delivery without the payment of the consideration. The bank was the agent of Moss and not of Soward, and as there was no delivery of the deed to the vendee or his authorized agent, the sale was never consummated. Until the purchaser's money was paid the deed was under the control of Moss, who could have ordered the same returned to him. There was no such performance of the contract as to take the case out of the statute of frauds. The title never vested in Soward. A deed left in the hands of the grantor's agent to be held until the purchase-money is paid is not a delivery to the grantee. See *Patrick v. McCormick*, 10 Nebr., 1; *Wier v. Batdorf*, 24 Nebr., 83. The contract being within the statute of frauds, is not binding, and an action will not lie thereon to recover the purchase-money. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CHARLES SHIVERICK & COMPANY V. R. J. GUNNING COMPANY.

FILED OCTOBER 5, 1899. No. 8,701.

Instructions: DAMAGES: EVIDENCE. Instructions should not submit to the jury elements of damages not embraced within the evidence adduced on the trial.

REHEARING of case reported in 58 Nebr., 29.

Hall & McCulloch, for plaintiffs in error.

N. H. Tunnicliff and *Elmer E. Thomas*, *contra*.

NORVAL, J.

This cause is on rehearing. The former opinion is reported in 58 Nebr., 29, which contains a sufficient statement of the facts as well as the questions involved. Relative to the measure of damages the trial court charged the jury: "The plaintiff is entitled to recover as its measure of damages in this action such amount as will compensate it for the loss it sustained in consequence of defendants' wrongful act in erasing and marking out the sign in question, the costs of replacing said sign, including railroad fare of workmen from Chicago or elsewhere, if sent specially for that purpose, together with hotel bills to plaintiff. The actual cost of repairing, replacing and maintaining said sign under its contract to the Durham tobacco people is plaintiff's full measure of damages, and this you will ascertain and allow in such sums as from a preponderance of the evidence you find to be such cost; but you cannot allow exemplary damages—that is, you must not assess damages for the purpose of punishing the defendant." This instruction, although vigorously assailed upon the former hearing by counsel for defendant below, was approved by this court, and the giving thereof sustained. After an investigation of the subject anew we are convinced that we committed a grave error in so holding. While hotel bills and railroad fare may be proper elements of damages under certain contingencies or state of facts, they were improperly allowed or directed to be taken into consideration, because it was not shown upon the trial that it was necessary to send workmen from Chicago to replace the sign in dispute. While it was developed that no one living in Omaha was capable of restoring the sign, it was not es-

tablished by any evidence that it was essential that painters should be sent from Chicago to do the work. It may be that sufficiently competent persons could have been obtained in Council Bluffs, Burlington or Des Moines to repair this sign. It was therefore error to direct the jury to allow plaintiff railroad transportation from Chicago or elsewhere. And this error was not waived by the defendant tendering an instruction upon the measure of damages, since the request tendered expressly stated evidence of railroad fare was not to be considered in the estimation of damages, unless, in replacing the sign, it was necessary to bring workmen from another city. There is not a particle of proof in the record to justify the giving of the instruction quoted above. For this error the judgment is reversed, and the cause remanded.

REVERSED AND REMANDED.

NATIONAL BANK OF COMMERCE V. THOMAS BRYDEN, TRUSTEE.

FILED OCTOBER 5, 1899. No. 8,951.

Chattel Mortgages: REGISTRATION: RIGHT TO PROPERTY. A mortgagee of chattels who files the instrument before the rights or liens of third parties intervene is entitled to the property as against them.

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

E. J. Cornish, for plaintiff in error.

A. C. Troup, J. W. Carr and *W. T. Nelson, contra.*

NORVAL, J.

This suit was instituted by Thomas Bryden, trustee, to have declared fraudulent and void as to creditors a certain chattel mortgage executed by the Phœnix Foundry

Company to the National Bank of Commerce. A decree was entered in the court below adjudging the mortgage void, to review which is the purpose of this proceeding.

The facts, briefly stated, are these: On December 28, 1894, the Phœnix Foundry Company in good faith executed and delivered to the National Bank of Commerce a chattel mortgage on property situate in Douglas county, to secure the payment of $10,000, of which sum $3,410 was cash at that time loaned, and $6,590 represented a previous indebtedness then due and owing by the mortgagor to the bank. Neither this mortgage nor a copy thereof, was filed for record until March, 1895. There was no agreement or understanding between the parties that the mortgage should be withheld from the record, but the omission to file the same at an earlier date was due to an accidental oversight on the part of the bank. The mortgaged chattels remained in the possession of the mortgagor; and the bank did not take possession of or assume control over any portion of the chattels during the period between the execution and filing of the mortgage in question. The plaintiff and interveners had no notice or knowledge of the existence of said mortgage prior to the date of the recording thereof. The mortgage was duly recorded before either the plaintiff or any one of the interveners had obtained any lien upon the property.

The single question presented by the record is whether the failure of the bank to record the mortgage until March 20, 1895, rendered the instrument void as to the other creditors of the mortgagor who became such between the date of the execution and the filing of the mortgage, but who had not obtained any lien upon the property at the date of such filing. The precise point was determined in *Forrester v. Kearney Nat. Bank*, 49 Nebr., 655, it being there stated: "Where a mortgagee of personal property, without any intention to defraud, has delayed filing his mortgage and taking possession of the property, but the instrument is in fact filed, or the mortgagee obtains and holds actual possession of the property under

the mortgage before the rights or lien of any third party attaches, the lien of the mortgage is good against a creditor of the mortgagor who subsequently causes the property to be seized upon attachment or execution." We are satisfied with the conclusion there reached, and the decision of the trial court in the case at bar being in conflict therewith, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

FIRST NATIONAL BANK OF PLATTSMOUTH, APPELLANT, V. SIMEON RECTOR ET AL., APPELLEES.

FILED OCTOBER 5, 1899. No. 8,965.

Religious Societies: DEBTS: LIABILITY OF MEMBER. A member of an unincorporated religious society not founded for the purpose of gain or pecuniary profit is not individually liable for its debts, unless he authorized the incurring of the obligation or subsequently ratified the same.

APPEAL from the district court of Cass county. Heard below before RAMSEY, J. *Affirmed.*

Beeson & Root, for appellant.

C. S. Polk and *Stewart & Munger*, *contra.*

NORVAL, J.

The unincorporated religious society known as the Methodist Episcopal Church of Weeping Water, in November, 1888, entered into a written contract with the First National Bank of Plattsmouth for the purchase of eighty acres of land in Cass county situate near the town of Weeping Water. The land was bought to enable the society, by the subsequent sale of the premises, to erect and maintain a college or seminary of learning, as well as for the advancement of the cause of religion. The

society sold forty acres of the land, and the proceeds were applied on the claim of the bank. Full payment on the contract of the purchase-money not having been made as therein provided, the bank commenced foreclosure proceedings against the society to subject the other forty acres to the payment of the purchase price. A decree of foreclosure was entered, the land sold thereunder, and the sum realized was applied on the decree, leaving a deficiency of $1,573.73, for which sum a deficiency judgment was rendered in favor of the bank on October 10, 1892. Execution was issued on the judgment, and the same was levied on the church property. Simeon Rector and others, as trustees of the Methodist Episcopal Church of Weeping Water, instituted a suit to enjoin the bank from selling the church property, to cancel and annul the deficiency judgment, and to restrain the collection thereof upon various grounds, which need not be here stated. A decree was rendered therein perpetually enjoining the sale of the church building and parsonage, the court refusing to enjoin the collection of the deficiency judgment. The present suit was instituted by the bank against the individual members of the society under sections 24 and 27 of the Code of Civil Procedure, to subject their individual property to the payment of the deficiency judgment. Issues were joined, and a trial thereof was had, which resulted in a decree in favor of the defendants, dismissing plaintiff's petition. The bank has prosecuted an appeal.

The sole question presented by the record is whether under the undisputed facts plaintiff had a right to recover in the present suit under sections 24 and 27 of the Code of Civil Procedure, which reads as follows:

"Sec. 24. Any company or association of persons formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property in this state, and not incorporated, may sue and be sued by such usual name as such company, partnership, or association may have assumed to itself or be known by,

and it shall not be necessary in such case to set forth in the process or pleading, or to prove at the trial, the names of the persons composing such company.

"Sec. 27. If the plaintiff, in any judgment so rendered against any company or partnership, shall seek to charge the individual property of the persons composing such company or firm, it shall be lawful for him to file a bill in chancery against the several members thereof, setting forth his judgment and the insufficiency of the partnership property to satisfy the same, and to have a decree for the debt, and an award of execution against all such persons, or any of them, as may appear to have been members of such company, association, or firm."

A reading and consideration of the foregoing provisions leads to the irresistible conclusion that it was never the intention of the legislature that said section 27 should apply to members of church societies or religious associations. Execution is permissible to issue against the individual under said section only when the partnership property of the company or firm is insufficient to satisfy the debts thereof. A religious society, within the meaning of the statute, can have no partnership assets. Such a society is not organized for the purpose of business or profit of its members, but to advance and promote the cause of religion. The authorities quite generally agree that members of a voluntary unincorporated association, such as a religious society, are not individually liable for its debts, unless they authorized the incurring of the obligation or subsequently ratified the same. The rule is thus stated in 1 Bates on Partnership at section 75: "A club or unincorporated association not formed for the purposes of gain or pecuniary profit is not a partnership. The fact that they have common property or a joint fund does not make them partners. * * * As these associations are not formed for profit or loss, if a contract is made in their society name, the associates are not bound by it, unless it was authorized by them; but all the officers or members who joined in

making or authorizing the contract are represented by the joint name, and they are liable upon it, on the ground of principal and agent and not of partnership." To the same effect is Mechem, Agency, sec. 72; and a like doctrine was recognized and applied by this court in *Hornberger v. Orchard*, 39 Nebr., 639. In the case with which we are dealing there is no averment or proof that the defendants authorized the making of the contract with the bank, or that they afterward, with knowledge thereof, ratified the same. The decree is right, and is

AFFIRMED.

MINNIE ZIMMERMAN, APPELLEE, V. PHILIP J. ZIMMERMAN, APPELLANT.

FILED OCTOBER 5, 1899. No. 8,970.

1. **Appeal:** TRIAL BELOW: REVIEW OF RULINGS. An appeal in an equity cause will not present for review the rulings made during the progress of the trial.

2. **Divorce:** EXTREME CRUELTY. Evidence examined, and *held* sufficient to justify the granting to the wife a decree of divorce on the ground of extreme cruelty.

3. ———: ALIMONY. The condition, situation and standing of the parties, financially and otherwise, duration of their marriage, the amount and value of the husband's estate, the source from which it came and whether the wife contributed anything to the common fund are proper matters to be considered in awarding permanent alimony.

4. ———: ———. Excessive alimony should not be allowed.

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

E. O. Kretsinger, for appellant.

Hazlett & Jack, contra.

NORVAL, J.

Minnie Zimmerman brought a suit for divorce in the court below on the ground of extreme cruelty. The defendant filed an answer and cross-petition praying that he be granted a divorce from the plaintiff. The cause was referred to Hon. A. H. Babcock to take the testimony, and report the same to the court with conclusions of fact and law. The referee made his report, finding that plaintiff was entitled to a divorce, the care and custody of her two minor children, and $3,000 as alimony. The defendant filed exceptions to said report, which were overruled by the court, and a decree was rendered confirming the report of the referee. The cause is here on the appeal of the defendant.

Exception is taken to the refusal of the referee during the trial to require plaintiff to submit to a physical examination of her person. This ruling is not reviewable, since the cause is before us on appeal. See *Ainsworth v. Taylor*, 53 Nebr., 484; *Alling v. Nelson*, 55 Nebr., 161; *Village of Syracuse v. Mapes*, 55 Nebr., 738.

Complaint is made that the evidence fails to sustain the finding that the defendant was guilty of extreme cruelty towards the plaintiff. The testimony adduced by the plaintiff before the referee upon this branch of the case, in many respects, is of too disgusting and revolting a nature to permit of its being detailed or summarized in an opinion. Suffice it to say that the record discloses by clear and satisfactory proofs that the defendant on many occasions was guilty of extreme cruelty towards his wife. His conduct was shown to be so inhuman as to make her living with him unbearable. In justice to the defendant it should be stated that his testimony, if believed, would entirely exonerate him from the charge of extreme cruelty imputed to him by his wife; and to some extent he is corroborated by witnesses called in his behalf. The finding of the referee is supported by the evidence of Mrs. Zimmerman, and she was corroborated by other

witnesses to such an extent as to justify the granting to her of the decree of divorce, although the proofs would have warranted a decree in favor of the defendant.

We are convinced that the allowance of $3,000 permanent alimony, and the further sum of $125 a year for the support and maintenance of the two children, until they reach the age of fourteen years, was excessive. It appears that the parties have been married less than three years, that the property of the defendant was accumulated prior to their marriage, and that the wife contributed nothing thereto. In the allowance of permanent alimony the condition, situation and standing of the parties, financially and otherwise, and the duration of their marriage, the amount and value of the husband's property, and whether the wife contributed anything to the common fund, are proper matters to be considered. The amount of permanent alimony should be reduced to $2,500, and the allowance for the support of the children cut down to $100 a year. The decree in all other respects, including the amounts allowed the referee and stenographer respectively, is affirmed. The decree as to alimony and support of the children is reversed, and the cause remanded to the district court with directions to modify its former decree in accordance with this opinion.

REVERSED AND REMANDED.

B. F. STURTEVANT COMPANY V. BOHN SASH & DOOR COMPANY AND DIXON NATIONAL BANK ET AL., INTERVENERS.

FILED OCTOBER 5, 1899. No. 8,690.

1. **Garnishment:** MONEY IN CUSTODIA LEGIS. Money *in custodia legis* is not subject to the process of garnishment.

2. ———: ———: WAIVER OF DEFENSE. The garnishee may waive the defense that the money is not liable in his hands to garnishment.

3. **Conflicting Evidence:** REVIEW. Findings of fact based on conflicting evidence will not be disturbed on review.

4. **Review:** PARTIES. One not prejudiced by a judgment can not obtain a review thereof.

REHEARING of case reported in 57 Nebr., 671. *Judgment below reversed in part.*

John P. Breen, for plaintiff in error.

Byron G. Burbank, contra.

NORVAL, J.

At the last term of this court the petition in error was dismissed, it being held that money about to be paid to a clerk of the district court to be distributed under decree of such court can not be reached by garnishment out of county court against distributee. See 57 Nebr., 671. A rehearing has been allowed, and the cause again submitted for our consideration.

It is insisted that no one but Mr. Moores, the garnishee, had the right to raise the objection that the fund was *in custodia legis* or question the validity of the attachment. We think the contention sound. But he could and did waive the defense that he was not liable to be garnisheed by not making objections on that ground in the court below. The garnishment proceedings were not void, but voidable only in case the officer made a defense that the money sought to be garnisheed was in the custody of the law, and for that reason was not liable to be reached by the process invoked by the plaintiff.

The district court found the issues in favor of the interveners and against the plaintiff. This finding having been based on conflicting evidence, in obedience to a long line of decisions, can not be disturbed on review.

In argument it is said that in no event was it proper for the trial court to render judgment in favor of the interveners and against the garnishee; that the proper practice would have been to have dismissed the proceed-

ings in attachment. Whether this contention is sound or not we are not called upon to decide, since the garnishee has not sought a reversal of the judgment rendered against him, and one not prejudiced by a judgment can not obtain a review thereof. See *Burlington & M. R. R. Co. v. Martin*, 47 Nebr., 56. It follows that the plaintiff can not be heard to complain of the judgment rendered against the garnishee.

Not only was the judgment entered against the garnishee for the full amount of money in his hands, but the interveners recovered $75 as interest thereon against the plaintiff. The recovery of interest was wholly unauthorized. The attached fund was never in their hands, and merely because the same was tied up by garnishment proceedings is no reason why the plaintiff should pay interest on the money. The judgment of the trial court allowing interest is reversed, but in all other respects is affirmed.

Complaint is made of the recovery of costs against the plaintiff. It and the interveners claimed independently and adversely the money in dispute, and the rights of each to the same were fully litigated, and plaintiff, having been unsuccessful, should pay the costs.

JUDGMENT ACCORDINGLY.

FANNIE E. BOWMAN, ADMINISTRATRIX, V. CITY OF OMAHA.

FILED OCTOBER 5, 1899. No. 10,594.

Municipal Corporations: NEGLIGENCE: PONDS: DEATH OF CHILD. A municipal corporation is liable for the death of a child who was drowned in a pond of water situate in part on a public street and in part on abutting lots, when shown that the accumulation of water was occasioned by the negligence of the city in

filling in the street with earth, that no fence or barrier was erected, and that the child entered the pond from the street. *City of Omaha v. Richards*, 49 Nebr., 244, followed.

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

Silas Cobb, for plaintiff in error.

W. J. Connell and *E. H. Scott*, *contra.*

NORVAL, J.

Fannie E. Bowman, as administratrix of the estate of Albert Bowman, deceased, recovered a judgment against the city of Omaha in the district court of Douglas county in the sum of $1,000, for negligently causing the death of her intestate. This judgment, on error proceeding brought to this court by the city, was reversed. See *City of Omaha v. Bowman*, 52 Nebr., 293. Subsequently the plaintiff filed an amended petition in the court below, to which a general demurrer was interposed by the city, sustained by the court, and the action dismissed. Error proceeding has been prosecuted by the plaintiff.

The sufficiency of the amended petition is the sole question presented. In the former opinion filed herein it was stated as a reason why plaintiff could not recover that it was not shown that her intestate went upon the pond in which he was drowned from Davenport street, and hence it could not be charged that the failure of the city to erect a barrier or fence between the street and the property abutting thereon on which the pond was located was the proximate cause of the boy's death. The amended pleading was doubtless framed to meet the objections to a recovery pointed out in the previous opinion, and we are constrained to hold that counsel for plaintiff in that regard has not been wholly unsuccessful. The amended petition alleges that "Albert D. Bowman came to his death through the negligence of the city of Omaha,

on the 15th day of June, 1892, by drowning in a pond of water, which negligence consisted in permitting the accumulation of said water, and in allowing said water to accumulate, and be and remain by the side of Davenport street, near Twenty-eighth street, within the limits of the city of Omaha, as well as to remain beside of an alley next south of Davenport street, and running parallel thereto, and upon lots 3, 4, and 5, block 3, Drake's Addition to the city of Omaha, all fronting upon said Davenport street; * * * that there was at said time no fence around said lots and no visible boundary line between them and Davenport street, said acts and conditions being the negligence complained of herein as well as the acts and conditions hereinafter named, said water being at the time of said death over public property of the city, to-wit, over part of the property set apart by said city for sidewalk purposes, and said water lying at said time in close proximity to said Davenport street at the place where said death occurred." The petition also charges that the pond was formed by the city negligently filling with earth Davenport street at a point where a ravine crossed it without leaving any outlet for the water; that there was no barrier or fence of any sort, or precaution of any kind taken, to protect children lawfully in that city against falling or going into said pond, which was attractive and enticing to children of tender age, many of whom were in the habit of playing in said pond, which was known to the officers and authorities of the city; that deceased was seven years of age, and while lawfully in vicinity of said pond with other children, yielded to the natural instinct of childhood, "went upon said pond immediately from said Davenport street, where said pond bordered and lay in close proximity to same," and while innocently engaged in playing in and upon said pond of water, on a section of the sidewalk which had been dislodged from its proper place and used as a raft, the child was drowned. These averments take the case out of the doctrine announced by this court on the former

hearing of the cause. The case as made before disclosed that there was a strip of ground at least six feet wide between the street and the pond of water, and that young Bowman did not enter the pond from the street. Now the case made by the plaintiff on paper shows that the water in the pond extended to, and over, the sidewalk, a portion of the street, and that plaintiff's intestate actually entered the pond from Davenport street. The case is governed by *City of Omaha v. Richards*, 49 Nebr., 244, 50 Nebr., 804. It is suggested by the city attorney that the last-named case, in effect, although not in express terms, was overruled by *City of Omaha v. Bowman*, 52 Nebr., 293. The court did not so intend. A clear distinction between the two cases exists, as was pointed out in *City of Omaha v. Bowman, supra.* The district court erred in sustaining the demurrer, and the judgment must be

REVERSED.

MILTON B. WHITNEY ET AL., APPELLANTS, V. SALLIE H. H. LOWE ET AL., APPELLEES.

FILED OCTOBER 5, 1899. No. 8,939.

1. **Mortgages:** RECORDS: NOTICE. The record of a mortgage is constructive notice of the existence of the debt which the mortgage was given to secure.
2. ———: ASSIGNMENT OF COUPONS. The assignment of coupons secured by a mortgage is, *pro tanto*, an assignment of the mortgage.
3. ———: UNAUTHORIZED RELEASE. The release of a mortgage by one who is not the owner of the debt, although possessed of apparent authority to enter satisfaction, is ineffective, except as to those who deal with the property relying in good faith upon such release.

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

D. M. Vinsonhaler and *Edward C. Wright*, for appellants.

Meikle & Gaines and *F. B. Tiffany, contra.*

SULLIVAN, J.

This action was brought to foreclose a real estate mortgage given by Sallie H. H. Lowe and her husband, William W. Lowe, to the Lombard Investment Company. The debt secured was evidenced by a coupon bond for the principal sum of $60,000. The appellants are the receivers of the mortgagee, and have succeeded to its rights. The Presbyterian Hospital of Philadelphia became, by purchase and assignment, the owner of the bond and mortgage. The investment company, having guarantied payment of the debt, both principal and interest, as the same should mature, was obliged, under its contract, to take up two coupons representing interest installments, upon which the mortgagors had defaulted. Afterwards John L. Welsh bought the mortgaged premises, paid the amount due the Presbyterian Hospital, and obtained from it a release of the mortgage. The balance of the consideration was applied to the payment of other liens against the property. To defeat this suit, which was brought to collect the coupons redeemed by the mortgagee, Welsh relies on the release and the fact that he did not actually know that the coupons were outstanding. The material part of the answer is as follows: "These defendants further say that at the time Sally H. H. Lowe and William W. Lowe sold and conveyed said land to John L. Welsh, as alleged in paragraph 11 of said petition, the mortgage described in said petition was fully released of record by the Presbyterian Hospital of Philadelphia, and that these defendants had no knowledge or information whatever as to the non-payment of the coupons held by the plaintiffs herein, and that in the purchase of said property said defendant John L. Welsh relied wholly upon the title as it appeared of record in the office of the register of deeds of Douglas county, Nebraska, at that date, and that he did not know that the plaintiffs herein claimed any interest therein, or any lien thereon, until long after said property was conveyed to him, and the

purchase-money for the same paid in full." The district court denied the specific relief demanded in the petition, and the plaintiffs bring the record here for review by appeal.

We find in the bill of exceptions an express admission that the Lowes sold and conveyed the mortgaged premises to Mr. Welsh on March 21, 1894, and that the release was not executed until the following day. It is also admitted that the deed from the Lowes to Welsh was recorded on April 6, 1894, and that the release from the Presbyterian Hospital was not filed in the office of the register of deeds until April 13, 1894. Thus it appears conclusively that Welsh did not buy the property on the faith of a recorded release and on the assumption that the mortgage to the Lombard Investment Company was not a subsisting incumbrance. The averments of the answer are not sustained by the proof. The record of the mortgage was notice to the world of the existence of the debt. This debt has not been entirely paid, and the mortgage release is, therefore, partially ineffective. The assignment of the coupons was *pro tanto* an assignment of the mortgage given to secure their payment. See *Studebaker Bros. Mfg. Co. v. McCargur*, 20 Nebr., 500; *Todd v. Cremer*, 36 Nebr., 430; *New England Loan & Trust Co. v. Robinson*, 56 Nebr., 50. To the extent of its interest in the security the investment company was authorized to acknowledge satisfaction. See *Daniels v. Densmore*, 32 Nebr., 40. The Presbyterian Hospital could neither acknowledge satisfaction for it, nor discharge its lien from the land. If a mortgagee enter satisfaction of the mortgage after the debt has been assigned, a subsequent purchaser of the property who acquires title on the faith of the record, and without notice of the assignment, will be protected; but as to all other persons the lien of the mortgage will not be impaired. See *Whipple v. Fowler*, 41 Nebr., 675. The facts in the case of *Griffith v. Salleng*, 54 Nebr., 362, were substantially identical with those in the case at bar, and it was there held that the assignee

of the coupons was entitled to enforce his security. Welsh knew that the coupons had been issued; he knew that they were covered by the mortgage, and he was not justified in assuming that they had been paid. The judgment is reversed, and the cause remanded with directions to the district court to render a decree in accordance with the prayer of the petition.

REVERSED AND REMANDED.

COUNCIL BLUFFS SAVINGS BANK, APPELLEE, v. LIZZIE M. SMITH ET AL., APPELLANTS.

FILED OCTOBER 5, 1899. No. 8,974.

1. **Homestead:** MORTGAGE: ACKNOWLEDGMENT. The homestead of a married person can not be incumbered by a mortgage which is not acknowledged by both the husband and the wife.
2. **Acknowledgment:** CERTIFICATE OF OFFICER: IMPEACHMENT. The certificate of an officer having authority to take acknowledgments can not be impeached by showing merely that such officer's duty was irregularly performed.
3. ——: ——. When the party executing a deed or mortgage knows that he is before an officer having authority to take acknowledgments, and intends to do whatever is necessary to make the instrument effective, the acknowledging officer's official certificate will be, in the absence of fraud, conclusive in favor of those who in good faith rely on it.

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

W. E. Reed, for appellants.

S. O. Campbell, James Nichols and *Powers & Hays, contra.*

SULLIVAN, J.

This is an appeal from a judgment of the district court foreclosing two real estate mortgages. One of the ap-

pellants is the wife of J. M. Smith, and the other is the wife of Albert V. Smith. J. M. and Albert V. were engaged in mercantile business in the city of Madison under the firm name of Smith Bros. They became indebted in the sum of $1,646.40 to the firm of Groneweg & Schoentgen, of Council Bluffs, Iowa; and on February 12, 1895, being requested to pay or secure the claim, promised, if their wives would join them, to execute mortgages on their respective homesteads. Thereupon negotiable notes representing the indebtedness were signed by the Smiths and two mortgages to secure the same were made out. Each mortgage covered the family homestead of one of the parties. The instruments were handed to S. O. Campbell, a notary public, who called next day on the appellants to secure their signatures and acknowledgments. It is conceded that appellants signed the mortgages when presented to them by the notary, but it is denied that there was any formal acknowledgment of either instrument. The evidence is somewhat conflicting, but the trial court was justified in finding, and we presume did find, that each of the appellants executed the mortgage on her homestead voluntarily, with knowledge of Campbell's official character, understanding the purpose for which he was present, and realizing fully the probable consequence of her act. That the plaintiff, the Council Bluffs Savings Bank, purchased the notes in good faith, before maturity, and became the assignee and owner of the mortgages was expressly admitted on the trial. It is claimed, and is doubtless true, that the appellants yielded reluctant consent to the giving of the mortgages; and it is possible that one of them was induced to consent because she believed her husband's statement that the creditors would take the property any way. But however that may be, the fact remains that in the end the execution of each of the mortgages was a deliberate and voluntary act, the performance of which is authenticated in the manner required by law. About this there is no dispute. The action is not defended on the theory that the mortgages were made

and delivered under circumstances that would render them ineffective regardless of the homestead character of the mortgaged property.

The contention of appellants, as we understand it, is that there was in fact no conventional acknowledgment of the mortgages (no assent in legal form to the validity of the instruments), and that they are, therefore, void under the provisions of section 4, chapter 36, Compiled Statutes, 1897, which declares: "The homestead of a married person can not be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." It must, we think, be conceded that the evidence, if competent, is sufficient to show that neither of the appellants declared in terms to the notary that the execution of the mortgage was her voluntary act and deed. The circumstances seemed to indicate that the formality was altogether superfluous and might with propriety be waived. The conduct of the parties, and what they said at the time they executed the instruments, so clearly denoted their purpose that it naturally appeared to them and to the notary that a formal characterization of their acts was unnecessary. There is no pretense that the notary acted in bad faith, or that there was any artifice in his failure to observe the customary practice in taking acknowledgments. Undoubtedly all parties to the transaction did what was believed to be necessary to make the mortgages valid liens upon the property therein described. The attempt to repudiate them is the result of an afterthought. On the established facts it is quite clear that the notary's certificates can not be impeached and that the evidence offered to dispute the recitals of fact therein contained must be rejected. The general rule is that the certificate of an officer having authority to take acknowledgements can not be overthrown by showing that his duty was irregularly performed. He is the person designated by the statute to certify to the due execution of deeds, mortgages and other instruments affect-

ing the title to real property, and his official certificate, in regular form, is, in the absence of fraud, conclusive in favor of those who in good faith rely upon it. Any other rule would work incalculable mischief. It would open wide the door to fraud and perjury, and make recorded acknowledgments a snare to persons dealing with land on the faith and credit of the public records. See *Banning v. Banning*, 80 Cal., 271; *Lowell v. Wren*, 80 Ill., 238; *Louden v. Blythe*, 16 Pa. St., 532; *Rollins v. Menager*, 22 W. Va., 461; *Baldwin v. Snowden*, 11 O. St., 203; *Moore v. Fuller*, 6 Ore., 272; *Tichenor v. Yankey*, 89 Ky., 508; *Johnston v. Wallace*, 53 Miss., 331; *Pool v. Chase*, 46 Tex., 207; *Jinwright v. Nelson*, 105 Ala., 399. "For reasons of public policy, and to protect innocent purchasers," say the supreme court of West Virginia, "it has been uniformly held that when a married woman appears before a justice of the peace for the purpose of acknowledging a deed, and does in some manner attempt to do what the law requires to be done, the certificate is conclusive of the facts therein stated as regards innocent purchasers. See *Pickens v. Knisely*, 29 W. Va., 1. In Jones on Mortgages, section 500, the rule is stated as follows: "As to statements of fact contained in a certificate of acknowledgment which is regular in form, such, for instance, as the fact that the grantor appeared, and acknowledged the execution of the instrument, they can only be impeached for fraud. Evidence which is merely in contradiction of the facts certified to will not be received." The question has been before this court in several cases. In *Pereau v. Frederick*, 17 Nebr., 117, it was held that "a certificate of acknowledgment of a deed or mortgage is *prima facie* correct and cannot be impeached except for fraud, collusion or imposition." In *Phillips v. Bishop*, 35 Nebr., 487, it is said that the formal attestation of an acknowledging officer can be overthrown "only by clear, convincing, and satisfactory proof that the certificate is false and fraudulent." To the same effect is *Barker v. Avery*, 36 Nebr., 599. It appearing in this case that there was what may be considered an irregular ac-

knowledgment, that the notary acted in good faith, and that the appellants intended by signing the mortgages in his presence to make them valid liens upon their homesteads, the conclusion is unavoidable that the judgment of the district court is right and must be

AFFIRMED.

ARLINGTON STATE BANK ET AL., APPELLANTS, V. EDMUND PAULSEN ET AL., APPELLEES.

FILED OCTOBER 5, 1899. No. 8,608.

1. **Review:** QUESTIONS BELOW. A question not litigated in the court below will not ordinarily be considered by this court.

2. **Executors:** UNAUTHORIZED CONVEYANCES: ESTOPPEL. Executors who have made conveyances in violation of the terms of the will under which they are administering an estate are not estopped in their representative capacity from denying that the conveyances are invalid, and that they do not transfer the title or interest of the devisees.

3. ———: ———: ———. Executors who attempt to transfer the entire estate in land to a third person, who executes a mortgage thereon, and uses the proceeds for the benefit of the estate, are, as devisees, estopped from denying that the title passed by the conveyance, or that the mortgage is valid.

4. ———: ———: ———. And in such case the estoppel is binding upon the creditors of such devisees.

5. **Rights of Creditors.** Except in cases of fraudulent conveyances, a creditor can reach nothing more than the right, title and interest of his debtor in the property seized.

REHEARING of case reported in 57 Nebr., 717. *Former judgment vacated, and judgment below affirmed.*

E. Wakeley, A. C. Wakeley, Paul Charlton and *C. A. Baldwin,* for appellants.

Hamilton & Maxwell, Cowin & McHugh and *F. A. Brogan, contra.*

SULLIVAN, J.

At the January term a judgment was rendered reversing the decree of the district court, and remanding the cause with directions to award subrogation to the United States National Bank and the Omaha Loan & Trust Company. See *Arlington State Bank v. Paulsen*, 57 Nebr., 717, 78 N. W. Rep., 303. Afterwards, on the motion of the Arlington State Bank and the Blair State Bank, a rehearing was allowed, and the cause having been orally argued is again submitted. It will not be necessary to recount here the events out of which the litigation has arisen. The original opinion contains an accurate statement of all the facts necessary to a comprehension of the case.

The principal contention of counsel for appellants is that the question of subrogation was not properly presented for decision, and that the conclusion announced upon that subject is, in any view of the case, unwarranted. It may be that the views expressed in the opinion are radical; that the decision is a new development of the doctrine of subrogation, and that it goes too far. The question is an important one, but we will not stop now to determine it, because it appears incontestably from the record that the right of appellees to subrogation was neither claimed nor litigated in the court below. The correctness of the former decision on this branch of the case will, therefore, remain an open question.

Upon two other points we were mistaken. In the opinion of Commissioner RAGAN it is said that the executors were not estopped from denying that any title or interest passed by the deeds to Lammrich and the mortgages to the appellees. Doubtless as executors they were not estopped, but as devisees they certainly were. Beyond all question they intended to convey to Mrs. Lammrich the entire estate in the land, so that she might borrow money thereon. They expressly covenanted that the fee was conveyed, and she, in the mortgages, covenanted that she was the owner of the fee. On these instruments the exec-

utors obtained appellees' money, which has been used directly or indirectly for their individual benefit. It would be strange, indeed, if these equitable owners of the land could, in a court of conscience, repudiate the conveyances while retaining the money which was obtained through their execution. That they are estopped, under these circumstances, from denying the validity of the appellees' mortgages is, we think, fully established by *Wells v. Steckelberg*, 52 Nebr., 597.

It was also said, or implied, in the opinion of Commissioner RAGAN that if the executors are estopped from denying that the mortgages are valid liens on their individual interest in the property, such estoppel is not binding upon their creditors. This is not a correct statement of the law. Estoppels would be of slight practical value in the administration of justice, if they interposed no barrier to the creditors of the persons estopped. Except in cases of fraudulent conveyances, the creditor can reach nothing more than his debtor's right, title and interest in the property seized. The law can not transfer to a purchaser at an execution or judicial sale a right in property which it does not recognize as belonging to the debtor.

The law does not recognize appellants' judgment-debtors as having an interest in the land in question, freed from the appellees' mortgages. The appellants cannot reclaim what their debtors have lost by estoppel. The judgment heretofore rendered by this court is set aside, and the decree of the district court is, in all things,

AFFIRMED.

WILLIAM KRULL ET AL. V. STATE OF NEBRASKA, EX REL. ALLEN P. FURGASON.

FILED OCTOBER 5, 1899. No. 10,942.

1. **Evidence:** WRITTEN INSTRUMENTS: OBJECTIONS TO ADMISSION. An objection to the introduction in evidence of a written instrument, to which is appended the names of several persons, on the ground that it is "incompetent, immaterial and irrelevant," is too general to be considered, and such objection does not raise the question of the genuineness of the signatures to the instrument offered.

2. **Schools and School Districts:** SELECTION OF BUILDING: MANDAMUS. A school district which does not own a schoolhouse may, at a special meeting duly called, select a building in which to hold school, and direct its board to lease the building selected; and mandamus will lie to compel the board to execute its command.

3. ——: ——: NOTICE OF DISTRICT MEETING. A notice calling a district meeting to fix the place where school shall be held is sufficiently comprehensive to justify the electors, assembled in pursuance of the call, in adopting a resolution directing the district board to rent a designated building to be used as a schoolhouse.

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

The opinion contains a statement of the case.

Wilson & Brown, for plaintiffs in error:

A school site can only be changed at an annual meeting, and the action taken at the special meeting was ineffectual for such purpose. A school site consists not so much in the mere land on which the schoolhouse may stand as in the real and substantial thing—the school. It would be to little purpose that the law guards against the changing of the school site, if the school itself may be taken from the proper place of holding it. See *Wilber v. Woolley*, 44 Nebr., 739; *State v. Marshall*, 32 Pac. Rep. [Mont.], 648.

Morning & Berge, contra:

The special meeting had authority to do all things expressed in the notice, and such implied power as was necessary to enable it to do those things. See *Peters v. Township of Warren*, 56 N. W. Rep. [Mich.], 1051; *People v. Board of Education*, 1 N. Y. Supp., 593.

The fact that a secretary for the special meeting was chosen does not make his minutes the only evidence of what occurred, but oral testimony was admissible for that purpose. See *State v. Hutchins*, 33 Nebr., 335; *Ross v. City of Madison*, 1 Ind., 281; *Baker v. Inhabitants of Windham*, 13 Me., 74; *Chamberlain v. Dover*, 13 Me., 466; *School District v. Clark*, 51 N. W. Rep. [Mich.], 529.

SULLIVAN, J.

The parties to this litigation are the members of the school board of district No. 77 of Lancaster county. The object of the suit was to obtain a peremptory writ of mandamus against the moderator and director, the plaintiffs in error, commanding them to execute, on behalf of the district, a written lease for a building to be used for school purposes during the current school year. The defense to the action was that the execution of the lease was within neither the duty nor authority of the board. The trial court found the issues in favor of the relator, and awarded a peremptory writ. It appears that the district is not the owner of a schoolhouse, but is the owner of a plot of vacant ground upon which it intends at some time to erect a school building. It also appears, either directly or inferentially, that for several years last past the school has been taught in an old butcher-shop located near the geographical center of the district, but that the lease for such building did not extend beyond the school year of 1898-'99. At the annual meeting in June last it was decided to hold nine months school during the current year, but it was not determined where school should be held. Afterwards, at a special meeting which, accord-

ing to the notice, was called "for the purpose of determining where school shall be taught during the school year beginning July 10, 1899," the following motion was adopted by a unanimous vote: "Moved and carried that the board be instructed to rent the Parsons building, known as the Spellman store-room, for a term of nine months, not to exceed $8 per month." No other business was transacted. In pursuance of the authority conferred by the special meeting, the relator arranged to rent the Parsons building, and requested the respondents to join him in making the lease. They positively declined to cooperate with him, or to have anything to do with the matter, for the reason, it would seem, that they had already caused the butcher-shop to be removed to the school site, and had promised the owner to rent it for a schoolhouse if he would repair it to their satisfaction.

The first contention of respondents is that the special meeting was not lawfully convened. This claim is based on the fact that there was no distinct proof that the signatures to the special request for the meeting were genuine. The document was received in evidence, and the court was entitled to consider it. Counsel objected to its reception, it is true, on the ground that it was "incompetent, immaterial and irrelevant," but did not point out any special reason why it should not be received. The objection was too general to be effective. It did not inform the court of the precise point upon which its ruling was sought, so that it might act intelligently. The utter worthlessness of such an objection as a means of raising the question of the due execution of an instrument, or the genuineness of the signatures thereto, has been frequently declared by this court. See *Gregory v. Langdon*, 11 Nebr., 166; *Rupert v. Penner*, 35 Nebr., 587; *Maul v. Drexel*, 55 Nebr., 446.

Another point made by counsel for respondents is that the action taken by the special meeting was not within the terms of the call. Liberally and fairly construed we think it was. The purpose of the meeting was to fix a

place where school should be held, and it can not be doubted that the voters intended to effectuate that purpose by directing the district board to rent a particular building for the ensuing school year. The district being without a schoolhouse of its own, the power to determine where school should be held carried with it, of course, as a necessary incident, authority to do whatever might be necessary to secure the right to occupy the premises designated. We are of opinion, therefore, that the special meeting was within the limits of its jurisdiction in designating a building, and directing its board to rent the same for a period of nine months. But it is said that the effect of the action taken at the special meeting was to change the school site, which under the statute can not be lawfully done except at an annual meeting. The site owned by the district was not changed. That is clear. The building in which school was formerly held did not belong to the district; and the district had, at the time of the special meeting, no right, title, interest or claim in or to it. Consequently it can not be said to be, in any sense, a school site. Evidently the respondents did not themselves regard it as a school site within the meaning of section 8, subdivision 2, chapter 79, Compiled Statutes, 1899, for without authority from the district electors they have caused it to be removed from its original location. The judgment of the district court is right, and is

AFFIRMED.

NORFOLK BEET-SUGAR COMPANY V. THOMAS G. HIGHT.

FILED OCTOBER 5, 1899. No. 10,780.

1. **Pleading:** AMENDMENTS. A petition in which the cause of action is insufficiently or defectively stated may be amended by adding other allegations to remedy or cure the defects.

2. ———: ———: LIMITATION OF ACTIONS. The statute of limitations does not run against an amended pleading wherein the amend-

ment consists in setting forth a more complete statement of the original cause of action.

3. **Master and Servant:** NEGLIGENCE: SCOPE OF EMPLOYMENT: INSTRUCTIONS. In the trial of an action grounded in negligence it is proper to submit to the jury the question whether the plaintiff was, at the time he received the injury, engaged in the performance of work outside of his contract, and different in character from that which he has undertaken to perform.

4. **Conflicting Evidence:** REVIEW. A special finding of the jury based upon conflicting evidence will not be disturbed.

5. **Master and Servant:** RISKS OF EMPLOYMENT. A servant, while temporarily employed in a more hazardous service than that for which he has been engaged, assumes only such risks in connection with the work as are equally open and apparent to himself and his employer.

6. ———: SCOPE OF EMPLOYMENT: NOTICE OF DANGER. If a servant is called by his master to perform work beyond the scope and terms of his employment, and there are hazards incident to the extra service which are, or ought to be, known to the master, and which the servant, on account of ignorance or lack of experience, does not understand or appreciate, it is the duty of the master to point them out—to indicate the peril and the means of avoiding it.

7. ———: ———: ———: CONTRIBUTORY NEGLIGENCE. But if the danger is in fact known to the servant, or if the accident could be avoided by the exercise of ordinary care on his part, the doctrine of contributory negligence forbids a recovery.

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

See opinion for statement of the case.

Robertson & Wigton, for plaintiff in error:

The amendment to the petition introduced a new cause of action, against which the plea of the statute of limitations should have been sustained. See *Union P. R. Co. v. Wyler*, 15 Sup. Ct. Rep., 877; *Denman v. Chicago, B. & Q. R. Co.*, 52 Nebr., 140; *Mayo v. Spartanburg, U. & C. R. Co.*, 21 S. E. Rep. [S. Car.], 10; *Chicago, B. & Q. R. Co. v. Jones*, 37 N. E. Rep. [Ill.], 247; *American Salt Co. v. Heidenheimer*, 15 S. W. Rep. [Tex.], 1038; *Anniston & A. R. Co. v. Ledbetter*, 9 So. Rep. [Ala.], 73; *Smith v. Missouri P. R.*

Co., 50 Fed. Rep., 760; *Fish v. Farwell*, 43 N. E. Rep. [Ill.], 367; *Gulf, C. & S. F. R. Co. v. Thompson*, 16 S. W. Rep. [Tex.], 174; *Morales v. Fisk*, 18 S. W. Rep. [Tex.], 495; *Nugent v. Adsit*, 53 N. W. Rep. [Mich.], 620; *Wigton v. Smith*, 57 Nebr., 299.

The law imposes the same obligation upon the servant to avoid apparent dangers while doing work without the scope of his employment as it does if the work is within the scope of his employment, and the servant assumes the risks incident to the performance of the work. See *Leary v. Boston & A. R. Co.*, 139 Mass., 580; *Cole v. Chicago & N. R. Co.*, 71 Wis., 114; *Wheeler v. Berry*, 95 Mich., 250; *Prentiss v. Kent Furniture Mfg. Co.*, 63 Mich., 478; *Wormell v. Maine C. R. Co.*, 79 Me., 397; *Fort Smith Oil Co. v. Slover*, 58 Ark., 168; *Paule v. Florence Mining Co.*, 80 Wis., 350; *Hogan v. Northern P. R. Co.*, 53 Fed. Rep., 519.

Brome & Burnett and *Mapes & Hazen, contra:*

The cause of action stated in the amended petition is the same as that upon which the action was originally based. The amendment consists merely of the statement of other and additional facts relevant to the cause of action originally set forth, and the action is not barred by the statute of limitations. The original petition stated a cause of action. See *Norfolk Beet-Sugar Co. v. Hight*, 56 Nebr., 162; *McKeighan v. Hopkins*, 19 Nebr., 34; *Merrill v. Wright*, 54 Nebr., 517; *Sanger v. City of Newton*, 134 Mass., 308; *Smith v. Missouri P. R. Co.*, 5 C. C. A. [U. S.], 557; *Kuhns v. Wisconsin, I. & N. R. Co.*, 76 Ia., 67; *Buel v. St. Louis Transfer Co.*, 45 Mo., 562; *Lottman v. Barnett*, 62 Mo., 159; *Gourley v. St. Louis & S. F. R. Co.*, 35 Mo. App., 87; *Eylton Land Co. v. Mingea*, 7 So. Rep. [Ala.], 666; *Scovill v. Glasner*, 79 Mo., 449; *North Chicago Rolling Mill Co. v. Monka*, 107 Ill., 340; *Sherman Oil & Cotton Co. v. Stewart*, 42 S. W. Rep. [Tex.], 241; *Craven v. Walker*, 29 S. E. Rep. [Ga.], 152; *Schneider-Davis Co. v. Brown*, 46 S. W. Rep. [Tex.], 108; *Ruberg v. Brown*, 27 S.

E. Rep. [S. Car.], 873; *Elting v. Dayton*, 67 Hun [N. Y.], 425; *People v. Cook*, 62 Hun [N. Y.], 304; *Dana v. McClure*, 39 Vt., 197; *Rand v. Webber*, 64 Me., 191; *Verdery v. Barrett*, 89 Ga., 349; *Kansas P. R. Co. v. Runkel*, 17 Kan., 145; *Cross v. Evans*, 29 C. C. A. [U. S.], 529; *Chicago & N. W. R. Co. v. Gillison*, 50 N. E. Rep. [Ill.], 657; *Middlesex Banking Co. v. Smith*, 27 C. C. A. [U. S.], 485; *Triplett v. Morris*, 44 S. W. Rep. [Tex.], 684.

SULLIVAN, J.

The plaintiff, Thomas G. Hight, recovered a judgment against the Norfolk Beet-Sugar Company on account of personal injuries which he sustained while engaged in the service of the defendant. The original petition alleged that the plaintiff was employed by the defendant in its sugar factory as a common laborer; that in the room where he was at work there was a rapidly moving belt used to propel certain machinery; that defendant's foreman negligently ordered plaintiff to take a gunny-sack and wipe from such belt some water which had accumulated thereon; that plaintiff had no experience in the use and operation of such machinery, and was ignorant of the peril involved in yielding obedience to the foreman's direction; that he proceeded, in the manner indicated by the foreman, to wipe the water from the belt, and while so doing, his hand, coming in contact with the belt, was drawn over the wheel on which the belt was running, and was crushed and mangled. To this petition a demurrer was sustained on the theory, no doubt, that the plaintiff was injured while engaged in the work for which he was employed, and that the accident in question was within the risks impliedly assumed. Afterwards the pleading was amended by adding thereto an allegation to the effect that the plaintiff's duty to his employer was simply to sweep the floor of the room in which he was injured, and that the wiping of belts was not within the scope of his employment. It is now insisted by the defendant that this amendment introduced

into the case a new cause of action and one which was, at the time, barred by the statute of limitations. This view of the matter was not accepted by the trial court and it does not commend itself to us. The gravamen of the action alleged in the original, as well as in the amended, petition was the wrongful act of defendant's foreman in requiring plaintiff to perform a dangerous service without informing him of the danger. In both pleadings the same negligent act is assigned as the basis for a recovery. The amendment is a mere amplification of the original statement. It charges no additional wrongful act, but merely states another fact to sustain the charge already made. In support of our conclusion that the cause of action stated in the amended petition was not barred by the statute of limitations we refer to *McKeighan v. Hopkins*, 19 Nebr., 33; *Merrill v. Wright*, 54 Nebr., 517; *North Chicago R. M. Co. v. Monka*, 107 Ill., 340; *Kuhns v. Wisconsin, I. & N. R. Co.*, 76 Ia., 67; *Scovill v. Glasner*, 79 Mo., 449; *Smith v. Missouri P. R. Co.*, 5 C. C. A. [U. S.], 557.

The jury, in addition to their general verdict, found specially that the plaintiff was injured while performing work outside of his regular employment, and not embraced in the contract of hiring. This finding, counsel for defendant insist, is not sustained by sufficient evidence. We think it is. Hight's testimony tended to show that he was engaged by the company's foreman for a particular purpose, viz., to sweep and keep clean the floor of the "filter-press room," and that the handling and care of the running belts, or any work of that character, was not contemplated by either party as being within the scope of the employment. Whether the work in which plaintiff was engaged at the time of the accident was outside of his duties and different in character from that which he had undertaken to perform, depending, as it does, upon the contract, was properly left to the jury to decide. They have decided it upon conflicting evidence. Their conclusion has been approved by the trial court;

and we see no reason why we should not accept it as conclusive.

The court in the tenth paragraph of the charge to the jury said: "A servant assumes the risks arising from the manner in which the business of the master in which he is engaged is conducted, when they are known to him, or are apparent and obvious to persons of his experience and understanding if he voluntarily enter into the employment or continue in it without complaint or objection to the hazards, and he cannot recover for injuries thus sustained. If however the servant is suddenly called on by the master to perform a duty not falling within the scope of the duties of his contract of employment and he does so he will have a right to rely upon the implied assurance of the master that the danger to his person to be encountered thereby is such only as can be guarded against by the exercise of ordinary care and prudence on his part, and if he use such care and prudence and is injured the master will be liable." This instruction, it is claimed, is erroneous because it relieves the servant from the duty of exercising his faculties to protect himself from the apparent dangers incident to the work which he is required to do. The criticism, we think, altogether unwarranted. The theory of the instruction, of course, is that the danger of handling running belts may not be fully understood by ordinary laborers, and that one who engages to sweep floors in a factory does not, in contemplation of law, represent that he is qualified to wipe water from such belts or that he has any adequate appreciation of the risk incident to work of that character. The plaintiff having been injured, according to the special verdict, while temporarily employed in a more hazardous service than that for which he had engaged, he assumed and took upon himself only such risks in connection with the work as were equally open and apparent to himself and his employer. See Pierce, Railroads, 378; 2 Thompson, Negligence, p. 976, sec. 7.

The rule that a servant assumes the risks ordinarily incident to the service in which he is engaged, and is presumed to have contracted with reference to such risks, does not measure the master's duty when he calls upon his servant to do work beyond the terms and intention of his contract. The law in such case is that if there are hazards incident to the extra service which are, or ought to be, known to the master, and which the servant, on account of ignorance or lack of experience, does not understand or appreciate, it is the master's duty to point them out—to indicate the peril and the means of avoiding it. See *Smith v. Peninsular Car Works*, 60 Mich., 501; *Consolidated Coal Co. v. Wombacher*, 134 Ill., 57; *Consolidated Coal Co. v. Haenni*, 146 Ill., 614; Wood, Master and Servant, sec. 349. But if the danger is in fact known to the servant, or if the accident could be avoided by the exercise of ordinary care on his part, the doctrine of contributory negligence forbids a recovery. By their verdict the jury have in effect said that the plaintiff was without fault in connection with the accident, and that the work in which he was engaged when injured was of such a character that the risks incident thereto were not as fully understood and appreciated by him as by the defendant's foreman. We can not say that these conclusions are unjustifiable deductions from the evidence. We can not declare, as a matter of law, that the plaintiff possessed sufficient knowledge to enable him to comprehend the character and extent of the danger to which he was exposed. The judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. L. J. ABBOTT.

FILED OCTOBER 18, 1899. No. 10,850.

Statutes: EVIDENCE OF ENACTMENT. The enrolled bill, authenticated by the proper officers of the house, approved by the governor, and filed with the secretary of state, and the journals of the

houses are the official records of the proceedings of the legislature relative to the enactment of the law, and are the only competent evidence in a controversy in regard to the due passage of the bill, or in respect to alleged material errors in its substance.

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

The facts are stated in the opinion.

Silas A. Holcomb and *W. B. Price,* for the state:

The enrolled bill is only *prima facie* evidence of the enactment of a law. Records of legislative proceedings may be introduced in evidence to show that a statute was not enacted according to constitutional methods. See *State v. McClelland,* 18 Nebr., 238; *Nesbit v. People,* 36 Pac. Rep. [Colo.], 221; *Supervisors v. Heenan,* 2 Minn., 281; *Field v. Clark,* 143 U. S., 649; *Purdy v. People,* 4 Hill [N. Y.], 384; *Leonard v. Southern P. R. Co.,* 21 Ore., 560; *State v. Platt,* 2 So. Car., n. s., 150; *City of Watertown v. Cady,* 20 Wis., 528; *Meracle v. Down,* 64 Wis., 323; *State v. Swan,* 40 L. R. A. [Wyo.], 195; *Gardner v. Collector,* 6 Wall. [U. S.], 499; *State v. Robinson,* 20 Nebr., 96; *In re Groff,* 21 Nebr., 647; *State v. Moore,* 37 Nebr., 13; *In re Granger,* 56 Nebr., 260; *Webster v. City of Hastings,* 56 Nebr., 669; *Jones v. Hutchinson,* 43 Ala., 721; *Moody v. State,* 48 Ala., 115; *Chicot County v. Davies,* 40 Ark., 200; *Glidewell v. Martin,* 51 Ark., 559; *Fowler v. Peirce,* 2 Cal., 195; *People v. Dunn,* 80 Cal., 211; *Spangler v. Jacoby,* 14 Ill., 297; *Hollingsworth v. Thompson,* 12 So. Rep. [Ala.], 1; *Berry v. Baltimore & D. P. R. Co.,* 41 Md., 446; *Legg v. Mayor,* 42 Md., 220; *Strauss v. Heiss,* 48 Md., 292; *Rode v. Phelps,* 80 Mich., 598; *People v. Burch,* 84 Mich., 408; *State v. Mead,* 71 Mo., 266; *Opinions of Justices,* 35 N. H., 579; *De Bow v. People,* 1 Denio [N. Y.], 9.

A. S. Tibbets and *Ed P. Smith, contra:*

References: *United States v. Ballin,* 144 U. S., 1; *People v. McElroy,* 72 Mich., 450; *Attorney General v. Rice,* 64

Mich., 385; *In re Granger*, 56 Nebr., 260; *People v. Board of Police*, 75 N. Y., 38; *People v. French*, 91 N. Y., 260; *Kehn v. State*, 93 N. Y., 291; *Hawkeye Ins. Co. v. Brainard*, 72 Ia., 130; *Hoffman v. Chippewa County*, 77 Wis., 214.

HARRISON, C. J.

The defendant in error, prior to April 1, 1897, became by appointment superintendent of the hospital for the insane at Lincoln, and during the time he was such officer, anterior to the date mentioned, he drew his salary in accordance with its amount as fixed by law (see Compiled Statutes, ch. 40, sec. 58), and appropriated by the legislature of 1895, at the rate of $2,500 per annum. During the two years from the said date he collected salary as if established at $2,000 per year, but at or after the expiration of the two years he filed with the auditor of public accounts a claim for what he asserted, and now contends, was the balance due him, $1,000, or $500 for each year. His claim was disallowed by the auditor, but on appeal to the district court of Lancaster county, as the result of a trial, the order of the auditor was reversed and a judgment entered in favor of the claimant. The state presents the case to this court for review. It is the contention for the state that by the general salary act, or House Roll 615, passed by the legislature of 1897, there was appropriated for the payment of the salary of the superintendent of the hospital for the insane at Lincoln $2,000 per year, or $4,000 for the biennium, while for the defendant in error it is asserted that the appropriation was $2,500 for each year, and $5,000 for the two. It is claimed for the state that in the original bill, as introduced in the house of representatives, the amounts were $2,500 per year and $5,000 for the two years; that the bill was so amended in the house as to read $2,000 instead of $2,500, and $4,000 in place of $5,000. The enrolled bill which was signed by the officers of the senate and house, and presented to and approved by the governor, and filed in the office of the secretary of state, a certified copy of which

was introduced in evidence, disclosed the items of appropriation in question as $2,500 for each year and $5,000 for the biennial period. This raised a presumption, or established *prima facie*, that the sums appropriated to pay the superintendent of the hospital for the insane at Lincoln during the two years were as claimed by the defendant in error, and that both houses of the legislature had so fixed them by the bill or act. The state introduced in evidence the original bill, House Roll 615, or what was in the office of the secretary of state, and was offered as such bill or roll, and as received there were with it in each instance, pinned on the face of one of the pages of the bill, what purported to be amendments of it. There were several of these. Some of them had on them, in blue pencil marks, the word "adopted," or the word "carried," and others were not marked. One of these, which by its terms purposed to amend the portion of the bill which referred to the salary of the superintendent of the hospital for the insane at Lincoln, was attached with a pin to the face of the page of the bill on which appeared the items of appropriation for the payment of said salary, and it had on its face, in blue pencil marks, the word "adopted." There was also offered and received what it was claimed is the engrossed House Roll 615, and in this the appropriations in controversy appear as contended for by the state. All recitations of the journals of both senate and house in which there was any reference to House Roll 615 were introduced in evidence. There was also made of evidence a report to the house of a committee which had been appointed to confer with a committee of the senate in relation to senate amendments to House Roll 615. To the introduction of these matters by the state, to which we have alluded, objections were interposed for the defendant in error, and they were received each subject to the objection. The journal of the house discloses that the bill was amended and passed that body as amended, but does not give any light in regard to the substance or subject-matter of any amend-

ment. The journal of the senate contained statements from which appeared the amendments proposed in the body, also the report of its conference committee in respect to House Roll 615, but in none of them was there any mention of the items of appropriation herein the subject of dispute. It also appeared in a journal that the bill, after agreement upon amendments and final passage, was duly presented to the governor.

In regard to what will establish a law as passed by the legislature, if the question arises, it has been stated: The decisions may be classified into those in which the enrolled bill has been deemed conclusive, and those recognizing the doctrine that courts will look back of said bill and examine and consider the journals of the legislature. See 23 Am. & Eng. Ency. Law, 200. In some cases the courts of last resort have approved the reception in evidence of the engrossed bill. See 23 Am. & Eng. Ency. Law, 198; *Berry v. Baltimore & D. P. R. Co.*, 41 Md., 463; 20 Am. Rep., 69; *Hollingsworth v. Thompson*, 12 So. Rep. [La.], 1. In this state we have not decided the enrolled bill to be conclusive, but have examined the legislative journals. In no case up to the present has the supreme court approved the reception and consideration of anything more or further than we have just stated. See *Hull v. Miller*, 4 Nebr., 503; *Cottrell v. State*, 9 Nebr., 125; *Ballou v. Black*, 17 Nebr., 389; *State v. McClelland*, 18 Nebr., 236; *State v. Robinson*, 20 Nebr., 96; *In re Groff*, 21 Nebr., 647; *State v. Van Duyn*, 24 Nebr., 586; *State v. Moore*, 37 Nebr., 13; *In re Granger*, 56 Nebr., 260. In the case last cited the consideration of other evidence than the enrolled bill and the journals was in effect disapproved. On the general proposition see, also, *Webster v. City of Hastings*, 56 Nebr., 752. In *Ames v. Union P. R. Co.*, 64 Fed. Rep., 165, in the determination of whether an act of the legislature of this state had been so passed as to become a law, after reference to sections 8, 10 and 11, article 3, of our constitution, and in the body of the opinion to several of the decisions of this court on the subject,

it was stated: "Held, that the most such constitution authorizes is that, in respect to certain matters, evidence may be sought in the journals of the two houses, which will prevail over that which appears on the enrolled bill as found in the secretary of state's office. * * * Parol testimony is not admissible to impeach the validity of an act which is shown by the record to have been duly and legally passed." In *Ex parte Howard-Harrison Iron Co.*, 24 So. Rep. [Ala.], 516, there was presented a question similar to the one in the case at bar. It was observed in the body of the opinion: "Of course the presumption is that the bill signed by the presiding officers of the two houses and approved by the governor is the bill which the two houses concurred in passing, and the contrary must be made to affirmatively appear before a different conclusion can be justified or supported. So here it must be made to affirmatively appear that amendments of the house bill in question were adopted by the senate, and were not concurred in by the house. And this must be shown by the journals of the two houses. No other evidence is admissible. The journals can neither be contradicted nor amplified by loose memoranda made by the clerical officers of the houses. To these the courts can not look for any purpose." In the syllabus: "The journals of both houses of the legislature are the only evidence admissible to show that amendments to a bill were adopted by one branch and not concurred in by the other, and that the bill as signed by the governor was not the bill passed."

We will now turn to some of the provisions of the constitution and the laws of this state which relate to the matter in hand.

In section 8, article 3, of the constitution appears the following in regard to the legislature, its work, records etc.: "Each house shall keep a journal of its proceedings, and publish them (except such parts as may require secrecy) and the yeas and nays of the members on any question, shall at the desire of any two of them be

entered on the journal. All votes in either house shall be *viva voce.* The doors of each house and of —— committee of the whole shall be open, unless when the business is such as ought to be kept secret. Neither house shall, without the consent of the other, adjourn for more than three days." In section 10: "The enacting clause of a law shall be, 'Be it enacted by the legislature of the State of Nebraska' and no law shall be enacted except by bill. No bill shall be passed unless by assent of a majority of all the members elected to each house of the legislature and the question upon final passage shall be taken immediately upon its last reading and the yeas and nays shall be entered upon the journal." In section 11: "Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto shall be printed before the vote is taken upon its final passage. No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed. The presiding officer of each house shall sign in the presence of the house over which he presides, while the same is in session and capable of transacting business, all bills and concurrent resolutions passed by the legislature." All laws shall be published in book form and distributed among the counties. See Constitution, art. 3, sec. 24. Every bill passed shall be presented to the governor, and, if he approves and signs it, it shall become a law, otherwise not, except he disapproves and returns it to the legislature, together with his stated objections, when it may or may not be passed over his veto, as the votes may determine; or if a bill be held by the governor for a certain number of days without any action, it will become a law. See Constitution, art. 5, sec. 15.

In section 14, chapter 48, Compiled Statutes, in which the duties of the officers of the houses of the legislature are prescribed, appears the following: "It shall be the

duty of the chief clerk of the house of representatives, and the secretary of the senate, to attend the sessions of the respective houses, to call the rolls, read the journals, bills, memorials, resolutions, petitions, and all other papers or documents necessary to be read in either house, to keep a correct journal of the proceedings in each house, and to do and perform such other duties as may be imposed upon them by the two houses, or either of them."

In sections 1, 2, and the 10th subdivision of section 4, chapter 83, article 2, Compiled Statutes, it is set forth:

"Section 1. All public acts, laws, and resolutions passed by the legislature of the state shall be carefully deposited in the office of the secretary of state, and the secretary of state is charged with the safe keeping of said office and all laws, acts, resolutions, bonds, papers, and records which now are or shall hereafter be deposited therein. He shall not permit any original rolls, papers, or public documents filed in his office to be taken out of it unless called for by a resolution of either or both houses of the legislature, or for the examination by the executive.

"Sec. 2. The secretary of the senate and the clerk of the house of representatives, at the close of each session of the legislature, shall deliver to the secretary of state all books, bills, documents, and papers in the possession of either branch of the legislature, correctly labeled, folded, and classified, according to the subject-matter of such documents, respectively; and the secretary of state is hereby required to preserve the same in his office."

Sec. 4, subdiv. 10. "In the publication of the laws of this state, or the resolution or journals of the legislature, the secretary of state shall cause to be published in each volume a general certificate to the effect that the same as contained in such volume are true copies of the laws and resolutions of the legislature, as the case may be, on file in his office."

It was not shown in the evidence herein, but the joint rules of the legislature of 1897 provided that all bills

after passage should be enrolled and then examined, and compared with the engrossed bills and errors, if any, corrected by the committees of the two houses on enrolled bills, acting jointly, and a report made to the houses, after which the bills were to be signed by the chief officers of the houses in a designated order or priority, and then presented to the governor. See Legislative Manual, 1897, p. 98. It will, no doubt, have been noticed that the enrolled bills must be filed with the secretary of state, and to them he must refer for the laws as passed. Of the proceedings of the houses of the legislature, the journals are the records prescribed by the fundamental law of the state, the constitution. To the enrolled bills and the journals it seems entirely proper to refer in case of a dispute in relation to the passage of a bill or any part thereof. The memoranda or slips of paper attached or pinned to the original bill were clearly incompetent. They were in no manner identified, except by their subject-matter respectively, and the fact that they were in the office of the secretary of state, and placed there by an officer of one house of the legislature, and probably that they were so delivered occurred because they were pinned to the original bill. There was nothing more to show that they ever became or were of the proceedings of the legislature. The original bill and the engrossed bill were not identified by the signature of any person or in any other manner than that they were placed in the office of the secretary of state by an officer of the legislature. Each had long prior thereto performed its functions, and had no longer an active existence, the first when the engrossed bill was prepared and reached the legislature, and the second when the enrolled bill had passed through the prescribed methods, and been duly accredited as correctly setting forth the legislative intentions on the subjects of the bill. Of both the original and engrossed bills, after their active use had ceased, no one seems to have been specifically charged that they be safely kept and preserved. They were in the possession of the legislature, and doubtless

should so remain. They came into the care of the secretary of state because they were in the possession of the legislature at the close of the session. See Compiled Statutes, ch. 83, art. 2, sec. 2. They were not of the specifically provided official records of the proceedings of the legislature. In *Hollingsworth v. Thompson, supra,* a case in which the engrossed bill was received in evidence, the appellate court, in voicing its approval, observed that it was of at least a "*quasi*-official character." That an act authenticated in the prescribed manner by the proper officers of the legislature, and approved by the governor was not passed, or that any portion of it was not, must be affirmatively and clearly shown. See *Hollingsworth v. Thompson, supra,* and cases cited. "Imperative reasons of public policy require that the authenticity of laws should rest upon public memorials of the most permanent character." See *State v. Smith,* 44 O. St., 348, 7 N. E. Rep., 449, 12 N. E. Rep., 829. The engrossed bill is not such matter of care and record in the proceedings that it should be received to impeach the statements of the properly authenticated records of the acts of the legislature. See *In re Granger, supra; Divison of Howard County,* 15 Kan., 194. There was no competent evidence to show an error in the amounts of the appropriation as they appeared in the enrolled bill, and we may add that if the engrossed bill had been competent evidence, it would not, in connection with the journals, have affirmatively and plainly proved that there was an error in the enrolled bill. It would but have raised a doubt, to solve which against the enrolled bill would have called for further evidence. It follows that the judgment of the district court will be

AFFIRMED.

NORVAL, J., dissenting.

CHARLES V. CARRINGTON V. OMAHA LIFE ASSOCIATION.

FILED OCTOBER 18, 1899. No. 8,990.

Fraud: DAMAGES. Fraud, to constitute a cause of action, counterclaim or defense, must have been fruitful of injury, or damage to the party who seeks to avail of it.

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

Brome & Burnett, for plaintiff in error.

Byron G. Burbank, contra.

HARRISON, C. J.

The plaintiff herein commenced this action in the district court of Douglas county, and alleged for the cause that, upon a stated date, he was a practicing physician in the city of Richmond, Virginia, and was then and there employed by the defendant company or association to act as its physician at said place, to examine any and all applicants for insurance or membership in the association and report the result to it; that for each examination his agreed compensation was to be the sum of $3. It was further pleaded that, at a subsequent date, there was a further contract that the plaintiff should receive $2 additional compensation for every "block" of 100 applicants examined by him. It was further stated that, pursuant to his employment, the plaintiff had examined 463 persons, for which services there had become due him from the association $2,233, of which sum he had been paid $485, the balance, $1,748, being his due and unpaid. An itemized statement of the account was filed with the petition.

The answer of the association contained an admission of its employment of the plaintiff, in the capacity and for the purpose set forth in the petition, and a denial of each and every other allegation of the plaintiff's petition.

For further defense the answer alleged that the plaintiff agreed, and undertook in good faith, to examine all persons who might apply in the city of Richmond for insurance in defendant company, for which plaintiff agreed to pay $3 for each person so examined; that on October 1, 1893, the defendant, relying upon the honesty, integrity, and good faith of the plaintiff, placed him in charge of defendant's business in Richmond, Virginia, and that plaintiff continued as its agent thereafter during all times mentioned in plaintiff's petition, and that plaintiff was the only representative defendant had in Richmond, and that it was agreed and understood between the plaintiff and defendant that the defendant would pay the plaintiff, as compensation for all applications for insurance taken by the plaintiff or his solicitors in good faith, a sum equal to the first quarterly payment as described in the company's table of rates, graded according to the age of the applicant; that subsequent to October 1, 1893, defendant agreed to pay plaintiff for every block of twenty-five applications sent in good faith, and approved by defendant, the sum of $50, but that within one week thereafter defendant canceled said agreement for extra commission or bonus, and notified the plaintiff of such cancellation, and that the agreement was never thereafter renewed.

That it was understood and agreed between the plaintiff and the defendant that no application would be taken in or sent to the defendant except *bona fide* applications made in good faith and paid for by the plaintiff, together with the said application, at the rate described in the company's table of rates according to the age of the applicant; that defendant never authorized the plaintiff, or any one acting under the plaintiff, to give away any of its policies or certificates of insurance; that the defendant, in violation of his duties as medical examiner and agent for defendant, fraudulently obtained a large number of persons to sign applications for insurance in defendant company for the express purpose of obtaining the fee of $3 for examining and said bonus of $2 per ap-

plication as hereinbefore stated; that plaintiff obtained a large number of persons to act with and for him in fraudulently obtaining persons to sign applications, and submit to the examination for the express and only purpose of obtaining the examiner's fee of $3, and the bonus of $2 for each application for blocks of twenty-five; that 463 persons did so sign applications for the aforesaid fraudulent purpose, and the plaintiff fraudulently forwarded to the defendant said applications, representing to the defendant that said applications were in good faith; that defendant, relying upon the honesty and representations of the plaintiff, issued policies upon a large number of said applications, to-wit, 419; that none of the said applications so sent to defendant by plaintiff were taken in good faith, but the same were all taken with intent upon the part of the plaintiff to defraud the defendant out of the examiner's fee and bonus as aforesaid; that when the last forty-four applications were received from plaintiff, it notified plaintiff that it had been informed that plaintiff was not transacting defendant's business honestly and in good faith; that all the applications plaintiff had sent were fraudulent; that defendant held the said forty-four applications subject to plaintiff's order; that it never issued any policies upon any of the said forty-four applications, and none of the said forty-four persons named therein ever made inquiry of defendant why it had not issued said policies and never applied to defendant for a return of the premium, or in any manner demanded anything or any information from this defendant; that said forty-four applications, together with all the other applications, were part of a deliberate scheme of plaintiff to defraud the defendant out of the $3 examiner's fee and $2 bonus.

Defendant further alleged that not a single applicant continued said insurance in force by the payment of the second quarterly premium; that the plaintiff and those acting under him never in any instance collected any portion of the first quarterly premium or membership fee

which were required from any of the persons whose application plaintiff sent to defendant; that the plaintiff and those acting under him told the applicant he would not have to pay anything for the policy; that by signing the application he would obtain three months' insurance for nothing; that at the end of three months he need not make any further payments unless he should so desire; that by signing the application and submitting to an examination, he would enable the plaintiff and those acting under him to obtain a fee for such examination; that the company did not care whether he kept up the policy or not; that the plaintiff knew that said statement and each and every one made by him and those acting under him were false and fraudulent; that, relying upon the truth and honesty of the applications and the examinations made by plaintiff and those acting under him, the defendant sent to the plaintiff $485, being $51 on October 14, $224 November 7, $110 November 27, and December 18, 1893, $100, and prayed judgment against said defendant in the sum of $485, and interest at the rate of seven per cent from dates of the several payments.

The reply was a general denial of all new matter stated in the answer, and further as follows:

"Plaintiff denies that he ever in any manner sought to or did misrepresent any fact to defendant in respect to procuring insurance for the defendant. Denies that he ever accepted the agency for or was the agent of defendant, either in the city of Richmond, Virginia, or elsewhere, other than in his capacity of medical examiner for said defendant, and in this behalf alleges that at the time of his appointment as such medical examiner it was understood and agreed by and between plaintiff and defendant that this plaintiff should in every manner consistent aid Edward Henry Kent, who was at that time and during all the times hereinafter mentioned, a duly authorized agent of defendant and a director of agents of defendant, and also a member of the board of directors of defendant and acting as such director of agents for said

defendant in the city of Richmond, Virginia, in advising persons of standing and influence and others who were friends or acquaintances of plaintiff, who were desirous of taking out insurance, to insure in defendant's company; that plaintiff received no compensation whatever for his aid in this respect other than his examination fees and the amount of $2 per person on blocks of twenty-five applications contracted to be paid by defendant; that this plaintiff did, as he agreed, advise all persons with whom he was acquainted who were desirous of taking out life insurance, to insure in defendant's company, and in every manner carried out his agreement in this respect.

"This plaintiff admits that on the 5th day of November, 1893, he was notified by the said Edward Henry Kent that the fee of $2 per applicant on blocks of twenty-five applications would no longer be paid, but in that behalf avers that on November 10, 1893, he received notice from said Kent to proceed under the terms of the old agreement, which plaintiff did and continued to do and act in his capacity as medical examiner for the city of Richmond up to the time that he found that defendant would not comply with the laws of the state of Virginia with reference to life insurance companies doing business in that state, as hereinafter specified, when this plaintiff severed his connection with defendant.

"That at the time of the appointment of this plaintiff as medical examiner as aforesaid for defendant it was understood and agreed by defendant that the first premium was to be given to persons taking out insurance in said defendant's company, in order to induce them to take out such insurance and in order to give defendant good standing in the city of Richmond, by having a large statement of business done for the year 1893 to be published for advertisement and to procure persons of means and influence to become insurers therein so that their names could be used to procure other persons to take out insurance in said company, and also for the reason that a large number of persons would keep up said insurance

after having once become members of defendant's company; that said applicants notified plaintiff at the time of their examination that it was their intention to keep up said insurance if said company complied with the laws of the state of Virginia, as defendant represented it would do; that said defendant did not comply with the laws of said state with reference to insurance companies doing business therein in any manner whatever, either before the second premiums on the policies of said applicants became due or since that time, and the policyholders could not with any degree of safety or security, and would not, and for that reason, and no other, did not pay the second premiums on said policies of insurance referred to in defendant's answer.

"Further replying, plaintiff alleges and states the fact to be that he has in everything pertaining to this transaction acted in good faith and in accordance with, and under the immediate direction and instructions of the duly authorized officers and agents of defendant, both in respect to aiding to advertise said defendant and examining applicants for insurance therein."

Of the issues there was a trial to a jury, which resulted in a verdict for the plaintiff in the sum of $1, and after a motion for a new trial was heard and overruled, a judgment was rendered on the verdict. The plaintiff presents the case to this court for review.

The main question for decision relates to the sufficiency of the evidence to sustain a finding of fraud practiced by the plaintiff which furnished a defense for the association against a recovery on the account for services. The plaintiff was employed for the association by Edward Henry Kent, who it appears was a member of the association, a member of its "managing board of directors, and director of agents," and with whom the association had a written agreement, in which appears the following: "The party of the second part agrees to devote all his time and energies to prosecuting the business of said party of the first part, to have charge of the

agency department of said party of the first part, as provided by the by-laws of said party of the first part relating to directors of agents, and to in every way use his best endeavors in procuring applications for insurance which shall be satisfactory to said party of the first part; the election as director of agents and corporate member, and member of the managing board of directors, to take effect, and be in full force from and after the date hereof. In consideration of which the party of the first part agrees to pay the party of the second part his legitimate traveling expenses from month to month, said party of the second part to retain the first quarter's fees by him collected on account of accepted applications, and in addition thereto said party of the second part shall have a twenty per centum of the profits of the association, exclusive of the salary or compensation allowed the officers and directors of said party of the first part."

Parties in Richmond who made applications to become members of the association and were examined by the plaintiff, and who were prompted so to do by the solicitations of Kent, were respectively not to pay the "first quarter fees" due on policies issued to them, and this was also a part of the plan which by Kent's authorization was adopted and used by the plaintiff, and all the persons who solicited others to join the association, each one approached and who applied was to receive a policy, and to pay nothing for it during its first quarter's existence. These Richmond, Virginia, applications were forwarded to the association nominally, at least, through or as taken under the supervision of Kent. The "first quarter fees" belonged to Kent; with them or their payment or disposition the association had no further concern, provided Kent was satisfied. He might give them to any applicant for a policy or authorize such gift, and that he did so, or parties authorized by him, constituted no fraud on the association, could not injure it or damage it. See *Pythian Life Ass'n v. Preston*, 47 Nebr., 374. At the time the services of the plaintiff were rendered to the associa-

tion it had not complied with the laws of Virginia in regard to such companies or associations, and was not authorized to do any business in that state, but it contemplated such compliance, and the business was solicited and transacted with the full expectation that the association would fulfill the requirements of the laws, and be granted the right to perform its functions within the state; but the idea was abandoned or at least never pursued. The association did not apply for or receive the liberty to engage in business in that state.

It is urged for the defendant that the plaintiff and the solicitors in Richmond, and who it appears reported to and were to be paid by him, stated to parties who were being urged to become insured, as an inducement, such persons being friends of either the plaintiff or a solicitor, that their so doing would enable the plaintiff or solicitor, or both, to get fees from the defendant association, and that this was the main, if not the sole, reason why many persons became applicants for insurance; also, that the statement was made to each one solicited in Richmond to join the association that at the expiration of the first quarter, for which, it will be borne in mind, no fees were to be paid, it would be optional with any party who held a policy to pay fees for the continuation of its existence, or not to do so, and allow the insurance to lapse. It appears that such representations were made to some of the parties and not to others; but even if they were made separately or connectedly, did they constitute matter of fraud against, and available to, the association in this action? Whatever the representations may have been, the result of all the prior negotiations between the plaintiff, the solicitors, and the parties to whom policies were issued was an application, which was, by the terms of the policy in each instance of insurance, made a part of it as a contract. Each application was signed by the applicant, and immediately above the signature appeared the following: "I do hereby agree to pay to said Omaha Life Association the money required to keep the policy

issued hereon in full force and effect, as provided in the by-laws of said association, and I hereby adopt said by-laws and agree to be governed by them, and will obey and comply with every article, its subdivisions, and the stipulations or provisions contained therein, until notice is given by me in writing of any intention to terminate said insurance." In short, the result was a contract in favor of the association, if it had been authorized to do business in Virginia, fully enforceable, and against the validity or full force of which none of the parties insured could have successfully urged the representations made by plaintiff or solicitors. The representations, then, did not produce anything from which the association did, or could in any event, suffer any injury or damage, and this being true, these things were not matters actionable in favor of the association, or of counter-claim or defense in this action. There were no matters in evidence which disclosed any fraud in the transactions in question which was the source of any injury or damage to the defendant, or which could have been; from which it follows that the evidence was insufficient to support a finding in its favor on the subject of fraud, and the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

CHARLES D. WOODWORTH V. ISAAC S. HASCALL.

FILED OCTOBER 18, 1899. No. 8,987.

1. **Conflicting Evidence:** REVIEW. A finding based on conflicting evidence will not be disturbed unless manifestly wrong.

2. **Pledges:** SALE BY PLEDGEE: CONVERSION. A sale of a pledge by a pledgee without notice to the pledgor to redeem, in the absence of stipulations for such a sale, constitutes its conversion.

3. **Conversion:** MEASURE OF DAMAGES. The general measure of damages in an action of conversion is the market value of the prop-

erty converted with legal interest, and this is applicable to a policy of life insurance. If it has no market value or trade value, then its present value at the time of conversion to its owner may be shown, and will furnish a rule of damages.

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

The facts and issues are stated in the opinion.

Hall & McCulloch, for plaintiff in error:

Some competent evidence was necessary to show the value of the insurance policy at the time of conversion. No such evidence having been adduced, there is nothing to support the judgment. See *Barlass v. Brash,* 27 Nebr., 212; *Peckinbaugh v. Quillin,* 12 Nebr., 586; *Baum Iron Co. v. Union Savings Bank,* 50 Nebr., 392.

Covell & Winter, contra:

Pledgee's interest is the right to retain the property for security. There can be no forfeiture until pledgor's rights are foreclosed. See *Brownell v. Hawkins,* 4 Barb. [N. Y.], 491; *Mitchell v. Roberts,* 17 Fed. Rep., 778.

Pledgee may sell at public auction upon giving debtor reasonable notice to redeem, but not otherwise. See *Lockwood v. Ewer,* 2 Atk. [Eng.], 303; *Kemp v. Westbrook,* 1 Ves. [Eng.], 278; *Vaupell v. Woodward,* 2 Sandf. Ch. [N. Y.], 143; *Hart v. Ten Eyck,* 2 Johns. Ch. [N. Y.], 62*; *Garlick v. James,* 12 Johns. [N. Y.], 146*; *Cushman v. Hayes,* 46 Ill., 145; *Luckett v. Townsend,* 3 Tex., 119; *Brightman v. Reeves,* 21 Tex., 70; *Mauge v. Herminghi,* 26 Cal., 577; *Wilson v. Brannan,* 27 Cal., 258; *Union Trust Co. v. Rigdon,* 93 Ill., 458; *Robinson v. Hurley,* 11 Ia., 410; *Stearns v. Marsh,* 4 Denio [N. Y.], 227; *Milliken v. Dehon,* 27 N. Y., 364; *Wilson v. Little,* 2 N. Y., 443.

The cash value of the policy, as nearly as such value could be fixed by evidence, was shown by testimony of witnesses. The current or market value of property at the time of conversion, with interest from that time until

trial, is the true measure of damages. See *Suydam v. Jenkins*, 3 Sandf. [N. Y.], 614.

HARRISON, C. J.

The defendant in error, it appears, was on October 10, 1890, the owner of an endowment limited payment policy of insurance on his life issued by the Mutual Life Insurance Company of New York, of date March 8, 1886. The annual premium of $539 had been paid for each of the years the policy had been in existence, and on the date we have first mentioned was assigned to the plaintiff in error as security for the payment of $570.50, the amount of a loan then made by him to the defendant in error. It was alleged in a petition filed in this action that the plaintiff in error on June 28, 1892, sold and converted the policy to his own use. The contention for the defendant in error was and is that the policy was but pledged, and the sale by the pledgee worked a conversion. For the other party it was and is asserted that the policy was so assigned and under such conditions that prior to the sale his ownership had become absolute. A trial of the issues resulted in a judgment for the petitioner, and his adversary has removed the case to this court by petition in error.

The questions argued relate to the sufficiency of the evidence to support the findings and judgment. On the issues of whether the policy had been pledged as collateral security merely or the transfer had been with stipulations of such a character that by lapse of time and other concurrent reasons it had become fixed and permanent the evidence was conflicting, and the apparent finding that the former was the fact was sustained by the evidence and will not be disturbed. The sale of the policy was without notice to the pledgor to redeem, and was wrongful and constituted a conversion.

The only further matter of controversy is of the proof of value of the policy. We will not discuss the competency of the proof introduced of the contents and con-

ditions of the policy, but if it be conceded, then of the stipulations were the following: "This policy may be surrendered to the company at the end of the fifth year from the date of issue and eighty per cent of the reserve, computed by the American table of mortality, and four and one-half per cent interest, and the surplus, as defined above, will be paid therefor. If surrendered at the end of the second or any subsequent five-year period, the full reserve, by the same standard, and surplus as defined will be paid. No cash value will be paid for a surrender at any other time or date." There was proof of what amount would have been realized had the policy been surrendered to the company and cash accepted according to its terms at the close of the first five years, or on March 8, 1891; but this was not the time of conversion, which took place June 28, 1892, at which later date the policy had no cash surrender value, and the evidence to which we have referred did not furnish a value of the policy when converted. It devolved upon the party who sought a recovery to show the market value of the policy of the date of conversion, which sum, with legal interest added, less the amount loaned and subsequently paid on premiums, would have furnished the correct sum for which judgment should have been rendered; or, if the policy had no market value, or value for sale in the regular course of trade, that such was the fact should have been shown, and the plaintiff in the action might then have been allowed to show the value of the policy at the time of conversion. See *Wheeler v. Pereles*, 43 Wis., 333; 26 Am. & Eng. Ency. Law, 847 and note. See, also, *Barney v. Dudley*, 42 Kan., 212, 16 Am. St. Rep., 476. There was no competent evidence of value; hence the finding on that point was erroneous and not sustained. It follows that the judgment must be reversed, and the cause remanded.

REVERSED AND REMANDED.

WILLIAM L. ORR, APPELLEE, V. CHARLES BAILEY, APPELLANT.

FILED OCTOBER 18, 1899. No. 8,996.

1. **Appeal:** ERRORS IN PROCEDURE: REVIEW. Alleged errors in matters of procedure of occurrence at or before the trial and rulings during trial in regard to the admission or exclusion of evidence are not reviewable on appeal to this court.
2. **Elections:** CONTESTS: COUNTY COURT: JUDGMENTS. The jurisdiction of statutory contests of election of county officers is placed in the county courts, and as term cases. The prescriptions of the Code of Civil Procedure in regard to time within which a justice of the peace must render judgment are not applicable, and judgments may be announced in contests in the county courts at any time during the term at which the trials occur.
3. ———: BALLOTS: NAMES OF JUDGES: CONSTITUTIONAL LAW. The requirements of the Australian ballot law, that the names or signatures of the two judges of an election shall be written on the back of each ballot to be used, and that a ballot not so indorsed shall be void, and not counted, are mandatory, and are not inimical to constitutional provisions.

APPEAL from the district court of Hayes county. Heard below before GRIMES, J. *Affirmed.*

See opinion for statement of the case.

W. S. Morlan, for appellant:

The omission of the judges of election to indorse their names on the ballots was an oversight. The court should not disfranchise voters on account of the failure of the election officers to perform their duty. The statutory requirement that names of two judges should be indorsed on ballots ought not to be construed as a mandatory provision. See *Swearingen v. Roberts,* 12 Nebr., 337; *Buckner v. Lynip,* 41 Pac. Rep. [Nev.], 765; *Tracy v. Troy & B. R. Co.,* 38 N. Y., 437; *State v. Russell,* 34 Nebr., 124; *Bragdon v. Navarre,* 60 N. W. Rep. [Mich.], 277; *Moyer v. Van De Vanter,* 41 Pac. Rep. [Wash.], 61; *Parvin v. Wimberg,* 30 N. E. Rep. [Ind.], 790; *Lindstrom v. Board of Canvassers,* 54 N. W. Rep. [Mich.], 280; *State v. Gay,* 60 N. W. Rep.

[Minn.], 676; *People v. Wood*, 42 N. E. Rep. [N. Y.], 536; *Boyd v. Mills*, 37 Pac. Rep. [Kan.], 16.

J. W. Cole, R. C. Orr and *J. T. McClure, contra:*

A statutory enactment disfranchising legal voters on account of the failure of election officers to indorse their names on ballots would be a violation of section 22, article 1, of the constitution, providing: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise." See *Moyer v. Van De Vanter*, 41 Pac. Rep. [Wash.], 60; *State v. Corner*, 22 Nebr., 265; *Attorney General v. City of Detroit*, 78 Mich., 545; *Peard v. State*, 34 Nebr., 375; *Dells v. Kennedy*, 49 Wis., 555; *Slaymaker v. Phillips*, 42 Pac. Rep. [Wyo.], 1049; *People v. Board of Canvassers*, 29 N. E. Rep. [N. Y.], 327; *State v. Russell*, 34 Nebr., 123.

The statutory provision requiring names of two judges to be endorsed on ballots is mandatory. See *State v. Van Camp*, 36 Nebr., 91; *State v. Norris*, 37 Nebr., 299; *Ledbetter v. Hall*, 62 Mo., 422; *West v. Ross*, 53 Mo., 350; *Lankford v. Gebhart*, 130 Mo., 622; *Doores v. Varnon*, 94 Ky., 507; *Tebbe v. Smith*, 108 Cal., 101; *Attorney General v. McQuade*, 94 Mich., 439; *Taylor v. Bleakeley*, 39 Pac. Rep. [Kan.], 1045; *Whittam v. Zahorik*, 59 N. W. Rep. [Ia.], 57; *Lay v. Parsons*, 104 Cal., 661; *Waterman v. Cunningham*, 89 Me., 295; *Sego v. Stoddard*, 136 Ind., 297; *State v. Connor*, 23 S. W. Rep. [Tex.], 1103.

A. J. Rittenhouse, also for appellee:

The law is not unconstitutional. See *Slaymaker v. Phillips*, 42 Pac. Rep. [Wyo.], 1049.

HARRISON, C. J.

At the general election held in November, 1895, the contestant was the republican candidate for sheriff of Hayes county, and the contestee the democratic candidate for said office, and the two were the only candidates

for the office. As a result of a canvass of the votes the former, it was determined, had received 300 votes and the latter 309. The contestee was declared elected, and the other party instituted this, a statutory contest. From a judgment in the county court favorable to the contestee the defeated party appealed to the district court, and it was there decided that the contestant had received 302 votes and his adversary but 276. The former was adjudged elected, and entitled to the office. The contestee has appealed to this court.

After issues had been joined in the district court the contestee made application to the judge thereof at chambers for leave to file an amended answer, and the following order was made: "I, the district judge aforesaid, considering myself disqualified from hearing and trying said case on its merits, and having heretofore made arrangements to have said case tried by the Hon. H. M. Grimes, district judge within and for the thirteenth judicial district of said state, do hereby refer the said application to the said Hon. H. M. Grimes, district judge aforesaid." The contestee subsequently made an application to the district court, Judge Grimes presiding, to be allowed to amend his answer, which was denied. Complaint is made of the order which we have quoted, also of the subsequent order of the court. These were of matters of procedure of occurrence at or before the trial, and are not reviewable on appeal. See *National Life Ins. Co. v. Martin*, 57 Nebr., 350; *Ainsworth v. Taylor*, 53 Nebr., 484; *Alling v. Nelson*, 55 Nebr., 161; *Troop v. Horbach*, 57 Nebr., 644; *Te Poel v. Shutt*, 57 Nebr., 592; *Estep v. Schlesinger*, 58 Nebr., 62. The foregoing is also applicable to the review of rulings on objections to evidence during the trial. See *Village of Syracuse v. Mapes*, 55 Nebr., 738; *Alling v. Nelson, supra.* The docket entry in the county court contained the following:

"January 13, 1896. The hour having arrived for which the case was set for trial, the parties appeared. The following witnesses were supœnaed, sworn, and testified on

behalf of plaintiff: * * * After hearing the evidence in the case, the cause was submitted without argument. Cause continued by the court to the 18th day of January, 1896, at 1 o'clock P. M.

"January 18, 1896, parties appeared. The court finds the issues in favor of Charles Bailey, the incumbent, and that he was lawfully elected to the office of sheriff of Hayes county, Nebraska. It is therefore considered by the court that the said election be in all things confirmed and the complaint be dismissed, and the said William L. Orr, the contestant, pay the costs of suit."

It is argued that this shows a submission of the cause on the 13th of January and an adjournment for such a length of time as caused the then trial court to lose jurisdiction, and that court had no further jurisdiction, and the appellate court acquired none by the appeal. The remedy of contest pursued in this method is a statutory one, and after prescribing that the proper district courts shall hear and determine "contests of the election of county judge" (Compiled Statutes, ch. 26, sec. 70), it is further directed: "The county courts shall hear and determine contest of all other county, township, and precinct officers * * * within the county." See Compiled Statutes, ch. 26, sec. 71. Our attention is called to section 2, chapter 20, Compiled Statutes, wherein it is stated: "The provisions of the Code of Civil Procedure, relative to justices of the peace, shall, where no specified provision is made by this subdivision, apply to the proceedings in all civil actions prosecuted before said county court." Also to section 1002 of the Code of Civil Procedure, in which appears the following: "Upon a verdict, the justice must immediately render judgment accordingly. When the trial is by the justice, judgment must be entered immediately after the close of the trial, if the defendant has been arrested or his property attached; in other cases it must be entered either at the close of the trial, or if the justice then desire further time to consider, on or by the fourth day thereafter, both days inclusive."

There are also cited decisions of this court which it is claimed are to the effect that a judgment of a justice of the peace not rendered within the time prescribed in section 1002 of the Code is a nullity. See *Fox v. Meacham*, 6 Nebr., 530; *Worley v. Shong*, 35 Nebr., 311; *Thompson v. Church*, 13 Nebr., 287. See, also, *Best v. Stewart*, 48 Nebr., 859. The exact question here was not in either of the cases cited, but we will not stop now to consider whether the continuance by the court, if it occurred, brought it within the rule; without deciding it, for the sake of the argument, it may be conceded that it did. In the law in relation to contesting elections it is stated: "The proceedings shall be assimilated to those in an action, so far as practicable, but shall be under the control and direction of the court." See Compiled Statutes, ch. 26, sec. 86. The court shall have power to adjourn from day to day. See same section. It will be borne in mind that the "county courts" are to hear and determine contests of elections of county officers, except county judges. We have hereinbefore cited the sections etc. "Upon the filing of such complaint [one of contest], summons shall issue against the person whose office is contested, in the same manner as in civil actions, and a copy of the complaint shall in all cases accompany the summons. The cause shall stand for trial at the expiration of thirty days from the time of service of the summons and complaint, if the court shall then be in session, otherwise on the first day of the next term thereafter." See Compiled Statutes, ch. 26, secs. 83, 84. It is clear that contests of elections are in the county courts, and not within the jurisdiction of the county judges in the exercise of the ordinary powers and jurisdiction of justices of the peace.

In section 7, chapter 20, Compiled Statutes, the chapter in reference to "Courts—Probate (County)," it is provided: "It shall be the duty of the probate judge, in each county, to hold a regular term of the probate court at his office, at the county seat, commencing at nine o'clock A. M., on the first Monday of each calendar month, for

the trial of such civil actions brought before such court as are not cognizable before a justice of the peace. Such regular term shall be deemed to be open without any formal adjournment thereof until the third Monday of the same month, when all causes not then finally determined shall be continued by such court to the next regular term; but such courts shall be deemed to be always open for the filing of papers and issuance of process in civil actions, and for the purpose of taking and entering judgment by confession." It is sufficient if the proceedings show that the court was in regular session when the judgment was announced. See *Kelly v. Morse*, 3 Nebr., 224. The record here discloses on its face that the trial commenced on the 13th day of January, 1896, and judgment was rendered on the 18th of the same month. The third Monday of January, 1896, was the 20th of the month, and the judgment was announced within the term, and the court at the time had jurisdiction.

In the district court special findings were made, and in regard to the votes in Logan precinct it was stated and determined: "That in Logan precinct there were cast 41 votes, as shown by the abstract and by the court, and of which 41 votes the defendant Charles Bailey received 31 and the plaintiff William L. Orr received 10. The court further finds that H. V. Shattuch, John Johnson, and Christ Eichenberge were the judges, and E. W. Crossby and John Fane were the clerks at this election in said Logan precinct; that each of the 41 ballots cast in said precinct at said election was indorsed on the back with the name 'Christ Eichenberge,' written in ink, and that said name was all and the only indorsement on said ballots; that one of said ballots, 'Exhibit 5,' had the X to the left of the name instead of to the right of the name of Orr. The court further finds that all the ballots cast and counted in Logan precinct, 41 in number, are void and not entitled to be counted, for the reason that none of said ballots are indorsed with names of two of the judges of election as required by law. To which finding defend-

ant excepts." In section 145 of chapter 26, Compiled Statutes, 1895, it is prescribed that when an elector shall present himself at the polling place for the purpose of voting at an election, then in progress, he shall receive from a member of the election board "a ballot, upon the back of which two members of the board shall first write their names in ink." He shall then go alone into a compartment of a booth and prepare his ballot and fold it so as to conceal the names and marks on the face and expose the names of the members of the board upon the back and, without or before leaving the railed enclosure in which the compartments have, in conformity to requirements of law been placed, shall deliver the ballot in the condition specified to the judges of election, "who shall, without exposing the names or marks upon the front or face thereof, verify the signatures upon the back thereof and deposit the ballot in the ballot box in the presence of the elector." Section 148 is as follows: "No judge of election shall deposit in any ballot box any ballot, unless the same is identified by the signature of two (2) of the judges of election as hereinbefore provided. Every person violating the provisions of this section shall, upon conviction thereof, be fined not less than ten ($10) dollars nor more than one hundred ($100) dollars." Section 150 in part states: "In the canvass of the votes any ballot which is not indorsed as provided in this act by the signature of two (2) judges upon the back thereof, shall be void, and shall not be counted." It is contended that the voter has a right to rely upon the officers of election to properly perform their duties and indorse the ballots, and if it is not done he is in no degree responsible, can not be held so; and may not be disfranchised for that which was no act of his, and which he could not direct or control, that the law must not or can not be construed as mandatory. It is also argued that if the law in this particular portion in question is mandatory, then in so much it contravenes the fundamentals of the state government and is contrary to the ideas or principles which have been

given expression in our constitution. The constitutional provisions to which our attention is challenged are section 22 of article 1 and section 1 of article 7, which read as follows:

Sec. 22, art. 1: "All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise.

Sec. 1, art. 7: "Every male person of the age of twenty-one years or upwards belonging to either of the following classes, who shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector: First, Citizens of the United States. Second, Persons of foreign birth who shall have declared their intention to become citizens conformably to the laws of the United States, on the subject of naturalization, at least thirty days prior to an election."

The arguments are that to carry out the intention of the legislature, in the enactment of the ballot law, as disclosed by the inspection of the whole act and blending all portions, some particular passages, and the one herein involved, may or must be construed to state that which by its terms it does not, or if it is mandatory, then it may as well have been omitted as violative of the constitution. "The Australian ballot law" or system has been adopted by almost all of the states of the United States. It has been at all times, and is, popular with those whom it affects—the voters. It has received and has general approval.

It has been stated: "The main features of these statutes consist in the provision for the use of an official ballot and in the provisions for secrecy as to votes, the object being, not only to allow a man to vote without any other person knowing for whom he votes, but to compel him to vote secretly, and thus prevent bribery, coercion, and other evils." See 10 Am. & Eng. Ency. Law [2d ed.], 585. "By thus tending to eradicate corruption and by giving effect to each man's innermost belief, it secures to the

republic what * * * is vitally necessary to its health—a free and honest expression of the convictions of every citizen." See 10 Am. & Eng. Ency. Law [2d ed.], 585, note 4; Wigmore, Australian Ballot System [2d ed.], Intro., p. 82. In regard to the rule to be observed in construing statutory provisions, it was said in *Swearingen v. Roberts*, 12 Nebr., 333: "It is an established rule, in the interpretation of a statute, that the intention of the lawgivers is to be deduced from the whole statute taken and compared together. 'The real intention, when accurately ascertained, will always prevail over the literal sense of terms. When the expression of a statute is special or particular, but the reason is general, the expression should be deemed general, * * * and the reason and intention of the lawgivers will govern the strict letter of the law, when the latter would lead to palpable injustice, contradiction, and absurdity.' " See, also, statement in *Tracy v. Troy & B. R. Co.*, 38 N. Y. App., 437. These are general, and it may be added that laws of the nature of the one under consideration in matters affecting the rights of the electors to exercise the voting power will be liberally construed.

In a consideration of provisions of the Australian ballot law, this court, in an opinion written by POST, J., stated: "In the construction of statutes of this character it is important to keep in mind two recognized principles: First—That the legislative will is the supreme law and the legislature may prescribe the forms to be observed in the conducting of elections and provide that such method shall be exclusive of all others. Second—Since the first consideration of the state is to give effect to the expressed will of the majority, it is directly interested in having each voter cast a ballot in accordance with the dictates of his individual judgment. Recognizing the principle first stated, the courts have uniformly held that when the statute expressly or by fair implication declares any act to be essential to a valid election, or that an act shall be performed in a given manner and no

other, such provisions are mandatory and exclusive. By an application of the second principle, the courts, in order to give effect to the will of the majority and to prevent the disfranchising of legal voters, have quite as uniformly held those provisions to be formal and directory merely, which are not essential to a fair election, unless such provisions are declared to be essential by the statute itself. Judge McCrary, in the last edition of his excellent work on the Law of Elections [3d ed.], section 190, states the rule as follows: 'If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold, whether the particular act in question goes to the merits or affects the results of the election or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done, within a particular time, or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election.'" See *State v. Russell*, 34 Nebr., 116; also, *Barnes v. Supervisors*, 51 Miss., 305; *Wheelock's Case*, 82 Pa. St., 297; *Ledbetter v. Hall*, 62 Mo., 422; *West v. Ross*, 53 Mo., 350; *Jones v. State*, 1 Kan., 273; *Lankford v. Gebhart*, 130 Mo., 621, 32 S. W. Rep., 1127, 51 Am. St. Rep., 585.

If the foregoing rules are given effect, then an examination of the ballot law as a whole, and in connection therewith the portion herein in question, with the purpose, in view in the light of the said doctrines, to ascertain the true intent or meaning, it must lead to a conclusion that it is mandatory. Its language is clear, free from ambiguity, and the meaning unmistakable. It declares that the requirement of the signatures of the judges is essential to the validity of the election and an

omission thereof fatal to the ballot, and there is nothing in the other portions of the act, or in its whole scope, to call for or demand or even warrant the construction of this part of it as merely directory. Any other construction would necessitate some judicial legislation, and this is not within our province. The main reason advanced against the enforcement of the law as enacted and as its language shows it, clearly mandatory, is the asserted hardship and injustice of depriving voters of their right by reason of the negligence or misconduct of election officers. "Such statutes are intended to prevent fraudulent voting, and if the legislature is of the opinion that the general good to be derived from their strict enforcement will more than counteract the evils resulting from the occasional throwing out of votes honestly cast, the courts can not reconsider the mere question of policy. The legislative will upon such a subject, when clearly expressed, must prevail." See *Slaymaker v. Phillips*, 42 Pac. Rep. [Wyo.], 1049; McCrary, Elections, secs. 190, 191.

In support of the contention that the voter may depend in the reception and use of his ballot upon the efficiency of the election officers, and that they will mark the ballot as required by law, and if not, he may not or can not be disfranchised by reason of an act, or rather a failure to act, not his own, and in regard to which he was entirely faultless, the counsel have cited a number of decisions which we have examined; also, the opinion in case of *Meyer v. Van De Vanter*, 41 Pac. Rep. [Wash.], 60, in which it was decided that a provision in regard to the indorsement of ballots very similar to the one now under consideration was in conflict with a section of the constitution. This decision last mentioned proceeds upon the ground that the law was mandatory; but the legislature could not pass an act by the effect of which the individual elector could be deprived of the right to vote by reason of no fault or neglect of his own, but that of those of other persons. In the opinion nothing appears to indi-

cate that a voter must do anything in regard to his ballot while in the preparation of it, or during the time he had possession of it, from which he could gain information of the indorsement or lack thereof, or that he was charged with any duty in respect to the indorsement; hence it can not be said to be strictly in point herein. The other cases cited all make the distinction between acts wholly of the duties of election or other officers who are charged with duties in regard to the election, or the conduct thereof, and acts within which there are included obligations upon the individual voter, and they all involved acts of the former nature and not of the latter; hence, as we view the requirements of the matters of litigation in the case at bar, the cases cited were not strictly in point. Turning more directly to the constitutional question, it is well established and universally known that courts are always reluctant to declare a law, or any portion thereof, unconstitutional, and the law will be upheld if it can and no violence be done to the fundamental law. Yet courts do not hesitate, when there is a clear violation of the constitution, to so declare. It can not be questioned that laws in regard to the conduct of elections which are merely regulative of the right to vote, or rather the manner in which the right shall be exercised, if they leave the election free and open to all electors, are not inimical to the constitutional provisions.

One of the important objects of the Australian ballot law was and is to provide purity and honesty in elections, to prevent frauds; and the presumptions that the signatures of two of the judges of election shall be placed on the back of each ballot before it is delivered to a voter and it shall by the voter be folded so as to disclose these signatures when he presents it for deposit in the ballot box, and it may not be so deposited unless they do appear or are in fact on the back of the ballot, and, if deposited without such indorsement, the ballot shall be void and not counted, are but parts of the general scheme, and it will be noticed that the voter is called upon to aid. He

must take notice of the signatures of the two judges on the back of his ballot, and so notice them as to materially assist in the process of casting the ballot and its identification prior to deposit by the proper official. The elector is charged with a knowledge of the law, and he can hardly escape the discovery that the signatures are or are not on the back of the ballot when he folds it and that it is or is not a ballot which can be used. To this extent he must be asked to give his attention, and that he be so asked is certainly not destructive of the freedom of the election, nor do we deem it an impediment or a hindrance of the exercise of the elective franchise, nor a new qualification of an elector. The provisions in question are clearly but regulative in their essential features, and assist in the honest, intelligent exercise of the right to vote, and are not violative of the constitution. See *Slaymaker v. Phillips*, 40 Pac. Rep. [Wyo.], 971, 42 Pac. Rep., 1049.

In regard to the conduct of the election in Frenchman precinct, the court determined as follows: "The court further finds that in Frenchman precinct said election was held in a sod schoolhouse; that no regular booth or booths of any kind had been furnished the precinct; that to take the place of a booth, or rather to serve as a booth, an overcoat was hung up to the rafter or one of the joists of the schoolhouse in or at one corner; that said overcoat was spread out and the bottom hung from six to fifteen inches above the top of the desk; that the school desk below and under said overcoat was for the purpose and used by the voters to mark their ballots upon; that there was no railing about the booth or about the place occupied by the election officers; that all of the voters did not go behind the booth to make out their ballots, but made them out sitting at school desks in the body of the room; that at least two of the tickets were filled out by one of the judges of election for two electors who claimed to be unable to read or write; that neither of such voters were required to make such declaration of such disability un-

der oath, nor did said officers certify on the outside of such ballot that they were marked by his or their assistance; that one Fierling was one of the judges of said election in said precinct, and was also a candidate for election to the office of assessor in said precinct." It is strenuously insisted for appellant that the court should have rejected the vote of this precinct. To this it may be said that, if the court erred in this particular, as the matter must stand here, it did not prejudice the complainant; as to reject the whole vote of the precinct would not change the result of the election as determined by the court. The ballots which were examined by the trial court are not with the bill of exceptions, and as this deprives us of portions of the evidence, we can not examine to ascertain whether the findings are sustained thereby, and they must be accepted. The judgment of the district court is

AFFIRMED.

NORVAL, J., expressed no opinion.

WILLIAM HAYDEN ET AL. V. NICHOLAS FREDERICKSON.

FILED OCTOBER 18, 1899. No. 10,595.

1. **Stare Decisis:** FORMER APPEAL. Where a cause is brought a second time to this court, the first decision will be deemed the law of the case, not merely as to the points expressly decided, but to all questions presented by the record and necessarily involved in the decision, and, ordinarily, will not be re-examined.
2. **Sales:** DELIVERY: ACTION FOR PURCHASE PRICE. Where personal property is in possession of the buyer at the time of the sale, and no other place of delivery is specified, no formal delivery is necessary to maintain an action for the purchase price.
3. ———: INVENTORY: RIGHTS OF PARTIES: WAIVER. When a contract of sale of chattels provides for the taking of an inventory by the parties, the buyer can not urge as a defense to the action to recover the purchase price that the inventory was made by the vendor alone, when the vendee was given an opportunity to participate therein, and refused to do so.

4. **Instructions:** WITHDRAWAL OF ISSUE. It is error to give an instruction which withdraws from the consideration of the jury a material issue of fact.

5. ———: EXPERT EVIDENCE. It is error to instruct the jury that "expert evidence is of the very lowest order and is the least satisfactory."

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

The facts and issues are stated in the opinion.

C. J. Smyth, for plaintiffs in error:

Before plaintiff can recover the purchase price he must show that he delivered the patterns. See *Atwood v. Lucas*, 53 Me., 508; *Messer v. Woodman*, 22 N. H., 172; *Newmarket Iron Foundry v. Harvey*, 23 N. H., 395.

The statement in the contract that the goods were sold and delivered was properly contradicted by evidence. See *Lingham v. Eggleston*, 27 Mich., 324; *Elgee Cotton Cases*, 22 Wall. [U. S.], 180; *Blackwood v. Cutting Packing Co.*, 76 Cal., 212; *Anderson v. Read*, 106 N. Y., 344; *McLaughlin v. Piatti*, 27 Cal., 458.

Before title could pass both parties were required to make an invoice indicating the particular patterns purchased. See *Stephens v. Santee*, 49 N. Y., 35; *Anderson v. Crisp*, 5 Wash., 178; *Lingham v. Eggleston*, 27 Mich., 324; *McClung v. Kelley*, 21 Ia., 508; *Chapman v. Shepard*, 39 Conn., 413; *Hudson v. Weir*, 29 Ala., 394; *Blackwood v. Cutting Packing Co.*, 76 Cal., 217; *Hutchinson v. Hunter*, 7 Pa. St., 140; *Elgee Cotton Cases*, 22 Wall. [U. S.], 188.

The question of delivery should have been submitted to the jury. See *McClung v. Kelley*, 21 Ia., 512; *Metz v. State*, 46 Nebr., 548; *Terry v. Beatrice Starch Co.*, 43 Nebr., 866.

Instructions indicating that the word "sold," as used in the contract, operated to transfer the title were erroneous. See *Herron v. Cole*, 25 Nebr., 692; *High v. Merchants Bank*, 6 Nebr., 155; *Farmers Bank v. Harshman*, 33 Nebr.,

445; *Howell Lumber Co. v. Campbell*, 38 Nebr., 567; *Whitaker v. Parker*, 42 Ia., 585.

George W. Cooper and *John E. Reagan, contra:*

The patterns were in plaintiffs' possession at the time of the sale, and further delivery or a tender was unnecessary after defendants made the invoice. See *Shurtleff v. Willard*, 19 Pick. [Mass.], 110; *Lake v. Morris*, 30 Conn., 201; *Warden v. Marshall*, 99 Mass., 305; *Macomber v. Parker*, 13 Pick. [Mass.], 175; *Nichols v. Patten*, 18 Me., 231; *Uhl v. Robison*, 8 Nebr., 272; *Farmer v. Gray*, 16 Nebr., 401.

When a quantity of goods bargained for at a certain rate is actually delivered, the sale is complete, notwithstanding the goods are to be counted, weighed or measured in order to ascertain the amount to be paid for them. See *Macomber v. Parker*, 13 Pick. [Mass.], 175; Tiedeman, Sales, sec. 87.

When plaintiffs refused to invoice the patterns to ascertain the number in stock that would comply with the contract, it was proper for defendant to make the invoice. See *Woodworth v. Hammond*, 19 Nebr., 215; *Grant v. Pendery*, 15 Kan., 236; *Hayden v. De Mets*, 34 N. Y. Super. Ct., 344; *Graham v. Frazier*, 49 Nebr., 90; *McCormick Harvesting Machine Co. v. Markert*, 78 N. W. Rep. [Ia.], 33.

There was no reversible error in the instruction relating to expert evidence. See *United States v. Pendergast*, 32 Fed. Rep., 198; *Winans v. New York & E. R. Co.*, 21 How. [U. S.], 101; *People v. Perriman*, 40 N. W. Rep. [Mich.], 425; *Whitaker v. Parker*, 42 Ia., 586.

NORVAL, J.

This case was before us and decided at a prior term. See *Hayden v. Frederickson*, 55 Nebr., 156. Subsequently a trial was again had in the district court, which terminated in a verdict in favor of plaintiff, and from the judgment entered thereon the defendants have prosecuted error.

The action was to recover the purchase price of certain patterns alleged to have been sold and delivered by plaintiff to defendants in pursuance of a written contract made by the parties, a copy of which is contained in the former opinion, to which reference is made. On September 16, 1893, Nicholas Frederickson was the owner of the dry goods department of what was known as the Bell Department Store, in the city of Omaha. On said date Hayden Bros., the defendants, purchased all the stocks in said department store, including that belonging to plaintiff. The contract between defendant and plaintiffs stipulated, among other things, for the purchase "of all patterns that are staple and down to date," and that the purchasers should pay plaintiff therefor "cash at completion of inventory at the rate of 90 per cent of the original contract price of said goods without discount." The defendants refused to pay for the patterns, claiming that they did not comply with the terms and conditions of the contract, in that they were not staple and down to date. Testimony bearing upon the marketable condition of the patterns was adduced by the respective parties, and expert witnesses were likewise called and examined by the defendants upon that issue in the case.

It is argued by counsel for defendants that the judgment is erroneous, because it was not shown that the patterns had been delivered to and accepted by the defendants. This question was presented upon the former hearing, and it is contended by plaintiff that the decision then rendered is *stare decisis*. The rule is that the determination of questions presented to this court in reviewing the proceedings in a cause in the district court becomes the law of the case for all subsequent proceedings, and, ordinarily, will not be made a subject of re-examination. See *Coburn v. Watson*, 48 Nebr., 257; *Fuller v. Cunningham*, 48 Nebr., 857; *Omaha Life Ass'n v. Kettenbach*, 55 Nebr., 330; *Mead v. Tzschuck*, 57 Nebr., 615. And this rule applies, not only to all points actually decided, but to all questions presented by the record and necessarily in-

volved in the decision. See *Mufford v. Estudillo*, 32 Cal., 131; *Headley v. Challiss*, 15 Kan., 602; *Crockett v. Gray*, 31 Kan., 346. While we were asked on the former appeal to reverse the judgment theretofore rendered on the same ground now urged for a reversal, we did not then consider nor decide the point or express an opinion upon the subject. The judgment of reversal was placed upon other grounds, and the decision did not necessarily involve the matter now urged upon our attention, and the rule of *stare decisis* can not be successfully invoked by this plaintiff.

To entitle plaintiff to maintain an action like the present, for goods sold and delivered, it was necessary that it be shown that the patterns were delivered to the defendant. The contract specified or recited: "Nicholas Frederickson has this day sold and delivered to Hayden Bros. a stock of linens * * * and all patterns that are staple and down to date." There is in the record before us evidence tending to show that the defendants were in possession of plaintiff's goods at the time the contract in question was entered into, which, if true, relieved him from formally tendering and delivering the patterns to the purchaser. See *Robison v. Uhl*, 6 Nebr., 328; *Uhl v. Robison*, 8 Nebr., 272; Tiedeman, Sales, sec. 96 and cases there cited.

It is insisted that the title to the patterns did not pass to the vendees until they were invoiced; hence there can be no recovery. The contract of sale stipulated that an inventory of goods should be taken, which was to determine what patterns were staple and down to date. It was within the contemplation of the parties that each should join or assist in the making of such inventory, or at least be given an opportunity so to do. The evidence discloses that the defendants refused to invoice the patterns, claiming that they did not meet the requirements of the contract. This constituted a waiver of the right of defendants to participate in the inventory. See *Woodworth v. Hammond*, 19 Nebr., 215. The defendants, under

the circumstances, can not be heard to urge as a defense that the inventory was made by Frederickson alone.

Exceptions were taken to the fourth and sixth instructions given by the court on its own motion, which are as follows:

"4. The burden of proof in this case is upon the plaintiff, and, before he can recover, he must satisfy you by a preponderance of the evidence that the patterns sold and inventoried to defendants, and for which he seeks to recover in this action, complied with the terms and conditions of the contract sued upon,—that is, that said patterns so sold and inventoried to defendants were staple and down to date. If plaintiff has so satisfied you, it will then be your duty to return a verdict for plaintiff for such sum as under the terms and conditions of said contract and the evidence you find to be due. If plaintiff has failed to satisfy you, your verdict will be for the defendants."

"6. The only question for your consideration in this case is whether or not the patterns sold defendants by plaintiff complied with the terms and conditions of the contract introduced in evidence,—that is, were staple and down to date; and, in determining this question, you must look solely to the evidence that has been introduced by the parties, and from this evidence determine this question."

These instructions submitted to the jury the single question whether the patterns were "staple and down to date," and withdrew from the consideration of the triers of fact the issue whether there had ever been a delivery to the defendants of the patterns in question. Manifestly this was error. The defendants were entitled to have this point passed upon by the jury.

The following instruction was given at the request of the plaintiff below: "The court further instructs the jury that it is your duty to consider the opinion and expert evidence in this case the same as the evidence of other witnesses. However, the court further instructs you that

such opinion and expert evidence is of the very lowest order, and is the least satisfactory, and the jury should not permit such opinion and expert evidence to overthrow positive and creditable evidence of creditable witnesses, who have testified in this case of their own personal knowledge." This instruction was bad, and should not have been given. The defendants had the right to have the jury consider the testimony of their expert witnesses without any admonition from the court that "expert evidence is of the very lowest order and is the least satisfactory." It was for the jury alone to determine the weight to be given such evidence. For the errors indicated the judgment is

REVERSED.

GERTRUDE T. EDNEY, APPELLEE, V. DANIEL BAUM ET AL., APPELLANTS.

FILED OCTOBER 18, 1899. No. 10,759.

1. **Review:** FAILURE TO FILE BRIEF. Where the appellant fails to file a brief in this court, the judgment will be affirmed, when the cause is reached in its order, without an examination of the questions presented by the record.

2. **Discharge of Administrator:** PARTIES. That one has been sued by an administrator will not authorize such person to resist in the county court an application made therein to vacate an order discharging the administrator.

APPEAL from the district court of Douglas county. Heard below before FAWCETT, J. *Appeal of the Baums dismissed. Judgment below affirmed in part.*

Burr & Burr and *G. W. Covell*, for appellants.

R. Cunningham and *Lamb & Adams, contra.*

NORVAL, J.

Gertrude T. Edney and Patrick Cavanaugh were appointed by the county court of Douglas county, respect-

ively, administratrix with the will annexed and executor of the estate of James A. Edney, deceased. Subsequently, on September 24, 1895, they filed in said court a motion to be discharged from their trust. On February 29, 1896, the county court entered of record an order discharging the administratrix and executor and revoking the letter of administration theretofore granted to them. On April 20, 1895, Gertrude T. Edney, in her individual capacity, filed a motion to vacate and set aside the said order of discharge, which motion was not presented to or acted upon by the county court during the term at which it was filed and said order was entered. James E. Baum, David A. Baum and Daniel Baum, against whom in the district court of Lancaster county a verdict in the sum of $3,000 had been obtained by the Edney estate, but which action was subsequently dismissed by the court, were permitted to intervene, and they, together with the guardian of the minor children of the decedent, resisted the application of said Gertrude T. Edney. The county court overruled said application, holding that it had lost jurisdiction to grant the relief prayed, since the term of court had terminated at which the order of discharge was made. Gertrude T. Edney alone appealed to the district court, where, upon final hearing, the order discharging the administratrix and executor was vacated and annulled. The case comes to this court on the appeal of the guardian and the Baums.

The question argued at length in the briefs is whether the county court had the jurisdiction or power to set aside its former order discharging the administratrix and executor, but in our view we are not now required to consider or pass upon this point, since neither the guardian, nor any one in his behalf, has filed a brief in the cause, and the Baums have no right in this proceeding to question the correctness of the decision of the district court. It is the well-settled practice in this court that, when the appellant fails to file a brief, the judgment sought to be reversed will be affirmed, without an examination of the

questions presented by the record. The judgment of the district court as to the guardian will be affirmed.

In *Missouri P. R. Co. v. Bradley*, 51 Nebr., 596, it was ruled that the fact that one has been sued by an administrator will not authorize such person to petition a county court for the revocation of the letters of administration. The principle upon which that decision was grounded is decisive of the case at bar. The Baums had been sued by the representatives of the Edney estate, and a verdict returned against the Baums, but the action was dismissed without any judgment having been entered on the verdict. See *Edney v. Baum*, 53 Nebr., 116. They have no such pecuniary interest in the settlement of the Edney estate as to entitle them to review an order of the county court, or that of the district court on appeal, made in the progress of the settlement of the estate. From the opinion filed in *Missouri P. R. Co. v. Bradley, supra*, we quote the following: "It is also insisted that because the statute authorizes an appeal in all matters of probate jurisdiction 'from any final order, judgment, or decree of the county court to the district court, by any person * * * who may be affected thereby,' the railroad company had the right to move to vacate the appointment of the administrator. The fallacy of this argument consists in the erroneous assumption that the railroad company was affected by the order granting letters of administration. The right to appeal from the decision of the county court in probate matters is vested alone in persons against whom an order, judgment or decree is made, or who may be thereby affected or aggrieved. One is aggrieved or affected by a decision of such court alone when it operates upon his property or bears directly upon his interests. See 2 Woerner, American Law of Administration, sec. 544; *Deerings v. Adams*, 34 Me., 41; *Bryant v. Allen*, 6 N. H., 116; *Wiggin v. Sweet*, 47 Mass., 195; *Smith v. Bradstreet*, 33 Mass., 264. This railroad company is not affected by the order appointing the administrator, and it had not sufficient interest to move the revocation

of the appointment." Upon principle we are constrained to hold that the Baums had no such interest in the settlement of the estate of Edney as to permit them to intervene in the county court to resist the application of Mrs. Edney to vacate the order discharging the administratrix and executor, and consequently could not appeal from the order of the district court made in premises. If the county court was without jurisdiction to grant the application of Mrs. Edney, the district court acquired none by the appeal, and the order in question made by the last named tribunal would be void, and the Baums could avail themselves of that fact when the estate attempts to take further proceedings in its action against them. The appeal of the Baums is dismissed, and the judgment of the district court as to the guardian is affirmed.

JUDGMENT ACCORDINGLY.

RICHARDSON DRUG COMPANY ET AL. V. ALICE M. TEASDALL ET AL.

FILED OCTOBER 18, 1899. No. 9,909.

1. **Stare Decisis:** FORMER APPEAL. A decision of the supreme court, on a former appeal, of a question presented by the record is thereafter the law of the case, and the point ordinarily will not be reviewed.

2. **Replevin:** FINDINGS: DESCRIPTION OF PROPERTY: HARMLESS ERROR. Where a verdict in replevin finds for the defendant as to a portion of the property, the omission to describe therein the portion which the defendant is entitled to have returned is error without prejudice, when it is disclosed that all the property seized under the replevin writ has been destroyed by fire.

3. ———: ———: ———: JUDGMENT: HARMLESS ERROR. The failure, under the circumstance stated, to render an alternative judgment in such a case, for a return of the property, or its value in case a return can not be had, is error without prejudice.

4. ———: JUDGMENT AGAINST PLAINTIFF: RETURN OF PROPERTY. A plaintiff in replevin can not satisfy a judgment against him for a return of the property by offering to return other property of like kind and value, but must return, or offer to do so, the identical property replevied.

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

The opinion contains a statement of the case.

John P. Maule, for plaintiffs in error:

Defendants intermingled the goods conditionally sold with those afterward purchased. It was impossible for plaintiffs to separate the new goods from those originally sold. Defendants failed to identify the goods purchased by them subsequent to the conditional sale. Plaintiffs, therefore, were entitled to recover the entire stock. See *People v. Bristol,* 35 Mich., 29; *Kreth v. Rogers,* 7 S. E. Rep. [N. Car.], 683; *Willard v. Rice,* 11 Met. [Mass.], 493; *Adams v. Wildes,* 107 Mass., 123; *Fuller v. Paige,* 26 Ill., 358; *Simmons v. Jenkins,* 76 Ill., 479; *Merchants Nat. Bank v. McLaughlin,* 2 Fed. Rep., 128; *Jenkins v. Steanka,* 19 Wis., 139; *Brackenridge v. Holland,* 2 Blackf. [Ind.], 377.

Charles O. Whedon, contra.

NORVAL, J.

This was replevin of a stock of merchandise. A verdict, under the directions of the district court, was entered in favor of the defendants, and the judgment rendered thereon was reversed by this court. See *Richardson Drug Co. v. Teasdall,* 52 Nebr., 698. The cause was subsequently tried in the court below, and a verdict returned as follows:

"RICHARDSON DRUG COMPANY AND THE LINCOLN PAINT & COLOR COMPANY, Corporations organized under the Laws of the State of Nebraska, Plaintiffs,
v.
ALICE M. TEASDALL AND THOMAS L. TEASDALL, Defendants.

"We, the jury impaneled and sworn in the above entitled cause, do find that at the commencement of this

action the right of the property and of possession of the goods and fixtures originally delivered by the plaintiffs to defendants, under the contract between them, was in the plaintiffs.

"We further find that at the commencement of this action the defendants were the owners of a portion of the stock taken by the plaintiffs from defendants by the writ of replevin in this action, and were entitled to the immediate possession thereof.

"We further find that the value of said goods so owned by defendants, when taken by plaintiffs, was the sum of $750.

"We further assess the damages sustained by defendants by the wrongful taking of said goods at the sum of $276.35, which damages and value, amounting to the sum of $1,026.35, we assess as the amount defendants are entitled to recover from plaintiffs on account of the wrongful taking of said goods.

"J. YOUNGBLUT, *Foreman.*"

A motion for a new trial was made by the plaintiffs and overruled, and to reverse the judgment entered on the verdict plaintiffs have brought the case here. On January 27, 1892, plaintiffs sold defendants a stock of drugs and store fixtures, the contract of sale being in writing, a copy of which follows:

"This agreement, made and entered into by and between the Richardson Drug Company and the Lincoln Paint & Color Company, of the first part, and Thomas L. Teasdall and Alice M. Teasdall, his wife, of the second part, witnesseth: That said parties of the second part are to forthwith become the agents of the parties of the first part, and as such shall at once take possession of all the stock of drugs, chemicals, paints, oils, merchandise, and all fixtures belonging to said stock, at No. 1843 O street, Lincoln, Nebraska, and shall, as such agents, sell such goods at retail in the ordinary course of business and pay to the parties of the first part the sum of $100 in cash for each month for the first two months, and

the sum of $150 thereafter, until said parties of the second part shall have paid to the said parties of the first part the total sum of $2,000 net, the monthly payments to be commenced promptly on March 15, 1892, and to be made on the 15th day of each and every month thereafter, until the whole sum of $2,000 shall have been paid; and said parties of the second part shall receive no compensation for their services as such agents save the net profits of said business over and in excess of said amounts to be paid to said parties of the first part; and said parties of the second part agree and guaranty that all said profits shall be made, and all payments agreed made, without in any degree depleting said stock of goods. Said $2,000 shall be applied as follows: Sixteen hundred dollars ($1,600) to the Richardson Drug Company and four hundred dollars ($400) to the Lincoln Paint & Color Company, and said monthly payments shall be made to the Richardson Drug Company and by them divided as follows: 80 per cent to be retained by the Richardson Drug Company, and 20 per cent to be turned over as paid to the Lincoln Paint & Color Company, and when the total amount of the said $2,000 shall be paid, said parties of the first part shall transfer to said parties of the second part all their right, title, and interest in said stock of drugs and fixtures, but until said sum of $2,000 shall have been fully paid, the title to all said property shall be and remain in said parties of the first part. When said amount of $2,000 shall have been fully paid, said parties of the first part shall release and deliver to said parties of the second part all claims and evidences of indebtedness which they now hold against them.

"Witness our hands at Lincoln, Nebraska, this 27th day of January, 1892.

"ALICE M. TEASDALL.
"THOMAS L. TEASDALL.
"RICHARDSON DRUG COMPANY,
"AMOS FIELD, *Treasurer.*
"LINCOLN PAINT & COLOR COMPANY,
"M. WEIL, *Treasurer.*"

Possession was taken by the defendants of the goods mentioned in the contract, and they sold a portion thereof in the usual course of trade, and from time to time they purchased other goods of a like character, which were added to the stock. The defendants having failed to make certain payments provided for in the contract, plaintiffs replevied all the goods in the store, including those purchased by the defendants, subsequent to the making of the contract copied above.

It is urged that the verdict is contrary to law. We are relieved at this time of the necessity of construing the contract in question, since an interpretation was placed thereon when the cause was here before, and which decision has become the law of the case for all future proceedings. It was then determined that the contract was one of conditional sale, and that the vendors were entitled to a verdict only for such portion of the original stock conditionally sold as remained in the defendant's hands; that the latter had the right to have returned the goods by them subsequently bought and added to the original stock, and that the vendees' mingling of the goods absolutely purchased with those conditionally bought was neither wrongful nor fraudulent. Tested by these principles, the judgment is not contrary to law, since the jury awarded to the plaintiffs and defendants, respectively, the portion belonging them. The testimony adduced by the defendants tended to show that the value of the new goods purchased by them and taken under the replevin writ was over $1,500, and yet the jury by their verdict assessed the value thereof at $750, so the defendants and not the plaintiffs are prejudiced by the verdict.

It is insisted, however, that the defendants were not entitled to recover any portion of the goods or their value, for the alleged reason that they intermingled the new goods with those conditionally purchased from the plaintiffs, so that the new goods were incapable of being distinguished or identified. It is true the new goods were

placed on the shelves with the old ones, but this record fails to disclose that such intermingling was either wrongful or fraudulent. Besides there was evidence adduced on the trial, tending to show that the new goods were capable of being identified. Mr. Teasdall so testified when examined as a witness on behalf of the plaintiffs. Moreover, this suit was instituted upon the erroneous theory that the plaintiffs were entitled to all the goods contained in the store—the new and old alike—and the plaintiffs never called upon the defendants to make a separation of the goods. They can not be permitted now to urge that it was the duty of the defendants to have selected and delivered to them the goods conditionally purchased. Had the plaintiffs requested an identification of the goods, and defendants had refused to comply therewith, or had it been proven—which was not the case—that the goods were incapable of identification, then the authorities cited by plaintiffs would be in point.

Plaintiffs tendered the following instruction, which the court refused: "2. By the terms of the contract the defendants were required, until they had paid for the stock of goods turned over to them under it, to keep it up to its original value, namely, $2,000. When the plaintiffs brought this action they were entitled to take all the original stock there was in the store; and the goods of like character, mingled therewith, to the amount of $2,000. That is, the whole amount so taken must not exceed $2,000." The refusal of this instruction was in harmony with the former opinion in the case. The request to charge ignored the doctrine that plaintiffs could recover only the portion of the original stock which had not been sold by the defendants. The rule of *stare decisis* must control. The evidence is ample to sustain the verdict. Indeed it would have supported a finding that the property wrongfully taken from the defendants was of the value of more than $1,000. The plaintiff can not complain because the value of the property was assessed at a smaller sum than was justified by the evidence. See

Ackerman v. Bryan, 33 Nebr., 515. The court directed the jury to allow the defendant interest on the value of the property belonging to defendants as damages. This was entirely proper.

It is insisted that the verdict is insufficient in form, as well as indefinite and uncertain, in that it omitted to describe the property which the jury found belonged to defendants. No objection to the form or terms of the verdict was made at the time the same was returned in the court below. Ordinarily, a verdict for defendant in replevin for a portion of the property seized under the writ should specify the property he is entitled to have returned, since the statute requires that the judgment entered on such verdict shall be in the alternative, for a return of the property, or its value in case a return can not be had. See Code of Civil Procedure, sec. 191*a*. But in this case plaintiffs were not prejudiced by the failure of the jury to specify the property they found the defendants were entitled to have returned, inasmuch as the record discloses that the entire property replevied had been destroyed by fire, and therefore no portion could be returned to the defendants.

It is also urged that the judgment is erroneous because not in the alternative form, for a return of the property or its value. It having been established that the property in controversy had been destroyed by fire, and therefore incapable of being returned, plaintiff was not prejudiced by the failure to render an alternative judgment. See *Goodman v. Kennedy*, 10 Nebr., 270. But it is contended that the plaintiff had the right to return goods of a like kind to those replevied. This court has held the rule to be otherwise. See *Eickhoff v. Eikenbary*, 52 Nebr., 332. There is nothing in the other assignments of error which require special consideration. We have examined all of them, and find they are without error. The judgment is

AFFIRMED.

RICHARDSON DRUG COMPANY ET AL. V. RAYMOND BROS. & COMPANY.

FILED OCTOBER 18, 1899. No. 8,983.

Conditional Sale of Merchandise: FUTURE PURCHASES. The contract of conditional sale of merchandise involved herein construed, and *held* not to authorize the vendees to purchase new goods on the credit of the vendors. *Richardson Drug Co. v. Plummer*, 56 Nebr., 523, followed.

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

John P. Maule, for plaintiffs in error.

George E. Hibner, *contra.*

NORVAL, J.

An action was brought in the court below by Raymond Bros. & Co. against the Richardson Drug Company and the Lincoln Paint & Color Company, Thomas L. Teasdall, and Alice M. Teasdall to recover the purchase price of certain goods and merchandise sold by the plaintiffs to Thomas L. Teasdall. A dismissal was entered as to the Teasdalls, and a trial to the court terminated in a judgment against the other defendants in the sum of $217.96, who have prosecuted this error proceeding.

The defendants, against whom a recovery was had in the court below, being the owners of a stock of drugs in the city of Lincoln, on January 27, 1892, sold the same conditionally to the Teasdalls, the parties at the time entering into a written contract, a copy of which is set out in the opinion in *Richardson Drug Co. v. Teasdall*, 59 Nebr., 150, filed herewith. The Teasdalls took possession of the goods under said contract and the business was thereafter carried on in the name of said Thomas L. Teasdall, by whom the goods in controversy herein were purchased. The trial court found that the Teasdalls, in

making such purchase, were the agents of the Richardson Drug Company and the Lincoln Paint & Color Company, and that the goods were obtained for their benefit. This finding is now assailed. Aside from the written contract already mentioned, there is not a scintilla of evidence to sustain the finding. This instrument has at least three times been construed by this court as being a contract for the conditional sale of merchandise. See *Richardson Drug Co. v. Teasdall*, 52 Nebr., 698; *Richardson Drug Co. v. Plummer*, 56 Nebr., 523; *Richardson Drug Co. v. Teasdall*, 59 Nebr., 150, herewith decided. The case under consideration is parallel with *Richardson Drug Co. v. Plummer*, 56 Nebr., 523. In that case it was sought to recover from the Richardson Drug Company and the Lincoln Paint & Color Company the purchase price of goods sold the Teasdalls, under circumstances like these disclosed by the present record. The plaintiffs relied upon the contract of conditional sale to establish that the Teasdalls were the agents of the defendants. This court, in an opinion by SULLIVAN, J., held that said contract of conditional sale did not authorize the vendees to purchase new goods on the credit of the vendors, and that there was no basis for the judgment rendered against the latter. With the conclusion then reached we are content. The judgment of the district court herein is

REVERSED.

WALTER L. SELBY V. P. J. MCQUILLAN ET AL.

FILED OCTOBER 18, 1899. No. 8,992.

1. **Justice of the Peace:** JURISDICTION: REPLEVIN. Prior to the enactment of chapter 92, Session Laws of 1899, the jurisdiction of a justice of the peace in an action of replevin depended upon the appraised value of the property in suit.

2. ———: REPLEVIN JUDGMENT. A judgment rendered by a justice of the peace in an action of replevin, for a return of the property

and $50 damages, or in case a return could not be had, for $200 and costs, is valid.

3. ———: ———: ———: APPEAL. An appeal from such judgment invests the district court with jurisdiction of the cause, and it may, on the trial, if the issues are found in favor of the defendant, render judgment in his favor for the ascertained value of the property, whatever that may be.

4. **Replevin**: BOND: LIABILITY OF SURETY. The essence of a contract entered into by a surety in behalf of a plaintiff in an action of replevin is that he will satisfy the judgment which the law requires to be rendered, in case the findings of the trial court are in favor of the defendant.

5. ———: JUDGMENT: FORM: PARTIES. Section 191*a* of the Code of Civil Procedure, which declares that the judgment in favor of a defendant in replevin shall be in the alternative, was enacted in the interest of litigants, and not for the benefit of sureties, and only contemplates the rendition of a judgment in the prescribed form where, under the conditions existing at the time of the trial, such a judgment would or might be of practical value to one or both of the parties.

6. ———: ———: ACTION ON APPEAL BOND. The failure to render an alternative judgment in replevin is no defense to an action on an appeal bond given in behalf of the plaintiff, where the property can not be returned, and that fact has, upon proper inquiry, been determined by the court.

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

See opinion for statement of the case.

Hall & McCulloch, for plaintiff in error:

A surety on an appeal bond can not be held in an appellate court for a larger amount than the lower court had jurisdiction to render. See *Union P. R. Co. v. Ogilvy*, 18 Nebr., 638; *O'Leary v. Iskey*, 12 Nebr., 136; *Courtnay v. Price*, 12 Nebr., 192; *Fuller v. Schroeder*, 20 Nebr., 631.

Unless an alternative judgment is entered, the judgment is not one upon which an action on an appeal bond can be based. See *Singer Mfg. Co. v. Dunham*, 33 Nebr., 686; *Field v. Lumbard*, 53 Nebr., 397; *Lee v. Hastings*, 13 Nebr., 508.

John P. Breen, contra.

References: *Bates v. Stanley*, 51 Nebr., 254; *Flannagan v. Cleveland*, 44 Nebr., 58; *Johnson v. Reed*, 47 Nebr., 322; *Howell v. Alma Milling Co.*, 36 Nebr., 86; *Goodman v. Kennedy*, 10 Nebr., 270; *Manker v. Sine*, 35 Nebr., 746; *Eickhoff v. Eikenbary*, 52 Nebr., 332; *Pasewalk v. Bollman*, 29 Nebr., 519; *Thomson v. Joplin*, 12 S. Car., 580.

SULLIVAN, J.

Wilkinson sued McQuillan before one of the justices of the peace for Douglas county to recover the possession of specific personal property. In execution of the order of delivery the chattels therein described were seized, appraised and turned over to the plaintiff, he having first given the undertaking required by the statute in such cases. A trial of the cause to a jury in the justice court resulted in a verdict in favor of the defendant, in which the value of the property was fixed at $200 and the damage occasioned by the wrongful retention at $50. The judgment was in the alternative form—for a return of the property and the damages assessed, or in case a return could not be had, for the ascertained value and for costs. To enable the plaintiff to prosecute an appeal from this judgment Walter L. Selby executed an appeal bond in the usual form. The cause was thereupon docketed in the district court, where the following judgment was afterwards rendered: "This cause now comes on to be heard on motion of the plaintiff for a new trial herein; on consideration whereof the court overrules the same, to which plaintiff duly excepts; and the court finds that the defendants recover from the plaintiff the sum of $520.82, it being shown from the evidence that return of the property in question cannot be had. The court further finds that Walter L. Selby is surety on the appeal bond herein, and that he is liable as such surety on said appeal bond in the sum of $520.82, and for costs. It is therefore considered, ordered, and adjudged by the court

that the defendants have and recover of and from the plaintiff John J. Wilkinson, as plaintiff, and Walter L. Selby, as surety, the said sum of $520.82, and the costs of this action, taxed at $90.83, and execution awarded therefor." The judgment against Selby being afterwards reversed by this court (*Selby v. McQuillan*, 45 Nebr., 512), the present action was instituted by McQuillan to recover on the appeal undertaking. The answer denied the validity of the bond, denied that defendant was bound to satisfy the judgment, since it was not in the form prescribed by the statute, and alleged that the property was in existence and capable of being returned at the time of the trial in the district court. All the issues were decided in favor of the plaintiff, and he was given judgment in accordance with the prayer of his petition. The defendant prosecutes error.

The first contention is that the bond is void because (1) the judgment pronounced by the justice of the peace was in excess of his lawful authority; and (2) because the district court, exercising a derivative jurisdiction merely, was without authority to take cognizance of the case, or to render judgment for a sum in excess of $200. Prior to the enactment of chapter 92, Session Laws of 1899, the jurisdiction of a justice of the peace to hear and determine actions of replevin was made to depend upon the appraised value of the property. See *Hill v. Wilkinson*, 25 Nebr., 103; *Bates v. Stanley*, 51 Nebr., 252; *Kilpatrick-Koch Dry Goods Co. v. Rosenberger*, 57 Nebr., 370, 77 N. W. Rep., 770. The appraisement in the suit brought by Wilkinson against McQuillan was $99.10. The justice had, therefore, jurisdiction to try the cause; and the judgment rendered, having been for a return of the property and damages, or for $200 and costs in case a return could not be had, was authorized by law and entirely valid. This being so, the appeal invested the district court with jurisdiction of the cause and with power to render a judgment for the value of the property, even though such

amount should be in excess of the jurisdiction given to justices of the peace. See *Bates v. Stanley, supra.*

The next question to consider is whether the defendant is liable for the satisfaction of the replevin judgment in the form in which it was given. *Lee v. Hastings*, 13 Nebr., 508, and *Field v. Lumbard*, 53 Nebr., 397, are cited in support of the contention that he is not so liable. According to the doctrine of these cases, the essence of the contract entered into by a surety in behalf of a plaintiff in replevin is that he will satisfy the judgment which the law requires to be rendered in case the defendant shall succeed in the action. Assuming that the principle of these decisions is applicable where the suit is on an appeal bond given in replevin, we have to inquire what judgment is, in contemplation of law, to be rendered on a finding of the court or verdict of the jury in favor of the defendant. Section 191*a* of the Code of Civil Procedure declares that the judgment shall be in the alternative form; and this section has been frequently held to be mandatory. See *Hooker v. Hammill*, 7 Nebr., 231; *Singer Mfg. Co. v. Dunham*, 33 Nebr., 686; *Manker v. Sine*, 35 Nebr., 746; *Field v. Lumbard, supra.* But in construing the statute it must be remembered that it was enacted in the interest of litigants, to protect their rights, and not for the benefit of sureties. The section in question does, of course, contemplate that an alternative judgment shall be rendered, if, under the conditions existing at the time of the trial, such a judgment can or may be of practical worth to either of the litigants; but the law does not require vain things. It issues no imperative mandate in any case for the doing of a useless and idle act. It does not command the performance of that which in the very nature of things it is impossible to perform. A judgment directing the return of property which the court had previously determined could not be returned would be entitled to rank as an absurdity with the famous decree of Canute against the waves of the sea. That the law does not require such a judgment where the facts do not

justify it is recognized in *Lee v. Hastings, supra,* for it is there said: "A judgment in an action of replevin, under the act of 1873, must be in the alternative—for a return of the property, or in case a return can not be had, the value thereof, unless it is shown by the record that a return could not have been had." It appears from the judgment of the court in the replevin action that the property taken on the order of delivery could not be returned to McQuillan. It also appears that the district court in this case reached the same conclusion from the testimony of the parties given at the trial. It would seem, therefore, to be pretty conclusively settled that Selby was not prejudiced by the failure to render judgment against Wilkinson in the form prescribed by the statute. We are satisfied that the judgment rendered was the one which, in the circumstances of the case, the law contemplated and required. In the case of *Field v. Lumbard, supra,* upon which counsel for defendant mainly rely, the law contemplated the rendition of an alternative judgment because the court did not ascertain and decide that the return of the property was impossible. The judgment of the district court is right, and is

AFFIRMED.

EDMON GEORGE V. STATE OF NEBRASKA.

FILED OCTOBER 18, 1899. No. 10,879.

1. **Cattle Stealing:** RECEIVING STOLEN CATTLE. The crimes of stealing cattle and of receiving stolen cattle, described in section 117*a* of the Criminal Code, are separate and distinct offenses.

2. **Criminal Law:** CONVICTION UNDER ONE OF TWO COUNTS: NEW TRIAL: FORMER JEOPARDY. Where an information, in different counts, charges separate and distinct crimes, and the accused, on the trial, is acquitted on a count charging one crime but is convicted on a count charging another crime, he can not, on a new trial being granted, be tried for the offense of which he was acquitted at the former trial.

3. ———: ———: ———: ———. In such case the new trial can be granted only on the count upon which a conviction was had on the former trial.

4. ———: DEGREES OF CRIME: NEW TRIAL. Where a crime consisting of several degrees is charged in different counts of an information, the allowance of a new trial goes to the whole case.

5. ———: ISSUES. In a criminal case but one issue can properly be before the court at one time.

6. ———: PLEADING: JUDICIAL NOTICE. It is unnecessary to plead facts of which the court will take judicial notice.

7. ———: PLEA IN BAR. A plea in bar may be disregarded, if presented while the plea of not guilty remains on the record.

8. ———: ———: FORMER ACQUITTAL. A plea in bar need not be interposed to call to the attention of the court matters of record, which show that the accused was duly acquitted in the same court, in the same case of the identical charge upon which it is proposed to try him again.

9. ———: WITHDRAWAL OF PLEA. Whether a defendant is authorized to withdraw a plea of not guilty after the issue raised by it has been, in the orderly course of procedure, unalterably adjudicated, *quære.*

10. ———: ———: PLEA IN BAR: REVIEW. Where a court entertains and considers the merits of a plea in bar, without a formal withdrawal of the plea of not guilty, it is, at most, a mere irregularity, and the action of the court thereon may be the subject of review.

11. ———: ———: ———. In such case the plea of not guilty will be considered as constructively withdrawn.

ERROR to the district court for Cherry county. Tried below before KINKAID, J. *Reversed.*

The opinion contains a statement of the case.

John M. Tucker, for plaintiff in error:

Accused was charged with having committed two crimes. Under an information charging in different counts two separate and distinct offenses, a defendant who was acquitted under one count, and found guilty under the other, can not afterward be convicted of the offense of which he was acquitted. See *Levi v. State*, 14 Nebr., 2; *Bohanan v. State*, 18 Nebr., 57; *Morris v. State*, 8

S. & M. [Miss.], 762; *Lesslie v. State*, 18 O. St., 395; *King v. Mawbey*, 6 Term Rep. [Eng.], 638; *Campbell v. State*, 9 Yerg. [Tenn.], 333; *State v. Behimer*, 20 O. St., 572; *State v. Kettle*, 2 Tyler [Vt.], 471.

Wolfenbarger & Williams, also for plaintiff in error:

Stealing cattle and receiving stolen cattle are separate and distinct crimes. See *Commonwealth v. Bragg*, 47 S. W. Rep. [Ky.], 212; *George v. State*, 57 Nebr., 656; Criminal Code, sec. 117*a*; *Foster v. State*, 39 Ala., 229; *State v. Sias*, 17 N. H., 558; *State v. Smith*, 43 Vt., 324; *Shepherd v. People*, 25 N. Y., 406; *Torney v. State*, 13 Mo., 455; *State v. Shaffer*, 59 Ia., 290.

Other references: *Smith v. State*, 42 Nebr., 356; *Arnold v. State*, 38 Nebr., 752; *Conklin v. State*, 25 Nebr., 784.

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General*, for the state:

Where different counts of an information are formal variations stating the same offense, the granting of a new trial opens the whole case, and accused may be put upon his trial and convicted under any of the counts. See *Jarvis v. State*, 19 O. St., 585; *Bailey v. State*, 26 Ga., 579; *Mitchell v. State*, 8 Yerg. [Tenn.], 514; *Brown v. United States*, 52 S. W. Rep. [Ind. T.], 56.

When the defendant in a criminal prosecution is adjudged guilty of the crime charged, and subsequently procures a reversal of the judgment of conviction on account of error by the trial court, he will be held to have waived his right to object to further prosecution on the ground that he has been once put in jeopardy. See *McGinn v. State*, 46 Nebr., 427; *State v. Terreso*, 42 Pac. Rep. [Kan.], 354; *Benton v. Commonwealth*, 21 S. E. Rep. [Va.], 495.

SULLIVAN, J.

The first count of the information charges the defendant, Edmon George, with the larceny of certain cattle.

In the second count it is alleged that he received the same cattle knowing that they had been stolen, and with the intent of defrauding the owner. A jury, impaneled to try the issues raised by a general plea of not guilty, returned a verdict of conviction on the second count, and made no express finding as to the accusation contained in the first count. The court received the verdict, discharged the jury, and sentenced the defendant to imprisonment in the penitentiary for a term of years. He thereupon prosecuted error to this court, and secured a reversal of the judgment. The cause was remanded for further proceedings, and the defendant, having been again put upon trial, was found guilty, and sentenced on the first count of the information.

The principal question now before us for decision is the legal effect of the first verdict. Counsel for George insist that it was, in contemplation of law, an acquittal of the charge of larceny, and that the judgment under review is, therefore, erroneous. We think counsel are right. We think the defendant has been sentenced for a crime of which he has been once, in a regular judicial proceeding, declared by the verdict of a jury to be innocent. The prosecution was based on section 117*a* of the Criminal Code, which is as follows: "If any person shall steal any cow, steer, bull, heifer, or calf, of any value, or if any person shall receive or buy any cow, steer, bull, heifer, or calf, that shall have been stolen, knowing the same to have been stolen, with intent by such securing or buying to defraud the owner, or if any person shall conceal any such thief, knowing him to be such, of if any person shall conceal any cow, steer, bull, heifer, or calf, knowing the same to have been stolen, every such person so offending shall be imprisoned in the penitentiary not more than ten years nor less than one year, and shall pay the costs of prosecution." That the violations of this section charged in the two counts of the information are distinct crimes is, of course, self-evident. Neither offense comprehends

the essential elements of the other. They are, according to the plain meaning of the law, separate and distinct transactions. A person who is guilty of larceny under the above section can not also be guilty of receiving the stolen property. He can not be the receiver and the thief. The defendant was accused in the information of two substantive crimes. He was put on trial and convicted of one and, by implication, acquitted of the other; and he is now as much entitled to the benefit of the verdict in his favor as though he had been subjected to two prosecutions instead of one. "When there has been an acquittal on one count and a conviction on another," says Wharton, "and the counts are for distinct offenses, a new trial can only be granted on the count on which there has been a conviction; and it is error on a second trial to put the defendant on trial on the former." See Wharton, Criminal Pleading & Practice [9th ed.], sec. 895. The rule thus stated by the learned author is, we believe, in harmony with all the adjudged cases. See *Bell v. State*, 48 Ala., 684; *Fisher v. State*, 46 Ala., 721; *Campbell v. State*, 9 Yerg. [Tenn.], 333; *Lesslie v. State*, 18 O. St., 390; *State v. Behimer*, 20 O. St., 572. The case of *Bohanan v. State*, 18 Nebr., 57, cited by the attorney general, does not establish or recognize a contrary doctrine. It merely decides that where a crime, consisting of several degrees, is charged in different counts of an information, the allowance of a new trial goes to the whole case. The validity of the rule quoted from Wharton is recognized in the opinion, but held to be inapplicable, because in that case a single criminal act was under investigation. REESE, J., speaking for the court, said, in substance, that where the offenses charged are separate transactions—distinct crimes—the vacation of a verdict of conviction on one count does not destroy the verdict to the extent that it operates as an acquittal on other counts.

The next question to consider is whether the defendant is in a position to insist that he has been twice in

jeopardy. The record fails to show that the plea of not guilty was withdrawn, and the attorney general contends that the plea in bar was, therefore, not properly before the court for decision. It was said in *Davis v. State*, 51 Nebr., 301, that there can be only one issue before the court in a criminal case at one time, and that the court is at liberty to disregard a plea in bar which is presented while the plea of not guilty remains on the record. This is, no doubt, a correct construction of the statute; but we do not see the necessity for a plea in bar where, as in this case, the fact that the defendant has been once duly acquitted, appears affirmatively on the face of the record. It is an elementary rule of pleading, that it is not necessary to allege facts of which the court will take judicial notice. That George was informed against for the crime of larceny, and that he had been tried and acquitted were facts within the judicial knowledge of the court. The plea of not guilty, in the orderly course of procedure, had been sustained; the prosecution on the first count of the information was ended, and the defendant, but for the crime charged in the second count, was entitled to go free. To bring to the notice of the trial court, by a verified pleading, the fact that it was without jurisdiction or authority to try the accused again on the charge of larceny, would seem to be an idle and witless ceremony. It is the office of a plea in bar to bring new matters before the court, and not merely to present in another form the matters already inscribed on its records. This defendant has been lawfully acquitted of the charge of larceny; and that fact being incontestably established, we would be no more justified in affirming the sentence of the trial court than we would be, if the information did not allege the commission of a crime. Besides, it may well be doubted whether a defendant, under any circumstances, is authorized to withdraw a plea of "not guilty" after the issue raised by it has been unalterably adjudicated. But it is evident the judgment should be reversed, even if a plea

in bar were necessary to entitle the defendant to the benefit of the verdict on the first trial. The court did not refuse to consider the plea. It was fully considered; a motion to make it more definite and certain was sustained, and it was afterwards adjudged to be insufficient in law to constitute a bar to the prosecution; in other words, the court dealt with the special plea on its merits, and, having done so, its judgment thereon is subject to review. To act on the plea in bar while the plea of not guilty was pending would be, at most, an irregularity which would not invalidate the action of the court. There would probably be in such case a constructive retraction of the plea of not guilty. The judgment of the district court is reversed, and the cause remanded.

REVERSED AND REMANDED.

LYMAN CARY, APPELLEE, V. KEARNEY NATIONAL BANK ET AL., IMPLEADED WITH WALLACE A. DOWNING ET AL., APPELLANTS.

FILED OCTOBER 18, 1899. No. 8,958.

1. **Appeal to Supreme Court.** The right of appeal to this court is limited by statute to actions in equity.

2. **Proceeding in Error:** ACTION AT LAW. This court has no jurisdiction of an action, purely legal in its nature, in which no petition in error has been seasonably filed.

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

F. G. Hamer, for appellants.

W. D. Oldham and *Fred A. Nye, contra.*

SULLIVAN, J.

Lyman Cary, as treasurer of Buffalo county, recovered a judgment against the Kearney National Bank and

others in an action based upon an alleged breach of the conditions of a depository bond. Two of the defendants, Downing and Allen, bring the record here for review. The action was purely legal in its nature, but no petition in error was seasonably filed, and no summons in error has ever been issued. The cause was docketed in this court as an appeal. The right of appeal is confined by the statute to actions in equity, and does not extend to actions at law. Under repeated decisions of this court, we are constrained to hold that we have no jurisdiction of the cause, and therefore direct that the proceeding be

DISMISSED.

BANKERS LIFE INSURANCE COMPANY V. A. M. ROBBINS, EXECUTOR.

FILED OCTOBER 18, 1899. No. 10,619.

1. **Special Appearance.** A special appearance precludes the party entering such appearance from obtaining any decision on the merits of the controversy.

2. **Appearance:** GENERAL AND SPECIAL. Whether an appearance is general or special does not depend upon the form of the pleading, but upon its substance.

3. ———: ———. If a defendant invoke the judgment of the court, in any manner, upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general.

4. **Revivor of Judgment.** The proceeding to revive a dormant judgment is not the commencement of a new action, but the continuation of an action previously commenced.

5. ———: LIMITATION OF ACTIONS. The general law as to the limitation of actions does not apply to the proceeding to revive dormant judgments.

6. **Revivor of Action:** TIME. The limitation as to the time within which steps must be taken to revive an action in the name of the representatives of a deceased person does not apply to the revival of dormant judgments.

7. **Revivor of Judgments:** TIME. The word "manner," found in sections 472 and 473 of the Code of Civil Procedure respecting the revival of judgments, does not include the element of time.

8. **Review:** QUESTIONS NOT RAISED BELOW: JURISDICTION. A question raised for the first time in this court will not be considered, except it be of a jurisdictional character.

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

N. S. Harwood, John H. Ames and *E. F. Pettis,* for plaintiff in error.

A. M. Robbins and *M. B. Reese, contra.*

SULLIVAN, J.

In November, 1892, Anna B. Morrow recovered a judgment in the district court of Valley county against the Bankers Life Insurance Company of Lincoln, and soon afterwards caused an execution to be issued thereon. This writ was delivered to the sheriff of Lancaster county, who returned it unsatisfied in consequence of having been served with an injunctional order issued by the district court in an original action instituted by the defendant on the theory that the Valley county judgment was void. In July, 1893, Mrs. Morrow died, and A. M. Robbins, the defendant in error, was, in pursuance of testamentary nomination, appointed executor of her will. He immediately accepted the appointment, and, having first duly qualified, entered upon the discharge of his trust. In 1898 the action to enjoin the enforcement of the judgment against the insurance company was finally decided on the merits in favor of Robbins, who had been substituted for Morrow as a party defendant therein. This proceeding was then commenced to revive, in the name of the executor, the judgment rendered by the district court of Valley county in 1892. In response to a conditional order of revivor served upon it, the company, by its attorney, appeared in court and filed what is

styled a "special appearance," assigning eighteen objections to the revival of the judgment. Some of these objections raised issues of fact, which were tried and submitted upon oral evidence. The findings of the court upon all questions presented were in favor of the executor, and an order was thereupon entered reviving the judgment in his name. The defendant, by this proceeding in error, brings the record here for review.

The first contention is that the service of the conditional order did not give the court jurisdiction to hear the plaintiff's application, or to grant the relief demanded. We will not inquire into the efficiency of the order as a jurisdictional process, because we are satisfied that the defendant, by its "special appearance," appeared generally, and thus became subject to the authority of the court. Among the objections urged to the revivor of the judgment were these: That the several kinds of relief sought by the plaintiff were improperly joined; that Robbins was never the duly constituted executor of Morrow's will, and that the right to have the judgment revived had become barred by the statute of limitations. Upon two issues raised by these objections the company presented evidence, and sought the judgment of the court in its favor. Had the court decided these points against the plaintiff, he would have been defeated, not because the court was without jurisdiction of the defendant or of the subject-matter of the action, but because the facts alleged and proved did not entitle him to the relief demanded. These objections did not relate to the power of the court to hear and determine the application. They denied Robbins' right to a revivor, because his demands for relief were improperly blended, because he had no capacity to maintain the proceeding, and because the claim which he was seeking to enforce had become stale. The effort of the company evidently was to try the matter and obtain a judgment on the merits while standing just outside the threshold of the court. This it could not do. A party can not be

permitted to occupy so ambiguous a position. He can not deny the authority of the court to take cognizance of an action or proceeding, and, at the same time, seek a judgment in his favor on the ground that his adversary's allegations are false or that his proofs are insufficient. "A special appearance," says Mitchell, J., in *Gilbert v. Hall*, 115 Ind., 549, "may be entered for the purpose of taking advantage of any defects in the notice or summons, or to question the jurisdiction of the court over the person in any other manner; but filing a demurrer or motion which pertains to the merits of the complaint or petition constitutes a full appearance, and is hence a submission to the jurisdiction of the court." Whether an appearance is general or special does not depend upon the form of the pleading filed, but on its substance. If a defendant invoke the judgment of the court, in any manner, upon any question, except that of the power of the court to hear and decide the controversy, his appearance is general. See *Hurlburt v. Palmer*, 39 Nebr., 158; *South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank*, 45 Nebr., 29; *Fowler v. Brown*, 51 Nebr., 414; *Warren v. Cook*, 116 Ill., 199; 2 Ency. Pl. & Pr., 636.

We will now inquire whether the court was justified in making the order of revivor more than four years after Morrow died, and more than five years after the issuance of an execution on the judgment. The statutory proceeding to revive a dormant judgment is a substitute for the common-law writ of *scire facias*. It is not the commencement of a civil action, but the continuation of an action previously commenced. The object in view is not to obtain a judgment, but to obtain permission of the court to execute a judgment already in existence. See *Eaton v. Hasty*, 6 Nebr., 419; *Irwin v. Nixon*, 11 Pa. St., 425; *Rice v. Moore*, 48 Kan., 590; Freeman, Executions [1st ed.], sec. 81. Clearly then the general limitation law, which prescribes the time within which civil actions shall be commenced, has no application to the revivor of judgments. But it is insisted by counsel for defendant that the spe-

cial limitation contained in sections 456-470 of the Code of Civil Procedure does apply. This chapter provides the manner in which pending actions may be revived after the death of either the plaintiff or defendant. It further provides that the order of revivor shall not be made without the consent of the defendant, or his personal representative, after the expiration of one year from the time it might have been first made. Sections 471-473 of said Code prescribe the procedure for reviving dormant judgments. Sections 472 and 473 are as follows:

"Sec. 472. If either or both the parties die after judgment, and before the satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same, in the same manner as is prescribed for reviving actions before judgment; and such judgment may be rendered and execution awarded as might or ought to be given or awarded against the representatives, real or personal, or both, of such deceased party.

"Sec. 473. If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment."

Both of these sections, it will be observed, declare that the judgment is to be revived "in the same manner as is prescribed for reviving actions before judgment." Whether the limitation contained in chapter 1 may be alleged as a defense to a motion to revive a judgment under the provisions of sections 471-473 depends, therefore, upon the import of the word "manner" as it is used in the sections quoted. If the word embraces the idea of time, the special limitation is applicable to proceedings of this character; otherwise it is not. The manner of doing a thing has reference to the way of doing—to the method of procedure—and the element of time does not seem to be involved. In *United States v. Morris*, 1 Curtis [U. S. C. C.], 26, it is said: "Generally the time of doing an act and the manner of doing an act are distinct things." In at least three cases the question now

under consideration was presented to this court, and in each case it was distinctly held that there is no statutory bar to the proceeding for the revivor of judgments under the sections above quoted. *Hunter v. Leahy*, 18 Nebr., 80, was a motion to revive a judgment twelve years after the last execution had been issued thereon. The defendant interposed the objection that the right to revive was barred by the statute of limitations. The court overruled the objection, saying in the syllabus: "The limitation of one year within which an action may be revived on motion does not apply to the revival of a judgment." "The statute," says MAXWELL, J., in the body of the opinion, "does not provide that the judgment is to be revived in one year from the time it became dormant or the right to revive will be barred, and we have no authority to insert words to that effect therein." In *Creighton v. Gorum*, 23 Nebr., 502, it was held, on motion to revive a judgment that had been dormant for more than four years, that the plaintiff was entitled to the order, notwithstanding the defendant's objection that no execution had ever been issued. In *Boyd v. Furnas*, 37 Nebr., 387, there was a motion by an administrator to revive a judgment, and substitute him as plaintiff therein. The motion was made fifteen years after the rendition of the judgment. The defendant objected on the ground, among others, "that said application was not made within the time fixed by law." The trial court refused to sustain the objection, and its action in the matter was approved, this court saying in the syllabus: "The limitation of one year in which to revive an action on motion does not apply to a proceeding to revive a judgment." So both on principle and precedent the district court of Valley county was right in quickening the judgment and authorizing Robbins to enforce it.

It is finally urged as a reason for reversing the order of revivor that the proceeding by supplemental petition instead of by motion was fatally irregular. That point was not raised in the trial court and is, therefore, not

entitled to be considered here. The original attack on the plaintiff's application was based on its lack of substance and the alleged falsity of some of its averments, not because it was defective in form. The order of revivor entered by the district court is

AFFIRMED.

OAK CREEK VALLEY BANK, APPELLANT, V. LOUIS HELMER ET AL., APPELLEES.

FILED NOVEMBER 9, 1899. No. 9,021.

1. **Merger of Estates.** Generally, if two unequal estates are vested in the same party at the one time, and there is no intervening estate, the inferior is merged in the superior.

2. ———: INTENTION. The merger is not an absolute effect of the vesting of the unequal titles in the one person at the same time. Whether such will be the effect may depend upon the intention of the party in whom the titles appear, either as directly expressed or as it may be inferred or implied from the facts and circumstances of the particular case.

3. ———: PLEADING. The cross-petition in this action *held* to contain matter which left issuable the question of merger of two unequal estates.

4. ———: EVIDENCE. The evidence did not conclusively establish a merger, but was sufficient to sustain a finding of non-merger.

5. **Mortgages:** SURETY: INDEMNITY: RIGHTS OF CREDITOR. A creditor may become entitled to the benefit of a mortgage given by the principal debtor to his surety for the payment of the debt, which mortgage provides for the discharge or payment of the debt and to indemnify the surety; and, after the creditor's right to the security attaches, the latter can not usually be released without the participation and consent of all parties interested.

6. **Estoppel.** A party is not estopped by his acts or omissions which were in no manner or degree elemental of, or inducements to, the acts of the one who seeks to invoke the estoppel.

7. **Fraudulent Conveyances:** INTENT: QUESTION OF FACT. The question of fraudulent intent, when a conveyance is assailed on the ground that it is void as against creditors of the grantor, is one of fact. See *Omaha Coal, Coke & Lime Co. v. Suess*, 54 Nebr., 379.

APPEAL from the district court of Saunders county. Heard below before SEDGWICK, J. *Affirmed.*

The opinion contains a statement of the case.

C. S. Allen and *Clark & Allen*, for appellant:

A deed given to secure a debt passes the legal title to the land. See *Gallagher v. Giddings*, 33 Nebr., 222; *Harrington v. Birdsall*, 38 Nebr., 176; *Stall v. Jones*, 47 Nebr., 706.

A higher security is a substitute for the lower, and extinguishes the latter. See *McKnaughton v. Partridge*, 11 O. 233; *Kneeland v. Moore*, 138 Mass., 198; *Williamson v. Cline*, 20 S. E. Rep. [W. Va.], 917; *Belleville Savings Bank v. Reis*, 136 Ill., 242; *Lyman v. Gedney*, 29 N. E. Rep. [Ill.], 282; *Baker v. Baker*, 4 Dutch. [N. J.], 13; *Butts v. Dean*, 35 Am. Dec. [Mass.], 389.

As to third persons dealing upon the credit of the property, the indemnity mortgage was merged in the deed from Hovey to Helmer. Before registration of the assignment, plaintiff had a right to presume that Helmer was owner of the indemnity mortgage. See *Bowling v. Cook*, 39 Ia., 202; *Waters v. Waters*, 20 Ia., 363.

The deed is fraudulent and void as against plaintiff. The understanding that the deed was not to be recorded operated directly to defraud creditors. See *Goll v. Miller*, 54 N. W. Rep. [Ia.], 445; *Blennerhassett v. Sherman*, 105 U. S., 117; *Hildeburn v. Brown*, 17 B. Mon. [Ky.], 779.

Failing to record the deed under the circumstances was negligence, which estops the American Exchange National Bank from asserting the deed as against plaintiff. See *Scharman v. Scharman*, 38 Nebr., 39; *Anderson v. Armstead*, 69 Ill., 454; *Pierce v. Hower*, 42 N. E. Rep. [Ind.], 223; *Minnich v. Shaffer*, 34 N. E. Rep. [Ind.], 987; *Le Coil v. Armstrong-Landon-Hunt Co.*, 39 N. E. Rep. [Ind.], 922; *Iseminger v. Criswell*, 67 N. W. Rep. [Ia.], 289; *Drew v. Kimball*, 80 Am. Rep. [N. H.], 163.

When the effect of an intentional act is to work a fraud, as a question of evidence, the intent is conclusively proven. See *O'Connor v. Bernard*, 2 Jones [Irish], 656; *Edgell v. Hart*, 9 N. Y., 216; *Ford v. Williams*, 24 N. Y., 364; *Babcock v. Eckler*, 24 N. Y., 632; *Seward v. Jackson*, 8 Cow. [N. Y.], 406; *Reade v. Livingston*, 3 Johns. Ch. [N. Y.], 500; *Knapp v. Day*, 4 Colo. App., 21; *Cutcheon v. Buchanan*, 88 Mich., 596; *Seger v. Thomas*, 107 Mo., 635; *Sutherland v. Bradner*, 116 N. Y., 410; *Potter v. McDowell*, 31 Mo., 62; *Roberts v. Radcliff*, 35 Kan., 502; *Elser v. Graber*, 69 Tex., 225; *Hedman v. Anderson*, 6 Nebr., 400; *Sims v. Gaines*, 64 Ala., 397; *Steele v. Coon*, 27 Nebr., 586.

Sawyer & Snell, contra:

The indemnity mortgage was not merged in the deed to Burnham. See *Peterborough Savings Bank v. Pierce*, 54 Nebr., 712; *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Nebr., 9; *Henry & Coatsworth Co. v. Fisherdick*, 37 Nebr., 209; *Lowman v. Lowman*, 118 Ill., 582.

The indemnity mortgage was not merged in the Helmer deed. See *Whipple v. Fowler*, 41 Nebr., 676; *Bridges v. Bidwell*, 20 Nebr., 185; *Eastman v. Foster*, 8 Met. [Mass.], 19; *Eggert v. Beyer*, 43 Nebr., 711; *Stark v. Olson*, 44 Nebr., 646; *Griffith v. Salleng*, 54 Nebr., 362; *South Omaha Nat. Bank v. Wright*, 45 Nebr., 23; *Richards v. Yoder*, 10 Nebr., 429; *Tompkins v. Catawba Mills*, 82 Fed. Rep., 780; *Union Nat. Bank v. Rasch*, 64 N. W. Rep. [Mich.], 339.

The Burnham deed is not fraudulent and void. See *In re Lemert*, 59 N. W. Rep. [Ia.], 209; *Cutler v. Steele*, 53 N. W. Rep. [Mich.], 522; *Haug v. Third Nat. Bank of Detroit*, 54 N. W. Rep. [Mich.], 888; *Field v. Ridgeley*, 6 N. E. Rep. [Ill.], 159; *Haas v. Sternbach*, 41 N. E. Rep. [Ill.], 54; *Grand Island Banking Co. v. Costello*, 45 Nebr., 138; *Clarke Drug Co. v. Boardman*, 50 Nebr., 687; *Breeze v. Brooks*, 31 Pac. Rep. [Cal.], 742; *Hoag v. Martin*, 45 N. W. Rep. [Ia.], 1058; *Jansen v. Lewis*, 52 Nebr., 556; *Lavigne v.*

Tobin, 52 Nebr., 686; *May v. Hoover*, 48 Nebr., 199; *Otis v. Sprague*, 76 N. W. Rep. [Mich.], 154; *Barkworth v. Palmer*, 76 N. W. Rep. [Mich.], 151; *Omaha Coal, Coke & Lime Co. v. Suess*, 54 Nebr., 379; *Williams v. Evans*, 6 Nebr., 216; *Hedman v. Anderson*, 6 Nebr., 392; *Lepin v. Coon*, 54 Nebr., 664.

Mockett & Polk, also for appellees.

HARRISON, C. J.

In this, an appeal from a decree of the district court of Saunders county, the controversy in this court is between the Oak Creek Valley Bank and the American Exchange National Bank of Lincoln, and the question is one of the priority of liens on some real estate situate in Saunders county. The liens claimed by the latter party were prior of date and evidenced by mortgages, one of which was in form an absolute deed. The lien asserted by appellant was that of a judgment, and in this action it sought, on equitable grounds, to have it declared prior to that of the appellee, but was in the trial court denied the desired relief. One of the mortgages upon which the appellee bank declared was executed and delivered originally to Louis Helmer by E. W. Hovey. The latter was indebted to the State National Bank of Lincoln and induced the former to become his surety for the payment of said indebtedness, and executed and delivered the mortgage to Helmer, covenanting therein to pay the debt or debts in full and to protect and save the surety against all and any liabilities incurred by reason of the suretyship. The findings of facts and conclusions of law were made and stated in writing by the district court, and in the former appear the disputed and undisputed facts, inclusive of the dates of the several conveyances and occurrences involved in the litigation. The findings and conclusions read as follows:

"1st. The defendant the American Exchange National

Bank is a corporation, as alleged in its answer and cross-petition herein, and on and prior to the 25th day of April, 1888, one E. W. Hovey was the owner and in possession of the lands described in the petition herein; that on the said 25th day of April, 1888, the said Hovey was indebted to the State National Bank of Lincoln, which was then a corporation duly organized and existing under the laws of the United States, in about the sum of $6,000, and the said Hovey then desiring the defendant Louis Helmer to become surety for him upon the said indebtedness to the said State National Bank of Lincoln, to induce the said Helmer to do so, and indemnify the said Helmer in so doing, executed and delivered to the said Helmer the mortgage mentioned in the said answer and cross-petition of the said American Exchange National Bank, and thereby mortgaged and conveyed to the said Helmer the aforesaid property to secure the said Helmer in becoming such surety for the said Hovey in the sum of $6,000, which property is the same property described in the plaintiff's petition herein; that the said mortgage was given and delivered to the said Helmer for the purpose of securing the said Helmer from any and all liability by virtue of the said Helmer signing as surety the said notes of the said Hovey given by him to the said State National Bank, and that the said mortgage contained the conditions and provisions, as stated in the said answer and cross-petition of the said the American Exchange National Bank, and that said mortgage was filed for record in the office of the register of deeds of Saunders county, Nebraska, on the 5th day of May, 1888, and recorded in book 4 of mortgages at page 524, as alleged in said answer and cross-petition; and that afterwards, in the month of November, 1892, the said defendant the American Exchange National Bank purchased from the State National Bank all its assets, and among others, the note of $6,100, dated May 7, 1892, and signed by the said E. W. Hovey, and the said Louis Helmer as surety, which note was se-

cured by the said mortgage to the extent of $6,000, as alleged in the said answer and cross-petition, and at the time of executing the said mortgage the said E. W. Hovey was a single man and so executed the same; that the said note given by the said Hovey as principal, and the said Louis Helmer as surety, became the property of this defendant, the American Exchange National Bank, by virtue of the purchase aforesaid, and afterwards was from time to time renewed by the parties, the said Hovey executing the same as principal and the said Helmer as surety, until on the 5th day of April, 1894, when the same was renewed by the said Helmer, which note so executed was thereafter renewed from time to time, the last renewal thereof being set forth in said answer and cross-petition, and a copy thereof is attached thereto as Exhibit A. And at the time of the execution of the said mortgage the same was delivered to the said State National Bank, and kept by the said bank until the said bank sold and assigned its assets as aforesaid to this defendant, the American Exchange National Bank, whereupon the same was, with said assets, and as a part thereof, delivered to this defendant, the American Exchange National Bank, and this defendant, the American Exchange National Bank, has ever since been, and still is, the holder of the same, and is entitled to the benefit of the same as security for said loan to the said Hovey.

"2. And the court further finds that there is due to this defendant, the American Exchange National Bank, on the said note, the sum of $6,000, and is entitled to the foreclosure of said mortgage as prayed.

"3. And the court further finds that on or about the 5th day of April, 1894, the defendants Louis Helmer and Ellen Sarah Helmer were, and still are, husband and wife, and on that date were indebted to the defendant the American Exchange National Bank in the sum of $9,100; that said indebtedness was evidenced by a note of $6,100, a copy of which, as last renewed, is attached

to the said answer and cross-petition as Exhibit A, and another note of $3,000, due in ninety days from that date; and afterwards, on the 21st day of July, 1894, the defendant the American Exchange National Bank loaned to the said Louis Helmer and Ellen Sarah Helmer the further sum of $3,000, and took their promissory note therefor, so that the said Louis Helmer and Ellen Sarah Helmer were then indebted to the American Exchange National Bank in the sum of $12,100, which indebtedness was afterwards renewed from time to time until the 5th day of July, 1895, at which time the said defendants Louis Helmer and Ellen Sarah Helmer executed and delivered to the said the American Exchange National Bank their two promissory notes, one being the said note of $6,100, a copy of which is attached to said cross-petition as Exhibit A, and the other being a note for $6,000, a copy of which is attached to the said cross-petition as Exhibit B, the said Ellen Sarah Helmer signing said notes in the name of E. S. Helmer.

"4. And the court further finds that on the said 5th day of April, 1894, the said defendants Louis Helmer and Ellen Sarah Helmer executed and delivered to Silas H. Burnham, for and on behalf of the defendant the Exchange National Bank, a deed of conveyance, and thereby conveyed to the said Silas H. Burnham, for the said defendant the American Exchange National Bank, the aforesaid real estate. At that time said Burnham was, and still is, the cashier of the defendant the American Exchange National Bank, and said deed was so executed and delivered to the said Burnham, as such cashier, for the benefit of said bank and to secure the indebtedness of the said Louis Helmer and Ellen Sarah Helmer to the said bank which existed at that time, or which thereafter might be incurred and exist.

"5. And the court further finds that said deed was on its face an absolute conveyance, but was in reality a mortgage, executed to secure said indebtedness as aforesaid.

"6. And the court further finds that the said defendant the American Exchange National Bank did not cause the said deed to be recorded, but withheld the same from record until on or about the 31st day of June, 1895, and on that day the said deed was filed for record and duly recorded in the office of the register of deeds of Saunders county, Nebraska.

"7. And the court further finds that the said Helmer, knowing that the said deed was not recorded, represented to this plaintiff, and others, that the said property was clear and free from incumbrance and so induced this plaintiff to believe that the said Helmer owned the said property in his own right, and clear of incumbrance, and procured from the said plaintiff the loans of money hereinafter found.

"8. And the court further finds that the defendant the American Exchange National Bank had no notice that the said Helmer was so using the said property, or was making such representations, and that while the said Helmer was so making the said representations he was also making representations to the said the American Exchange National Bank that he needed sums of money to use in his business to keep up the said property, and for other purposes, and the said the American Exchange National Bank, believing that the said Helmer was not incurring any other indebtedness and would not incur any other indebtedness except to the said the American Exchange National Bank, and to assist the said Helmer in his business, did make further loans of money to the said Helmer from time to time; that the said the American Exchange National Bank did not allow the said deed to remain unrecorded for the purpose of assisting the said Helmer to obtain credit, or to obtain loans of money, and the said bank acted in good faith in the matter, not knowing that any person or persons were being or might be injured thereby.

"9. And the court further finds that while the said mortgage executed by the said Hovey to the said Helmer

as aforesaid was in the hands of the said the American Exchange National Bank, the said Hovey, being unable to pay the said indebtedness to the said the American Exchange National Bank, sold the aforesaid property to the said defendant Louis Helmer, and conveyed the same, on or about the 25th day of October, 1893, and did then execute and deliver to the said Helmer a deed of said premises, he, the said Hovey, being a single man; and as part consideration thereof the said Helmer assumed and agreed to pay the said indebtedness, for which he was then surety as aforesaid, to the said the American Exchange National Bank, which indebtedness was represented by said note, a copy of which is attached to said cross-petition as Exhibit A, and was secured to the extent of $6,000 by the said mortgage on the aforesaid premises; and at that time, the said mortgage being in the hands of the said the American Exchange National Bank, it was not agreed, nor intended by the parties executing and receiving the said mortgage and deed, that the said mortgage should be merged in the said deed, but, on the other hand, it was agreed and intended that the same should be kept separate and apart therefrom, and that the said the American Exchange National Bank might and should hold the said mortgage as security as aforesaid.

"10. And the court further finds that the plaintiff herein did, on or about the 22d day of July, 1895, begin an action in the district court of Lancaster county, Nebraska, against the defendant Louis Helmer upon two promissory notes, aggregating the sum of $1,500, and in said action an order of attachment was issued by the clerk of said court, directed to the sheriff of Saunders county, which was delivered to said sheriff, and was by him duly levied on the 25th day of July, 1895, on the aforesaid property, being a part of section 22, township 13 north, of range 5 east, in Saunders county, Nebraska, and particularly described as hereinbefore set forth, and that such proceedings were had in the said cause that, on

the 25th day of November, 1895, a judgment was rendered therein in favor of the said plaintiff and against the said Louis Helmer for the sum of $1,537.50 and costs, and said property so attached was ordered to be sold and the proceeds thereof applied on said judgment, and that a transcript of said judgment was filed in the office of the clerk of the district court of Saunders county, in November, 1895, that there was paid on said judgment $468.70 on the —— day of May, 1896.

"11. And the court further finds that on or about the 20th day of May, 1894, while the defendant Louis Helmer was in possession of the said property, he applied to the plaintiff for a loan of $500, and for the purpose of obtaining said loan represented to the plaintiff that he was the owner of the aforesaid real estate, and the mill property thereon, and that it was free and clear from any incumbrances, and that the plaintiff, relying upon Helmer's said representations as true, loaned him the sum of $500 on the faith and credit that he, the said Helmer, was the owner as represented and the title clear in him of all liens. And afterwards, and before the 23d day of May, 1895, the defendant Helmer again applied to the plaintiff for two loans of $500 each at different times, and for the purpose of obtaining each of said loans represented to the plaintiff that he was the owner of said real estate and the mill property thereon, and that it was clear from incumbrance, and, relying on said representations, the plaintiff loaned said defendant Louis Helmer an additional sum of $1,000, in loans of $500 each, on the faith and credit that he, said Helmer, was the owner of said property and that it was clear from incumbrance, and that the said Helmer was in possession of said property when each of said loans was made, and that the plaintiff had no actual knowledge that the defendant the American Exchange National Bank had any lien, title, or claim of any kind against the said property until the aforesaid deed of Silas H. Burnham was filed for record and recorded on the 27th day of June, 1895, at which

time the said plaintiff had notice of the rights and interests of the defendant the American Exchange National Bank; and the officers of the said plaintiff bank had knowledge and notice at the time of making said loans that there were business relations between the said defendant Louis Helmer and the defendant the American Exchange National Bank, and knew that facts in regard to the condition of the property of the said Helmer might be obtained by inquiry from the defendant the American Exchange National Bank, but carelessly neglected to make such inquiries.

"12. And the court further finds that the said loans made by the plaintiff to the defendant were evidenced by promissory notes, and that the said notes sued upon in the action brought in the district court of Lancaster county, Nebraska, were renewals of the notes given for said loans, and the said judgment and order of sale of said attached property was procured upon the said indebtedness, and the said plaintiff, at the time of filing his transcript of his said judgment in the office of the clerk of the district court of Saunders county, Nebraska, aforesaid, to wit, in the month of November, 1895, obtained, and has ever since held, and now has, a lien upon the aforesaid real estate in the amount of its said judgment, less the amount paid thereon as heretofore found, subject only to the liens of the defendant the American Exchange National Bank as herein found.

"14. And the court further finds that the said defendant the American Exchange National Bank, by virtue of the deed executed by the said Louis Helmer and Ellen Sarah Helmer to Silas H. Burnham, in behalf of the said the American Exchange National Bank, is entitled to a first lien upon the aforesaid real estate situated in Saunders county, Nebraska, in the nature of a mortgage, in the sum of $12,100, which is the first lien upon said premises, and is entitled to have the same foreclosed as prayed.

"15. And the court further finds that the aforesaid judgment lien of the plaintiff is a second lien upon the

said premises, subject only to the said lien of the American Exchange National Bank.

"19. And the court further finds that the defendant D. G. Wing claims an interest in said real estate by virtue of a lease from the said Louis Helmer, and that the said Wing is an officer of the defendant the American Exchange National Bank, and holds said lease for the said the American Exchange National Bank, and that the said lease was given by the said defendant Louis Helmer for the purpose of enabling the said the American Exchange National Bank to apply the rents, issues, and profits of the said property upon its aforesaid claim against the said Louis Helmer, and that the rents, issues, and profits of the property accruing to the said defendant the American Exchange National Bank through the said lease to the said Wing ought to be applied upon the aforesaid claim of the said the American Exchange National Bank, and upon the sale of the property under the decree herein an accounting should be taken of such sum so received and so applied upon the said claim of the American Exchange National Bank.

JUDGE SEDGWICK'S CONCLUSIONS OF LAW.

"First. That the mortgage having been given by Hovey to Helmer to indemnify him from loss as the surety of Hovey, the American Exchange National Bank, being the holder of the indebtedness on which Helmer was surety, is entitled to the benefit of the securities given to the surety.

"Second. That the mortgage given by Hovey to Helmer upon the property was not merged in the deed from Hovey to Helmer, but was held by the said bank as a distinct and separate security for its claim.

"Third. That the interest of the American Exchange National Bank in the said mortgage executed by Hovey to Helmer was not merged in the deed executed by the said Helmer and wife to the said the American Exchange National Bank, so as to destroy the effect of the recording

of the said mortgage, but the said mortgage was purposely retained by the said bank, because the same had been recorded and constituted constructive notice to all parties of the interest of the said bank in the said property to the extent shown by the said mortgage.

"Fourth. That the said bank was not so grossly negligent, under the circumstances, in retaining its deed from record as to estop the said bank from asserting its interest under the said deed.

"Fifth. That the officers of plaintiff bank were not justified in relying upon the representations of the defendant Helmer, as to his interests in the property in question, and not having insisted upon a lien upon said property at the time of making the loans, are not now in a position to contest the lien of the American Exchange National Bank."

It is argued for appellants that the cross-petition of the appellee bank disclosed that the title to the property mortgaged to Helmer by Hovey was subsequently conveyed by the latter to the former and then at a later date conveyed by Helmer to the appellee bank by an instrument which was in form a deed absolute, but which was in fact a mortgage; that from these matters, as pleaded, there arose a presumption that the mortgage became merged or extinguished in or by the deed, in its nature a superior conveyance, and that there was no statement in the pleadings which negatived an intention to substitute the higher for the lower conveyance, and extinguish the latter. It is the rule, as contended, that a deed given as a security passes the legal title (*Gallagher v. Giddings*, 33 Nebr., 222; *Harrington v. Birdsall*, 38 Nebr., 176; *Stall v. Jones*, 47 Nebr., 706; *First National Bank of Plattsmouth v. Tighe*, 49 Nebr., 299), but whether by the reception of a higher form of conveyance or of a superior estate a lesser then existing in the same party is merged or extinguished is not in this state a matter of presumption. If, from the apparent conditions which accompany the transactions, an intention that there shall be no merger is shown or

may be implied or inferred, the intention will prevail, and one circumstance from which an inference may be drawn is the effect a merger would have on the interests of the party who receives the conveyances. See *Henry & Coatsworth Co. v. Fisherdick*, 37 Nebr., 209; *Lowman v. Lowman*, 118 Ill., 582, 9 N. E. Rep., 245; *Matthews v. Jones*, 47 Nebr., 616; *Wyatt-Bullard Lumber Co. v. Bourke*, 55 Nebr., 9; *Peterborough Savings Bank v. Pierce*, 54 Nebr., 712. There were sufficient allegations of affirmative matters in the cross-petition to make it apparent that it was to the interest of the party pleading that no merger take place, and that no intention to extinguish one estate by the conveyance of another existed, or was elemental of the transactions involved.

It is also urged that the evidence conclusively proves that it was the intention of the appellant bank that the deed should take the place of its other securities, and be its sole security for the debt's payment. The finding of the court was to the contrary. There was evidence in support of the opposite view; but the finding was sustained by the evidence and will not be disturbed.

It is further contended in this connection that, as to third parties who gave to Helmer credit in reliance upon his ownership of the property, the merger became effective. To this it may be said that the appellant, when asked if he looked at the records to ascertain whether the property was clear, answered, "No, sir, I never did." Hence the merger or non-merger never entered into the transaction of loan between him and Helmer as an inducement and operating upon his mind therein. As a matter of fact, the mortgage from Hovey to Helmer had never been released of record. The principal creditor is entitled to the benefit of a mortgage given by the principal debtor to his surety for payment of the debt, when the mortgage provides for payment of the debt and to save the surety harmless, and the principal debtor has defaulted or become insolvent and the surety can not effectively release or discharge the mortgage, nor, if he ac-

quire title to the mortgaged property, will it work a merger or extinguishment of the mortgage. See *Eastman v. Foster*, 8 Met. [Mass.], 19; Jones, Mortgages [3d ed.], sec. 386; Brandt, Suretyship [1st ed.], sec. 282; *South Omaha Nat. Bank v. Wright*, 45 Nebr., 23; *Richards v. Yoder*, 10 Nebr., 429; *Union Nat. Bank v. Rasch*, 64 N. W. Rep. [Mich.], 339; *D. A. Tompkins Co. v. Catawba Mills*, 82 Fed. Rep., 780. The matter of litigation herein was in all respects within the doctrine just stated.

It is also argued that the deed was fraudulent and void as to the plaintiff, it being a creditor of the grantor. One ground of this argument is that there was an agreement between the appellee bank and Helmer that the deed be withheld from the record—that it was purposely so withheld. The finding of the trial court sustained by the evidence is not stated specifically, but was to the opposite effect of this contention and must prevail. Another branch of this argument is that, under the circumstances, the omission to record the deed was such negligence as estopped the appellee bank from asserting rights against the appellant under the deed. The direct effect of the failure to record an instrument of conveyance of the nature of the one here is set forth in section 16, chapter 73, Compiled Statutes, as follows: "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." It is of the arguments of the appellee on this point that a real estate conveyance may be withheld from record at the will and pleasure of the grantee, and, in the absence of the element

of fraud, his failure to record will extend no further than to postpone his rights under the conveyance to the extent indicated in the section quoted, to subject them to levy or conveyance of a prior mortgage of record; but, as we understand the argument of the appellant, it is to the effect that whatever may be the legal rights of the parties, there is a principle of equitable estoppel which, under the circumstances, became operative against the appellee, and which rests upon the proposition that when one of two persons, each guiltless of an intentional wrong, must suffer loss, it must be borne by the one who, by acts or omissions, has rendered the injury possible; but this can not be successfully invoked by the appellant, for the reason that there was no act or omission of the appellee shown to have in any manner contributed to the loan by the appellant to Helmer. The appellant relied solely upon the statements and representations of Helmer. He never examined the records, and that the deed had not been recorded had no influence upon him. That fact did not in the least aid or assist Helmer to obtain the loan of appellant, and can not be said to have, in any degree or to any extent, rendered the injury to appellant possible. He loaned to Helmer, without regard to the question of the actual condition of the title to the property. Counsel for appellant, in their argument on this subject, ask the following question: "Can the Exchange Bank assert this deed against innocent parties who were induced to give Helmer credit upon the title the defendant bank permitted the records to show in him?" However the answer might have been, the appellant is not in any position to demand an answer, as he to no extent depended upon any matters of record, but relied wholly upon the statements of Helmer.

It is further argued that the deed was conclusively fraudulent, or fraudulent *per se*, for the reason that it conveyed the legal title, which was afterward coupled with possession; that it left Helmer with but an equitable title and without possession, and not subject to

levy, and constituted a hindrance to creditors, inclusive of appellant, in the collection of their debts; that this was an unavoidable necessary effect of the deed, and the parties must be presumed to have intended the necessary consequence of the act. In this state the question of fraudulent intent is always one of fact. See Compiled Statutes, ch. 32, sec. 20; *Omaha Coal, Coke & Lime Co. v. Suess*, 54 Nebr., 379. It must be borne in mind that the appellant was a subsequent creditor, and not an existing creditor, at the time of the conveyance, the subject of attack. Whatever inference might be reasonably or necessarily drawn from the conditions which had their origin in the transaction of transfer of the property, it was but one of the matters which tended to prove the alleged fraud. It did not conclusively establish it. That it might operate to hinder other creditors in the collection of their debts did not conclusively stamp the transfer as fraudulent and void. See *Clarke Drug Co. v. Boardman*, 50 Nebr., 687. On the question of fraudulent intent being one of fact, see, also, *Williams v. Evans*, 6 Nebr., 216; *Hedman v. Anderson*, 6 Nebr., 392; *Lepin v. Coon*, 54 Nebr., 664.

The trial court determined that the element of fraud or the intent to hinder, delay or defraud creditors, was not shown to have entered into the transaction of transfer, and its finding in this regard was sustained by the evidence; hence will not be reversed. The judgment of the district court must be

AFFIRMED.

FIRST NATIONAL BANK OF HASTINGS V. OMAHA NATIONAL BANK.

FILED NOVEMBER 9, 1899. No. 8,998.

Negotiable Instruments: INDORSEMENTS: AGENCY: ESTOPPEL. The conclusions announced in *First National Bank of Hastings v. Farmers & Merchants Bank*, 56 Nebr., 149, approved and followed,

as governable of the matters of litigation in the present case, and, having been stated there, need not and will not be restated here.

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

A. M. Post and *J. B. Cessna,* for plaintiff in error.

T. J. Mahoney, contra.

HARRISON, C. J.

On and prior to October 15, 1891, also during a portion of the year 1892, A. M. Swartzendruver, then a resident and in business in Columbus, forwarded a number of applications for loans on farm lands situate in Platte county to the Nebraska Loan & Trust Company at Hastings, inclusive of one which purported to be made by John Liske, and another which was the apparent act of a person named Robert E. Long. The applications were approved, the bonds and mortgages prepared and sent to Swartzendruver, and by him returned to the company, each in appearance properly executed by the party in whose name, as maker, it was written. Drafts or checks on the First National Bank of Hastings were prepared, each in an amount necessary to meet the requirements in that regard of the loan to which it was to be applied, and payable to the order of the party in whose name the loan in terms ran, and they were forwarded to Swartzendruver. The signatures to the applications were by marks, as were those to the bonds, coupons and mortgages, and each was witnessed by Swartzendruver, and he, as notary public, signed certificates of the acknowledgments to the mortgages. The check, which was payable to Robert Long, was indorsed "Robert $\overset{\text{his}}{\underset{\text{mark}}{\text{x}}}$ Long, witness A. M. Swartzendruver," and presented by Swartzendruver to the Farmers & Merchants Bank of Platte Center, and the amount for which it called paid to him. It

was by the bank indorsed, "Pay to the order of the First National Bank of Columbus," and forwarded to it, and by it indorsed to the order of and sent to the Omaha National Bank, and by it indorsed and forwarded to the First National Bank of Hastings, and by it paid. The check, which was payable to John Liske, was indorsed "John $\overset{\text{his}}{\underset{\text{m rk}}{\text{x}}}$ Liske, witness A. M. Swartzendruver," and received like treatment as to presentation, payments, indorsements etc., as did the one to Robert E. Long. The trust company subsequently claimed to have information that the indorsement of Long and Liske were forgeries and was, on application and request and representations in regard to the facts, credited back on its account with the bank at Hastings the amount or the aggregate sum of the checks, and the Hastings bank commenced this action against the Omaha National Bank on its indorsements of the checks, and in the district court, as a result of a trial to the court and a jury, there was a verdict and judgment for the Omaha bank. The plaintiff, the Hastings bank, presents the case here for review.

In an action by the First National Bank of Hastings against the Farmers & Merchants Bank of Platte Center a recovery was sought on an indorsement of a check of the same trust company, issued and sent to A. M. Swartzendruver and payable to the order of a supposed borrower and mortgagor of farm land, and the facts and circumstances of that transaction were similar—did not differ in any material particular or point from these involved in the present litigation. The signatures of the applicant and borrower in the transaction involved therein were all by mark, the first indorsement in point of time of the check was by mark and witnessed by Swartzendruver. In one matter of loan shown in this cause the letter which accompanied the check, when forwarded to Swartzendruver, contained many more directions in regard to the completion of the loan than did the one sent

in the transaction which was ventilated in the former case. But they were, in view of all the facts disclosed, immaterial in their effect on the result of the litigation. Portions of the evidence given or used in the trial of the former case were introduced in this. All the matters of controversy were fully examined and discussed in the former cause. For opinion, see *First Nat. Bank of Hastings v. Farmers & Merchants Bank*, 56 Nebr., 149. After again considering the points as further presented in the case at bar, we must announce our approval of the conclusions reached in that adjudication of the rights of the parties, and they are entirely applicable and governable in this action. Within the doctrine then stated the instructions in this case on the subject of the effect of the agency of Swartzendruver for the trust company on the matters of litigation were erroneous, in that they ignored any knowledge in the Platte Center Bank, at the time it paid the check, of the extent of such agency. The judgment is reversed, and the cause remanded.

REVERSED AND REMANDED.

CHAMBERLAIN BANKING HOUSE V. RELIANCE INSURANCE COMPANY OF PHILADELPHIA.

FILED NOVEMBER 9, 1899. No. 9,008.

1. **Garnishment:** RIGHTS OF PARTIES. A plaintiff in a suit of garnishment, by service of the writ, becomes entitled to the rights of his debtor against the garnishee, and no after-understanding or agreement between the two latter parties can essentially change the rights which have so attached.

2. ———: ASSIGNMENT OF CAUSE OF ACTION: RIGHTS OF PARTIES: EVIDENCE: RES JUDICATA. A party recovered judgment against his debtor. The latter was summoned in garnishment proceedings by the creditor of the former, and, his answers being unsatisfactory, suit was instituted against him by the plaintiff in the suit of garnishment. All the suits and proceedings were in the one—the county—court. The garnishee paid into court an

amount which, subsequent to service of the writ of garnishment, his creditor had agreed to receive as his due. This was treated by the court, to the extent shown by the record, as a payment in the first original action. A party filed a claim of right to receive the money on the ground that the original cause of action had been his by assignment. This was filed in the original action, and notice of it was served on counsel for plaintiff in garnishment. They appeared, did not object to the hearing, and the applicant's right to receive the money was adjudicated. *Held*, A proceeding without law or rule of practice; that the court had no jurisdiction, and that the parties participating did not confer jurisdiction; the decision did not fix the rights of the parties; and the record of the proceedings and determination was not competent evidence in this, the garnishment suit of a prior adjudication alleged as matter of defense by the garnishee.

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

M. B. C. True and *S. P. Davidson*, for plaintiff in error.

C. C. Flansburg, contra.

HARRISON, C. J.

It appears herein that George Zutavern, of Tecumseh, during 1894, applied to the defendant in error, hereinafter styled the company, for insurance against loss by fire on some property which he then and there owned, and a policy was issued to him, and that thereafter the insured property was destroyed by fire February 19, 1895. Due notice was given and proofs of the loss made. The company refused or failed to pay the loss, and on June 5, 1895, Zutavern commenced an action in the county court of Johnson county against the company on the policy to recover the amount he claimed due him. The company interposed three defenses: that the action was prematurely brought; that the insured property, which was personal, was incumbered at the time of insurance, of which fact the company had neither knowledge nor notice; and that the policy of insurance, after its issuance, had been assigned to one Andrew J. Simpson without notice to, or consent of, the company. As the result

of a trial Zutavern was given a judgment against the company in the full amount stated in the policy and demanded in the suit, $409.02. The judgment was rendered August 16, 1895. On the same day the attorney for Zutavern filed a notice or statement of an attorney's lien in the sum of $100. On the 21st of the same month an undertaking was approved and filed, and on appeal of the action to the district court was perfected. On August 29, 1895, the plaintiff in error, hereinafter designated the banking house, instituted an action in the county court of Johnson county against the said George C. Zutavern and others, in which there was a judgment on the same day by confession in the sum of $999. On the next day an execution was issued and delivered to the sheriff and on September 3, 1895, this was returned "no property found." An affidavit was filed and summons in garnishment proceedings procured to issue, directed against the company, which was duly served, the day on which answer was required being October 5, 1895, at which time the company appeared and stated that it was indebted to Zutavern in the sum of $299.75. The banking house objected to the answer, as unsatisfactory and incomplete, and subsequently commenced this action against the company, alleging for cause that its answer in the garnishment proceeding was unsatisfactory and incomplete. In its answer in this present case, the company stated that prior to the time it was required to make disclosure in the garnishment proceeding, it and Zutavern had reached an agreement as to the amount it owed him as being $297.75, and which it had, in obedience to an order of the county court, paid into said court. The company further answered as follows: "For a second further and other defense this answering defendant says that after the payment of the money into court as aforesaid by this defendant, under the order of said court aforesaid, one Andrew Simpson, claiming the said money to belong to him by reason of an assignment of the said defendant George C. Zutavern, filed a petition of intervention and

notified the Chamberlain Banking Company that he claimed the said money; that the plaintiff herein, the Chamberlain Banking Company, the judgment creditor who had caused the garnishment proceedings to issue, and under which this defendant had answered, and paid the money into court, appeared in response to the petition of intervention of said Simpson, and resisted the claim of the said Simpson to said money; that this defendant was not in anywise advised of said pending proceeding, and not in the said cause and court, and that upon a trial of said cause upon its merits it was adjudged that the said Chamberlain Banking Company was not entitled to said money paid in said garnishment, but that said Simpson was entitled thereto; that no appeal was taken from said order, and the same is in full force and effect and unreversed, and said money was paid over to said Simpson, and was by him paid to the Chamberlain Banking Company, in settlement and discharge of the liability of said Zutavern, upon which the said Simpson was a surety to said Chamberlain Banking Company, the plaintiff herein; that the Chamberlain Banking Company, by reason of the aforesaid, is, and of right ought to be, estopped from claiming anything as against this answering defendant, and is bound by the said judgment and proceedings of the court hereinbefore recited and alleged." A trial of the issues resulted favorably to the company, and the defeated party has prosecuted an error proceeding to this court.

It is contended for the banking house that there was not sufficient competent evidence to support the findings of the trial court. Of the evidence introduced on the part of the company was a transcript of a record of the county court of proceedings in the case of George C. Zutavern against the Reliance Insurance Company. In this there is set forth the following: "It is hereby stipulated and agreed by the parties hereto that the judgment herein shall be satisfied on the payment into court of the sum of $299.75 in cash and the payment of an

order dated June 8, 1895, drawn on the Reliance Insurance Company in favor of Samuel Wertheimer by George C. Zutavern, and duly accepted by said insurance company, now amounting to $50.25, and the said insurance company, defendant, released and discharged of liability upon payment of costs in said case." This was of date October 5, 1895. And further: "And on the same day the Reliance Insurance Company, by its attorney, pays into court the sum of $299.75, judgment, and $10.10, costs of this action of date of judgment." Then appear entries in regard to attorneys for the banking house filing objections to the attorney's lien, notice of which, as we have before stated, had been filed and made of record; also, that the banking house appeared by its cashier and withdrew the objections and said they had been made without its knowledge or consent. It is also set forth in the transcript that Andrew Simpson on October 22, 1895, filed a claim for the money which had been paid into court by the company. The statement of his claim was to the effect that the insurance policy in the suit, on which the judgment had been recovered, had been assigned to him, and that he, Zutavern, and the banking house had an agreement that he was to relinquish his right and title to the policy and Zutavern was to bring the suit against the company on the policy, and if successful, Simpson was to receive the fruits of the action, and the banking house was not, in its suit against Zutavern, or in any proceeding, to make any claim to any of the money, if any, recovered by Zutavern in the action on the policy. The attorneys for the banking house accepted service of this application or claim, and it was further recorded that they were present, consented to, and participated in a trial of the claim of Simpson; that it was determined to be true and given force, and he, or his attorneys, received what remained of the money which had been paid into court, after the attorney's lien had been paid. There was also some testimony to the effect that when the money was paid into the county

court the judge thereof stated that he could not then make the entry, but would enter the fact of the payment by the garnishee and also its discharge from further liability. Upon service of a writ of garnishment the plaintiff in the suit in which the writ was issued becomes entitled to any and all rights of his debtor against the garnishee, and, if the disclosures of the latter are deemed incomplete, may commence a suit and therein enforce such rights. The plaintiff becomes practically an assignee of the claim of his debtor against the garnishee, and the debtor and the garnishee can not, by any subsequent agreement or understanding, destroy or essentially modify the claim. It is urged for the company that this doctrine, if enforced herein, deprives the company of the right to compromise with Zutavern "to buy its peace." It does not deprive it of its right "to buy its peace" of the proper parties, of those to whom it must answer and to whom it must make payment. No doubt a settlement, to be effective, should necessarily include Zutavern and his creditor, the plaintiff in the garnishment suit. The claim of Simpson for the money was made in an action which had proceeded to judgment, and had been fully determined. The time for intervention had passed, and there was no law or practice which gave the judge any jurisdiction over the matter of the claim to the money in the manner in which it was attempted to bring it before him. That the parties were present and made no objections, but participated in the trial, conferred no jurisdiction, and what was then decided constituted no adjudication of the rights of the parties in litigation in the case at bar.

The foregoing conclusions lead to the further one that there was no competent evidence to sustain the findings upon which the judgment herein, the subject of attack, was based. The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

CHAMBERLAIN BANKING HOUSE V. HARTFORD FIRE INSURANCE COMPANY OF HARTFORD.

FILED NOVEMBER 9, 1899. No. 9,007.

Garnishment: RIGHTS OF PARTIES: ASSIGNMENTS: RES JUDICATA.

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

M. B. C. True and *S. P. Davidson,* for plaintiff in error.

C. C. Flansburg, contra.

HARRISON, C. J.

By stipulation the decision in the case of *Chamberlain Banking House v. Reliance Ins. Co.,* 59 Nebr., 195, filed at this time, is to govern the disposition of this one. Following that decision, the judgment herein is reversed and the cause remanded.

REVERSED AND REMANDED.

PETER J. KARBACH ET AL. V. KATE CLARK.

FILED NOVEMBER 9, 1899. No. 9,016.

Replevin: VERDICT FOR DEFENDANT: EXCESSIVE DAMAGES. Amount of damages assessed, and for which judgment was rendered, *held* excessive and not warranted by the evidence.

ERROR from the district court of Douglas county. Tried below before FAWCETT, J. *Affirmed upon filing of remittitur.*

E. W. Simeral and *William Simeral,* for plaintiffs in error.

Parke Godwin, contra.

HARRISON, C. J.

In an action of replevin commenced in the district court of Douglas county the defendant in error sought the recovery of the possession of one carriage and a set of harness. The property was not taken under the writ and the action proceeded "as one for damages only." There was a trial of the issues to a jury, and a verdict was returned in favor of the defendant in error in the sum of $182.49. On hearing of the plaintiff in error's motion for a new trial, the trial court ordered a remittitur of $82.49, and upon compliance therewith overruled the motion for a new trial, and rendered judgment on the verdict for the sum of $100. The defeated party has removed the case to this court for review.

The argument for plaintiff in error is that the evidence will not sustain a finding of damages in the amount for which judgment was rendered, and this is the sole contention. There was no very competent evidence of the market value, at the time taken, of the property involved. A witness called on behalf of the defendant in error testified on the subject, and if his testimony is to be taken as proof of such value, and it is not questioned, or is conceded for plaintiff in error that it was, then the judgment was for a sum in excess of that proven, and it may be added that there was no other evidence upon which an estimate could be based. There was some testimony in regard to the condition of the property when possession of it was taken by plaintiff in error, but none of its market value, or upon which, in connection with other evidence, a calculation of its market value could be predicated. The damages shown by the evidence, adopting the theory of the trial court, and upon which the cause was tried, and of which there is no complaint here, or the market value at time of conversion, and interest thereon to the first day of the term of court at which the trial occurred is $26.83. The defendant in error may file within forty days a remittitur of $73.17 as of the date of

judgment, and the judgment as thus reduced stand affirmed. If the remittitur is not filed, the judgment is reversed, and the cause remanded.

JUDGMENT ACCORDINGLY.

MARCUS WITTENBERG ET AL. V. JOHN T. MOLLYNEAUX.

FILED NOVEMBER 9, 1899. No. 10,865.

1. **Review:** FORMER APPEAL: STARE DECISIS. Where a cause is brought a second time to this court, the first decision will be deemed the law of the case, and not merely as to the points expressly decided, but to all questions presented by the record and necessarily involved in the decision, and ordinarily will not be reexamined. See *Hayden v. Frederickson*, 59 Nebr., 141; *Richardson Drug Co. v. Teasdall*, 59 Nebr., 150.

2. **Contract:** BREACH: DAMAGES: INTEREST. If the right to damages for breach of a contract is matter of reasonable litigation, and the amount to be recovered, if any, is unliquidated and must be fixed, not by mere computation but by suit, interest may not be allowed for time precedent to the settlement of the right to a recovery and the ascertainment of the amount.

3. **Instructions:** REQUESTS: REVIEW. Error in giving an instruction that fails to fully or definitely state the issues in a case is not available unless the complainant prepared and requested a full charge upon the point.

4. **Breach of Contract:** DAMAGES. The time of a stipulation was fixed by its terms at two years. In this action, commenced prior to the expiration of the full time, there could be no recovery of damages for breaches of the agreement which occurred subsequent to the institution of the suit.

5. **Evidence at Former Trial.** The showing of the absence of a witness from the jurisdiction of the trial court *held* insufficient to warrant the admission of his testimony given at the former trial of the cause.

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

G. W. Bemis and *R. G. Brown*, for plaintiffs in error.

E. E. Hairgrove and *Thomas Ryan*, *contra.*

HARRISON, C. J.

In an exchange of hotel property situate in Sutton, and owned by the plaintiffs in error, for another hotel property owned by defendant in error in the same place, in the deed by which the latter conveyed to the former there appeared the following: "With all buildings thereon, the same not to be used for hotel purposes for two years from this date." The deed was of date June 11, 1889. The defendant in error instituted this action in the district court of Clay county on March 24, 1891, and alleged for cause a violation of the restriction as to use of the property of inception September 17, 1889, and a continuation thereof to the time of the commencement of the suit. The parties sued filed an answer, to which there was a reply. The cause was submitted on the pleadings, and the court rendered a judgment for the defendants in the action, which in an error proceeding to this court was reversed, and the cause remanded. See *Mollyneaux v. Wittenberg*, 39 Nebr., 547. After the case was returned to the district court, an amendment of the answer was made, and there was a trial of the issues, which resulted in a judgment for the plaintiff, and the case was again presented to this court, and the second judgment was reversed, and the case again remanded. See *Wittenberg v. Mollyneaux*, 55 Nebr., 429. It has again been tried, and the results were a verdict returned and judgment rendered thereon in favor of the plaintiff in the sum of $——. The case is again here for review. For full statement of the matters pleaded and in litigation we refer to the former opinions. They need not and will not be restated herein. By the first opinion it was decided that the restrictive matter of the deed was not invalid for being in restraint of trade, and was not within the prohibition of our statutory law in regard to trusts, and further, there was sufficient pleaded to entitle the plaintiff to at least nominal damages. By the second opinion there were certain points determined which we need not partic-

ularly notice at this time, but on the one main question, that of damages, the recovery sought being profits or gains which the party who sued asserted had been prevented by reason of the violation of the restrictions in regard to the use of the property, it was decided: "A party injured by breach of contract may recover for gains prevented, provided they are within the established rules permitting consequential damages, and provided they can be proved to a reasonable degree of certainty." See 55 Nebr., 430. And it was also stated in the opinion that of an important essential element of the evidence on this subject of damages there was an entire lack or absence in the proof, and without it there was a failure to show the loss of profits to any degree of certainty. In this procedure the plaintiffs in error again attack the allowance of gains or profits as damages. This question was settled, as we have stated in the last decision, and what was then determined has become the law of the case. See *Hayden v. Frederickson*, 59 Nebr., 141; *Richardson Drug Co v. Teasdall*, 59 Nebr., 150. The recovery of profits was allowed by this court in *Russell v. Horn, Brannen & Forsyth Mfg. Co.*, 41 Nebr., 567.

The jury in the case at bar returned a verdict in which there appeared a statement of the amount of damages, $1,500; also interest on said sum from a date which in an instruction had been stated it was proper to allow interest on the amount determined as damages. The amount of interest set forth in the verdict was $759.15. It is contended for plaintiffs in error that it was improper to instruct the jury to allow the interest, and the allowance was erroneous. This contention must be sustained. The right to any sum was a matter for determination by suit. The amount, if any, was not ascertainable from the contract or by computation, and must be fixed by litigation. It was unliquidated and interest was not allowable. See *Shipman v. State*, 44 Wis., 458; *Vietti v. Nesbitt*, 41 Pac. Rep. [Nev.], 151; *Swinnerton v. Argonaut Land & Development Co.*, 44 Pac. Rep. [Cal.], 719;

Sutherland, Damages, 610; *Pacific Postal Telegraph Cable Co. v. Fleischner*, 66 Fed. Rep., 899; *Hooper v. Patterson*, 32 Pac. Rep. [Cal.], 514. The claim was not within the provisions of our statutes in regard to interest. The collection of interest is a statutory right, and did not exist at common law. See 11 Am. & Eng. Ency. Law, 379. This error does not call for a reversal of the judgment. It can be cured by a remittitur of the amount of interest included in the verdict.

It is argued that the instruction numbered 1 is not sufficiently full and definite in its statements. This was the portion of the charge to the jury in which the issues were set forth. The instruction is probably open to the objection urged against it, but the counsel who complain did not prepare and request more explicit directions. See *Barr v. Omaha*, 42 Nebr., 341, 60 N. W. Rep., 591; *Carter White Lead Co. v. Kinlin*, 47 Nebr., 409, 66 N. W. Rep., 536.

Instruction numbered 5 is as follows: "If you find for plaintiff, you may include in your verdict interest at seven per cent on whatever of damages the evidence shows you was due plaintiff at the close of the two years, such interest, if any, to be computed from January 11, 1892." It is objected that this contained a misdirection, in that it stated that the damages would be the amount shown by the evidence for the entire two years; that this suit was commenced some seventy-nine days prior to the close of the two years designated in the deed, and the jury should not have been told that the damages would in this action be for the whole of the two years, as no recovery could be had herein beyond the time of the commencement of the action. The instruction may be said to be defective and erroneous as claimed. It is true that no recovery of damages could be allowed in this suit beyond or subsequent to its institution. See *Terry v. Beatrice Starch Co.*, 43 Nebr., 866; *Carstens v. McDonald*, 38 Nebr., 858. The instruction is misleading in its terms and substance and of a nature to prejudice the rights of the complaining party.

During the trial it was desired on the part of defendant in error to introduce the testimony of a witness who was not present at court, but who had testified in the former trial of the cause and whose testimony had been preserved in a bill of exceptions. To this there was an objection for plaintiff in error, which was overruled and the testimony was admitted. It appeared that the witness was a resident, with his family, of the town of Sutton, in the county in which the trial occurred; that he had, in a conversation with one of the attorneys for the defendant in error, promised to be present at the trial if notified of the time. It was not disclosed that the witness was ever given any notice of the time it was expected the case would be tried. It was shown that the attorney for defendant in error ascertained at some time during the day prior to the trial that the witness was not at his home; that the attorney then went to the residence of the witness, and was told by his wife that she did not know where he had gone. The attorney also talked with a relative of the witness in regard to his whereabouts, and was told that the witness had gone from town "on the K. C. & O. railroad." A subpœna was then procured and placed in the hands of the sheriff, who made a return thereon of "not found." There was no showing made from which it appeared that with reasonable diligence the attendance of the witness could not have been effected, nor was there any such showing of the absence of the witness from the state or jurisdiction of the court in which the cause was pending as to warrant the admission of his testimony given at the former trial. It follows from what has been stated and determined that the judgment must be reversed.

REVERSED AND REMANDED.

J. M. HERMAN ET AL. V. FRANK P. KNEIPP.

FILED NOVEMBER 9, 1899. No. 9,001.

1. **Bill of Exceptions:** AUTHENTICATION. Where the certificate of the trial court attached to the record states "that the foregoing is a true and perfect transcript of the record in the above entitled cause, except the bill of exceptions, which original bill is hereto attached," it is a sufficient authentication of such bill.

2. **Replevin:** DEMAND: EVIDENCE. When a defendant in replevin denies plaintiff's title and right of possession of the property, and pleads a right of possession thereof in himself, and prays a return of the property, proof of demand before the bringing of the action is unnecessary.

3. ———: PLAINTIFF'S TITLE. A plaintiff in replevin must recover, if at all, on the strength of his own title or right of possession.

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

G. C. & E. E. Wright, for plaintiffs in error.

H. L. Ganoe, contra.

NORVAL, J.

This was an action of replevin by Frank P. Kneipp to recover possession of three horses, in which he claimed a special interest by virtue of a chattel mortgage given him by one Thomas Healey. The defendant, J. M. Herman, filed a separate answer, denying each and every allegation contained in the petition, except that the horses were in his possession; alleging that no demand was made for the property prior to the institution of the action; and setting up an agistator's lien on the horses for their care and keeping, under and in pursuance of a contract with E. M. Healey, who claims to be their owner, and praying their return to him and that his lien as agistator be established. The defendant, J. J. Herman, answered, disclaiming any interest in the property in controversy. Plaintiff replied by a general denial. A trial

to the court, without jury, resulted in a finding and judgment in favor of plaintiff, and against the defendants. The latter have prosecuted error proceeding.

It is insisted by counsel for plaintiff below that the bill of exceptions is unauthenticated, and hence the same can not be considered. If the premises assumed by counsel were true, the conclusion drawn by him therefrom would be irresistible, for it is the doctrine of this court, recognized and applied in numerous decisions, that a bill of exceptions not authenticated as required by statute will be disregarded in the appellate court. But this record does not sustain the contention of counsel, and he evidently must have overlooked the certificate of the clerk of the district court attached to the transcript herein, in which is stated "that the foregoing is a true and perfect transcript of the record in the above-entitled cause, except the bill of exceptions, which original bill is hereto attached." This constituted a sufficient authentication of the bill of exceptions.

The horses were in the possession of J. M. Herman when replevied, and it is insisted that there can be no recovery because no demand for the property was made upon him before the action was commenced. Whether or not a demand was made is wholly immaterial, since said defendant in his answer pleaded a special interest in, and right to the possession of, the horses in himself, and prayed for their return to him. It is, therefore, evident that had a demand for the property been made by the plaintiff it would have been unavailing, and the failure to make such demand therefor will not defeat the recovery. See *Homan v. Laboo*, 1 Nebr., 204; *Aultman v. Steinan*, 8 Nebr., 109; *Flynn v. Jordan*, 17 Nebr., 519; *Ogden v. Warren*, 36 Nebr., 715; *Rodgers v. Graham*, 36 Nebr., 730; *Wilcox v. Beitel*, 43 Nebr., 457.

The findings and judgment are wholly unsustained by the evidence. The plaintiff introduced no proof to show that Thomas Healey ever owned the property in controversy, and, as plaintiff claimed the right of possession

of the horses solely by reason of a chattel mortgage given him by said Healey, it was incumbent on plaintiff to establish on the trial that the mortgagor owned the property, or at least had possession thereof when he executed the chattel mortgage. It is a familiar rule that a plaintiff in replevin must recover upon the strength of his own title or right of possession and not on the weakness of his adversary's. See *Goodman v. Kennedy*, 10 Nebr., 270; *Bardwell v. Stubbert*, 17 Nebr., 485; *St. John v. Swanback*, 39 Nebr., 841; *Kavanaugh v. Brodball*, 40 Nebr., 875. The introduction in evidence of the chattel mortgage was no proof that Thomas Healey had any interest in the property mortgaged. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN C. DREXEL, SHERIFF, ET AL. V. ANDREW MURPHY.

FILED NOVEMBER 9, 1899. No. 9,009.

1. **Chattel Mortgages:** DESCRIPTION OF PROPERTY: EVIDENCE. Where the description of property in a chattel mortgage is clear, and free from all ambiguity, parol proof is inadmissible to show the extent and meaning of language employed.

2. ———: ———. Although the description in a chattel mortgage may be insufficient to impart notice to innocent third parties, such fact will not avail a purchaser from the mortgagor who was apprised of the lien on the property before he parted with the consideration.

3. ———: PROOF OF REGISTRATION. The filing of a chattel mortgage is not proven by the introduction in evidence of a copy of the instrument, even though the fact of filing may have been indorsed thereon.

4. ———: PRIVATE SALE: WAIVER OF LIEN. Where a mortgagee of chattels authorizes the mortgagor to sell the property described in the mortgage at private sale, and with the proceeds pay the mortgage debt, and the sale is accordingly made, the mortgagee has thereby waived his lien.

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

B. N. Robertson, for plaintiffs in error.

Ed P. Smith and *James B. Sheean, contra.*

NORVAL, J.

On October 21, 1893, one William Snyder was engaged in the manufacture and sale of buggies in the city of Omaha, and on that day he executed and delivered to Andrew Murphy a chattel mortgage to secure a note of $1,400. The chattels were described in the mortgage as follows: "A full set of blacksmith's tools; 9 phaeton bodies; 9 buggy bodies; all new wheels, in number about 25; 5 buggy poles; all shafts; all bar iron, bolts, hub bands, screws, top propnuts and all other iron materials; all lumber and wood furnishings, including white wood and hickory, and all spokes and rims; all buggy bows; 24 old wheels; and all leather, and all trimming materials; platform carriage, under way of construction; 3 stoves and pipe; all paints, paint tools and materials, and all other tools, materials, furnishings, and unfinished work now in the place of business of said Snyder at 1320, 1322, and 1324 Harney street, corner of Fourteenth street, in the city of Omaha, Nebraska." Murphy was at the time liable on certain notes he had signed as surety for Snyder, and the mortgage was given to secure Murphy against the payment of said notes and a certain stay bond he had signed for Snyder. After the mortgage was executed Murphy paid a portion of said indebtedness of Snyder, and the latter completed one of the phaetons in the process of construction, which he sold or traded to one John W. Paul, the arrangement between them being that Paul was to deliver to Snyder, as part payment, an old buggy, valued at $150, and pay $200 in cash. The old buggy was delivered to Snyder as agreed, and the latter subsequently sold the same, with Murphy's consent,

and applied the proceeds on the indebtedness the mortgage was given to secure. For the balance of the purchase price Paul delivered to Snyder a note which the former held against a third party, on which the latter was to raise the $200, but Snyder being unable to negotiate the note it was returned to Paul, who retained the same. Subsequently Snyder went to Paul and informed him that he was in trouble on account of his having disposed of a buggy which he had mortgaged to Murphy, and begged Paul to make him a check for $100 to give to Murphy, stating that Paul could pay the remaining $100 at his own convenience. Paul gave Snyder the check for $100 as requested. The latter had authority from Murphy to sell the mortgaged chattels, and apply the proceeds upon the mortgage indebtedness. A portion of the property was sold, and the money realized therefrom was so applied. The defendant John C. Drexel, as sheriff, by his deputy, levied an execution upon said phaeton as the property of said Paul. Murphy thereupon brought replevin to recover the property, before a justice of the peace, where he obtained judgment. On appeal to the district court by the other party a judgment again was rendered in Murphy's favor.

On the trial the defendant sought to prove by the witness, W. R. Drummond, that the description of the chattels contained in the mortgage did not include a finished phaeton, which offered testimony was excluded, and the ruling is now assailed as being erroneous. The trial court properly excluded the proffered testimony, for the very obvious reason that no finished or complete vehicle was covered by the mortgage, so no evidence was permissible to show that which was too plain to admit of proof. The mortgage did describe different parts of phaetons and carriages under way of constructon at the mortgagor's place of business, which was definitely stated in the mortgage. The unfinished vehicle was subsequently finished and sold to Paul, and he was advised by Snyder, before any part of the purchase price was paid, that the

phaeton was mortgaged to Murphy. So, whether or not the description of the chattels in the mortgage was sufficient to create a lien as to innocent third parties, was unimportant, as Paul had actual notice of such lien before he parted with the consideration.

It is insisted, as a ground for reversal of the judgment, that there is no evidence that the mortgage to Murphy was filed for record. The original instrument was not produced at the trial, but a copy thereof, under the certificate and seal of the county clerk of Douglas county, was introduced in evidence, but the indorsement thereon as to filing was not offered as evidence. And the introduction of the copy was insufficient to cover the indorsement of filing. See *Noll v. Kennealy*, 37 Nebr., 879; *Fuller v. Brownell*, 48 Nebr., 145. The certificate of the county clerk authenticating the copy of the chattel mortgage discloses that it is a copy of an instrument on file in his office. Even though such certificate may be evidence that the chattel mortgage was on file in the office of the county clerk at the date of his certificate, it was no evidence that the instrument had been lodged in his office at the time the phaeton was transferred to Paul. But whether it was then of record or not is of no consequence, since actual notice had been imparted to Paul before he paid the consideration.

It is urged that Murphy can not recover, and that the judgment in his favor is erroneous, because he authorized the mortgagor to sell the property, and apply the proceeds in payment of the mortgage. We regard this position as entirely sound. Murphy consented to the sale of the property at private sale, and he received and retained a portion of the proceeds derived therefrom, which constituted a waiver of the lien of the mortgage. See *Paxton v. Smith*, 41 Nebr., 56; *Littlejohn v. Pearson*, 23 Nebr., 192; *First Nat. Bank v. Weed*, 50 N. W. Rep. [Mich.], 864; *New England Mortgage Security Co. v. Great Western Elevator Co.*, 71 N. W. Rep. [N. Dak.], 130.

The case of *Houck v. Linn*, 48 Nebr., 227, is not in conflict

with the conclusion we have reached. It was therein decided that "a chattel mortgage is not avoided by the fact that subsequent to its execution the mortgagee consented to a sale of the property by the mortgagor for the benefit of both parties, no other liens existing, and the sale not having been consummated." That case is clearly distinguishable from the one at bar, in that in the case cited, the mortgagor never exercised the power of sale given him, while here the mortgaged chattels were actually sold to Snyder in pursuance of the authority given him by Murphy.

The numerous other assignments of error need not be reviewed, since the judgment must be reversed for the reason already given.

REVERSED AND REMANDED.

L. H. LAWTON V. LIZZIE FONNER.

FILED NOVEMBER 9, 1899. No. 9,012.

1. **Contracts:** CONSTRUCTION. Courts will usually adopt the interpretation placed on a contract by the parties themselves.

2. ———: ———. A contract should be construed, if possible, so as to give effect to all its provisions.

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

L. M. Pemberton, for plaintiff in error.

James H. Woolley, W. H. Thompson and *O. A. Abbott, contra.*

NORVAL, J.

Lizzie Fonner, on May 16, 1890, was the owner of certain real estate situate in South Grand Island, and on

said day she entered into a contract with respect thereto as follows:

"This agreement, made the 16th day of May, A. D. 1890, between Lizzie Fonner, of Grand Island, county of Hall, and state of Nebraska, party of the first part, and L. H. Lawton and J. C. H. Read, of the same place, parties of the second part, witnesseth: The said Lizzie Fonner agrees with the said Lawton and Read to sell them the following described real estate, upon the terms and conditions hereinafter stated, to-wit: Blocks Nos. one (1), ten (10), eleven (11), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), each block containing eight lots. All the above described real estate situate in South Grand Island, Hall county, Nebraska. The said Lizzie Fonner further agrees that she will receive, as payment in full for each of the lots above designated, the sum of one hundred and ten dollars ($110), and the said Lizzie Fonner agrees with the said Lawton and Read that when they shall pay, or cause to be paid, the sum above mentioned, she will execute a warranty deed to them, or either of them, or any person or persons they may designate, for any or either of the lots contained in the above described real estate.

"It is agreed, however, by the said Lawton and Read that should they sell only lots contained in blocks twenty-three (23), twenty-four (24), and twenty-five (25), then will they pay to the party of the first part one hundred and twenty-five dollars ($125) for each lot sold, on terms as herein stated. The said Lizzie Fonner further agrees with said Lawton and Read that they shall have a term of four years in which to dispose of the above described real estate. The said Lawton and Read agree with the said Lizzie Fonner that they will pay all taxes legally assessed upon the above described property after it comes into their hands, so long as this contract shall be in force. It is further agreed by the said Lawton and Read that they will pay to the said Lizzie Fonner, after one year from date of this contract, eight per cent inter-

est, annually, upon the amount remaining due her, as such amount is designated in this agreement; and that their failure to do so will be just ground for declaring this contract null and void.

"Witness: L. H. LAWTON.
"JOHN FONNER, J. C. H. READ."

Lawton and Reed did not find a purchaser for, or sell, any of the lots described in the contract within four years, nor did they pay Lizzie Fonner for the lots or any portion thereof, nor any interest money, nor did they pay the taxes legally imposed upon the property. The premises were never conveyed to them, nor was a deed demanded. A suit was instituted by Lizzie Fonner to have the rights of Lawton and Read under the contract extinguished, and to recover from them the amount of taxes paid by plaintiff upon the lots, together with interest upon the agreed price named in the contract. Service of process was made by publication upon Read, who did not appear in the cause, while summons was personally served upon Lawton. Upon the trial the court found the issues in favor of the plaintiff, and rendered a decree quieting the title in the plaintiff, and that she recover from Lawton the sum of $2,272.80, on account of interest on the purchase price and taxes. The latter has prosecuted error to this court.

Counsel for Lawton, in the brief filed, argues at considerable length that the instrument copied above is not a contract of sale, but merely an agreement on the part of Mrs. Fonner to convey the lots, or any of them, to Lawton and Read, or to any person or persons they might designate, for a stipulated price, should they decide to purchase, or should find a buyer within the period of four years. This interpretation of the agreement is not assailed by counsel for plaintiff, but is acquiesced in by her, and this court is justified in adopting the same as the true construction or rendering of the instrument. Treating the contract as giving Lawton and Read an option to buy the real estate, what were their obligations

and liabilities? Manifestly they were to pay only $110 per lot in case they exercised the option to purchase all the lots, but in the event they should sell the lots in blocks 23, 24 and 25, they were to pay therefor $125 for each of such lots. Lawton and Read, by the terms of the agreement, obligated themselves, as consideration for the option, to pay all taxes legally imposed upon the property after it should come into their possession during the continuance, or life of, the contract, and they were also to "pay the said Lizzie Fonner after one year from date of this contract eight per cent interest annually on the amount remaining due her, as such amount is designated in this agreement." The option was to continue for four years, unless the same was sooner terminated by Mrs. Fonner under the terms of the contract for the non-payment of interest. The taxes levied against the lots, which Lawton and Read promised to pay, were something less than $100, and the court did not err in rendering judgment against them therefor.

It is insisted that Mrs. Fonner was entitled to nothing on account of interest, since none of the lots were conveyed to Lawton and Read, or sold by them, and no sum therefore existed upon which interest could be cast. This position is wholly untenable. There is nothing in the agreement of the parties to warrant the interpretation that Mrs. Fonner was to sell the lots on time; on the contrary, she agreed to sell for cash, for it is expressly stipulated that when Lawton and Read "shall pay, or cause to be paid, the sum above mentioned, she will execute a warranty deed to them, or either of them, or any person or persons they may designate, for any or either of the lots" etc. By the language contained in the contract, "eight per cent interest annually upon the amount remaining due her, as such amount is designated in this agreement," it is very evident that it was the intention of the parties that interest should be computed on the aggregate price of the lots remaining unsold. Thus, if any of the lots should be sold, interest was to be cast on

those remaining unsold at the contract price. Manifestly this is what was meant by "the amount remaining due her." The construction contended for by counsel for Lawton and Read would render portions of the contract meaningless, because if nothing is due until a sale has been made of the lots, there would be no sum upon which interest could be computed "after one year from the date of the contract," unless the property had been previously sold, and in which event the purchase price must have been paid down at the time of the conveyance, consequently there could be no sum to draw interest. The word "due," in the sense it is employed in the agreement, means the unpaid purchase price. Contracts should be so construed, if possible, as to give meaning to their several provisions, and when the one before us is read in the light of this cardinal rule of interpretation there is no reason to doubt that Mrs. Fonner was to receive interest on the stipulated price of the lots. This the court below accorded her, and in so doing no error was committed.

The contention that the judgment is inconsistent with itself, because the court allowed interest on $7,920, the agreed value of the property, and did not render judgment against Lawton for the principal sum, is without merit. He can not be heard to urge that the amount awarded plaintiff was not large enough. This is a familiar rule of practice. But the judgment is entirely consistent with the findings. Lawton and Read never promised to buy the lots or to pay the purchase price. It was optional whether they purchased or not. Never having availed themselves of their option, they would not be holden for the agreed value of the property, while they did obligate themselves to pay interest on such value as a part consideration for the option. The judgment is

AFFIRMED.

HENRY OLIVER, APPELLEE, V. JAMES F. LANSING, APPELLANT, ET AL.

FILED NOVEMBER 9, 1899. No. 10,229.

1. **Partition Sale:** REMOVAL OF FIXTURES: REMEDY OF PURCHASER. When, after real estate has been sold under a decree in partition, the purchase-money has been paid into court, but before the delivery of the deed, one of the parties to the suit injures or removes fixtures which passed by the sale, the purchaser may have the same rescinded, or, at his election, the court may, in the partition suit, award him compensation for damages sustained, out of the share of the purchase-money in its hands belonging to the transgressing party.

2. **Estoppel.** An estoppel *in pais* is not available to a stranger to the transaction.

3. **Fixtures.** Ordinarily the requisites of a fixture are: (1) Actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the one making the annexation to make the article a permanent accession to the freehold—this intention being gathered from the nature of the articles affixed, the relation and situation of the person making the same, the structure and mode of annexation, and the purpose or use for which it has been made. *Freeman v. Lynch*, 8 Nebr., 192, followed.

4. ———: EVIDENCE. Evidence examined, and *held* not to sustain the findings of the trial court.

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

The opinion contains a statement of the case.

Lionel C. Burr and *Roscoe Pound*, for appellant:

The criterion of a fixture is in the united application of three tests: (1) Actual annexation to the realty, or something appurtenant thereto; (2) appropriation to the use or purpose of that part of the realty with which it is connected; (3) the intention of the party making the annexation to make the article a permanent accession to the freehold—this intention being inferred from the na-

ture of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose and use for which the annexation has been made.

The elements mentioned in this rule are not alternative. They must concur. It is not meant that an article becomes a fixture in case any one of these tests is satisfied. No one of them is enough of itself, but it is their united application that determines the nature of the article. See *Teaff v. Hewitt*, 1 O. St., 511; *Ward v. Kilpatrick*, 85 N. Y., 413; *McRea v. Central Nat. Bank*, 66 N. Y., 489; *Binkley v. Forkner*, 117 Ind., 176; *Winslow v. Bromich*, 54 Kan., 300; *Honeyman v. Thomas*, 25 Ore., 539; *Henkle v. Dillon*, 15 Ore., 610; *Helm v. Gilroy*, 20 Ore., 522; *Thomas v. Davis*, 76 Mo., 72; *Rogers v. Crow*, 40 Mo., 96; *Chase v. Tacoma Box Co.*, 11 Wash., 377; *Cherry v. Arthur*, 5 Wash., 787; *Clore v. Lambert*, 78 Ky., 226; *Wolford v. Baxter*, 33 Minn., 12; *Farmers' Loan & Trust Co. v. Minneapolis Engine & Machine Works*, 35 Minn., 543; *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y., 38; *Loan v. Gregg*, 55 Mo. App., 581; *Keeler v. Keeler*, 31 N. J. Eq., 181; *Rogers v. Brokaw*, 25 N. J. Eq., 497; *Matthiesen v. Arata*, 50 Pac. Rep. [Ore.], 1015; *Hopewell Mills v. Taunton Savings Bank*, 150 Mass., 519; *Hoyle v. Plattsburgh & M. R. Co.*, 54 N. Y., 319; *Walker v. Sherman*, 20 Wend. [N. Y.], 636; *Peck v. Batchelder*, 40 Vt., 233; *Hubbell v. East Cambridge Savings Bank*, 132 Mass., 447; *Manwarring v. Jenison*, 61 Mich., 117; *Maguire v. Park*, 140 Mass., 27; *Wall v. Hinds*, 4 Gray [Mass.], 271; *National Bank v. North*, 160 Pa. St., 309; *Washington Nat. Bank v. Smith*, 15 Wash., 160; *Case Mfg. Co. v. Garven*, 45 O. St., 290; *Balliett v. Humphreys*, 78 Ind., 388; *Atchison, T. & S. F. R. Co. v. Morgan*, 42 Kan., 23; *Haeussler v. Glass Co.*, 52 Mo., 452; *D'Eyncourt v. Gregory*, 3 L. R. Eq. Div. [Eng.], 394; *Southbridge Savings Bank v. Mason*, 147 Mass., 500; *Cooper v. Johnson*, 143 Mass., 108; *Carpenter v. Walker*, 140 Mass., 416; *Fortman v. Goepper*, 14 O. St., 558; *Hill v. Wentworth*, 28 Vt., 428; *Cole v. Finch*, 37 Tex., 413; *Capen v. Peckham*, 35 Conn., 88.

There is no special and peculiar law of fixtures in theatres, and no ground for applying to buildings of that character rules different from those applied to all buildings.

Loose, portable articles, such as desks, step-ladders, center-tables, electric light globes not in use, and pictures on the walls, are personalty. See *Peck v. Batchelder*, 40 Vt., 233; *Chase v. Tacoma Box Co.*, 11 Wash., 377; *Scudder v. Anderson*, 54 Mich., 122; *Chapman v. Union Mutual Life Ins. Co.*, 4 Brad. [Ill.], 29.

Mirrors are not fixtures. See *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y., 38; *Loan v. Gregg*, 55 Mo. App., 581.

Gas fixtures are personalty and do not pass by a grant or mortgage of the realty. See *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y., 38; *Vaughen v. Haldeman*, 33 Pa. St., 522; *Jarechi v. Philharmonic Society*, 79 Pa. St., 403; *Heysham v. Dettre*, 89 Pa. St., 506; *Rogers v. Crow*, 40 Mo., 91; *Towne v. Fiske*, 127 Mass., 125; *Capehart v. Foster*, 61 Minn., 132; *Chapman v. Union Mutual Life Ins. Co.*, 4 Brad. [Ill.], 29; *Shaw v. Lenke*, 1 Daly [N. Y.], 487; *Manning v. Ogden*, 24 N. Y. Supp., 70; *Kirchman v. Lapp*, 19 N. Y. Supp., 831; *Smusch v. Kohn*, 49 N. Y. Supp., 176; *Montague v. Dent*, 10 Rich. Law [S. Car.], 135.

The following articles are personalty and did not pass to the purchaser at the partition sale: carpets, rugs, curtains and hangings (*Loan v. Gregg*, 55 Mo. App., 581; *Walker v. Sherman*, 20 Wend. [N. Y.], 636; *Manning v. Ogden*, 24 N. Y. Supp., 70); radiators (*National Bank of Catasaqua v. North*, 160 Pa. St., 309; *Freeland v. Southworth*, 24 Wend. [N. Y.], 191; *Towne v. Fiske*, 127 Mass., 125); loose, portable stage properties (*Hubbell v. East Cambridge Savings Bank*, 132 Mass., 447; *Chase v. Tacoma Box Co.*, 11 Wash., 377; *Wolford v. Baxter*, 33 Minn., 12; *Scudder v. Anderson*, 54 Mich., 122).

Joseph R. Webster and *Halleck F. Rose, contra:*

The court not only had power, but ought in duty to protect and vindicate the right of its purchaser. See

Parrat v. Neligh, 7 Nebr., 458; *State Bank v. Green*, 10 Nebr., 130; *Penn Mutual Life Ins. Co. v. Creighton Theatre Co.*, 51 Nebr., 659; *Paulett v. Peabody*, 3 Nebr., 197; *Frasher v. Ingham*, 4 Nebr., 531; *Mahoney v. Allen*, 42 N. Y. Supp., 11; *Van Rensselaer v. Van Rensselaer*, 113 N. Y., 214; *Morrissey v. Broomal*, 37 Nebr., 779; *Swift v. Dewey*, 20 Nebr., 107; *Disher v. Disher*, 45 Nebr., 100.

The properties removed from the theatre and destroyed were part of the property sold in the partition suit, and the purchaser was entitled to compensation by abatement from the purchase price. See *Kloess v. Katt*, 40 Ill. App., 99; *Woodham v. First Nat. Bank*, 50 N. W. Rep. [Minn.], 1015; *Reyman v. Henderson Nat. Bank*, 98 Ky., 751; *Brown v. Roland*, 33 S. W. Rep. [Tex.], 275; *Maginnis v. Union Oil Co.*, 47 La. Ann., 148; *Tewksbury v. Provizzo*, 12 Cal., 21; *Morris v. Harris*, 9 Gill [Md.], 26; *Patterson v. Lanning*, 10 Watts [Pa.], 135; *Venable v. Beauchamp*, 3 Dana [Ky.], 321; *Feather v. Strohoecker*, 3 P. & W. [Pa.], 505.

Intent with appropriation to uses of the realty or business there carried on is now the criterion to determine when a chattel becomes a fixture. See *Norton v. Dashwood*, 65 L. J. Ch. [Eng.], 737; *D'Eyncourt v. Gregory*, 3 L. R. Eq. [Eng.], 394; *Fifield v. Farmers Nat. Bank*, 148 Ill., 163; *Davidson v. Westchester Gas Light Co.*, 99 N. Y., 558; *Kloess v. Katt*, 40 Ill. App., 99; *Woodham v. First Nat. Bank*, 50 N. W. Rep. [Minn.], 1015; *Reyman v. Henderson Nat. Bank*, 98 Ky., 751; *New Orleans Canal & Banking Co. v. Leeds*, 21 So. Rep. [La.], 168; *Hopewell Mills v. Taunton Savings Bank*, 6 L. R. A. [Mass.], 249; *Parker Land & Improvement Co. v. Reddick*, 47 N. E. Rep. [Ind.], 848; *Simpson Brick Press Co. v. Wormley*, 166 Ill., 383; *Hill v. Munday*, 4 L. R. A. [Ky.], 674; *Farrar v. Stackpole*, 6 Greenl. [Me.], 155; *Eckstorm v. Hall*, 90 Me., 186.

Gas fixtures are real estate. See *St. Louis Radiator Mfg. Co. v. Hendricks*, 72 Mo. App., 315; *Keeting Implement & Machine Co. v. Marshall Electric Light & Power Co.*, 74 Tex., 605; *Hutchins v. Masterson*, 46 Tex., 554; *Sewell v. Anger-*

stein, 18 Law Times, n. s. [Eng.], 300; *Johnson v. Wiseman*, 4 Met. [Ky.], 357; *Ex parte Acton*, 4 Law Times, n. s. [Eng.], 261; *Ex parte Wilson*, 2 Mont. & Ayr. [Eng.], 61; *Central Trust & Safe Deposit Co. v. Cincinnati Grand Hotel Co.*, 26 W. L. B. [O.], 149; *Funk v. Brigaldi*, 4 Daly [N. Y.], 359; *Keeler v. Keeler*, 31 N. J. Eq., 191.

A steam heating plant is a fixture. See *Tyler v. White*, 68 Mo. App., 607; *St. Louis Radiator Mfg. Co. v. Hendricks*, 72 Mo. App., 315.

The supreme court of Nebraska holds to the modern doctrine that the intention of the party to appropriate the chattel to use of realty is the material inquiry in determining whether it becomes a fixture. See *Freeman v. Lynch*, 8 Nebr., 198; *United States Nat. Bank v. Bonacum*, 33 Nebr., 820.

Theatre buildings are considered in reference to their uses, and include all fixtures, furnishings, carpets and paraphernalia necessary to make them going concerns. See *Forbes v. Howard*, 4 R. I. 365; *Grosz v. Jackson*, 6 Daly [N. Y.], 463; *Waycross Opera House Co. v. Sossman*, 94 Ga., 100; *Cunningham v. Curcton*, 96 Ga., 489; *Grewar v. Alloway*, 3 Tenn. Ch., 584; *Halley v. Alloway*, 10 Lea [Tenn.], 523; *Grosvenor v. Bethell*, 93 Tenn., 577; *Sosman v. Conlon*, 57 Mo. App., 25.

NORVAL, J.

James F. Lansing and Henry Oliver erected a block in Lincoln, a part thereof being used as a theatre, furnished and set off in a manner common to such places of amusement. To aid toward the building and furnishing of this theatre, a considerable amount was subscribed and paid by third parties, the condition of such subscriptions being in effect that a theatre, modern in every respect, should be built and fully equipped.

Afterward, Oliver sued Lansing for an accounting as to the moneys furnished by the two toward building and furnishing the same. In said suit, an accounting was had of all moneys expended by each party in such under-

taking of building and equipping said theatre. A balance was found in favor of Lansing, and a decree in partition was entered directing that the real estate on which said building was erected, naming it by lots and blocks, should be sold, and that the proceeds should be divided in accordance with the account found between the parties. Neither the decree, order or notice of sale specified anything be sold other than the real estate. Sale was had, and the property was bid in by one William Oliver, subject to mortgage and other incumbrances. The amount of the bid was paid into court, the sale was confirmed and deed ordered. Before the latter was delivered, Lansing removed from the premises a large amount of property of varied character. William Oliver then filed in the original partition suit a petition setting forth the facts, claiming that the property so removed was real estate, and passed to him under the sale in partition, asked the court to enjoin Lansing from further interfering with or injuring the property, and for compensation out of the purchase-money then in court for the damages already inflicted, or if compensation could not be made, that the sale be rescinded. From the last proposition William Oliver afterwards receded, merely asking the court to compensate him for the injury done the property.

Lansing filed an independent suit, claiming, in effect, that the property so removed was personalty only, of which he and Henry Oliver were joint owners, William Oliver claiming some interest therein, whom he therefore made a party defendant, and asked that an accounting be taken of such personalty, both that removed and a large amount still contained in the building, the rights of the parties thereto adjusted, and the same to be divided or sold, and the proceeds awarded according to such interests.

To this petition William Oliver answered, claiming that by virtue of the partition sale the title to all of the property contained in said building passed to him.

Henry Oliver also answered, alleging that by virtue of the partition sale, and other conveyances from him to William Oliver, title thereto passed to William, and disclaiming any interest in any of the property in litigation. These two actions were consolidated and tried as one in the lower court.

The property consisted of a variety of articles, such as stage settings, scenery, drop curtains, ropes for shifting scenes, carpets nailed to the floor, rugs lying loose thereon or tacked down, portieres, window and box curtains, gas and electric light fixtures, electric light bulbs, a piano, opera chairs screwed to the floor, upholstered chairs not fastened to the floors, an office desk and chair, ticket-boxes, settees, willow chairs, a step-ladder, a baggage-truck and many other similar articles. A portion of the property was also claimed by Lansing as his individual property.

On the trial, the lower court held that by virtue of the subscriptions of the citizens to the construction of the theatre building and its furnishings, and the appropriation of such subscriptions for such purpose by the beneficiaries, and by their donation to the public of such building for such purposes, it, the public, obtained a right to the use and enjoyment of the building as a theatre, and that such act on the part of the parties was such an appropriation of all these articles to the uses of a theatre as would estop them from a divestment of the building such as would render it unfit or inappropriate for the uses for which it was constructed, and that all of the property therein contained was either actually or constructively annexed to, and became part of, the realty, and that it was not necessary, in order that title should pass to William Oliver in the sale in partition, that all said property should have been particularly described in the proceedings in partition; that Lansing is not entitled to the relief prayed for in his original petition, or in his cross-petition; that the premises were injured to the extent of $2,200 by virtue of the articles removed from

such building by him, and adjudging that such amount be retained out of the moneys paid into court by William Oliver on account of the purchase in the partition proceedings and paid over to him to compensate him for his damages so sustained.

From this decree Lansing appeals, claiming that the appellee, William Oliver, has mistaken his remedy in that he has a remedy at law in replevin or for damages, that the court is without jurisdiction in the matter of retaining from the purchase-money an amount sufficient to compensate William Oliver for his alleged damages, and that the property so taken is not real estate, or appurtenant to the realty, but is personal property, the title to which did not pass by virtue of the sale in partition, and that he is owner of an undivided one-half interest therein.

As to the contention of Lansing that the court is without jurisdiction to determine the rights of the parties in this proceeding, but that William Oliver has his remedy at law either by replevin or by a suit for damages, we would say that, if any of the property removed by Lansing was a part of the real estate, the title thereto passed to said William Oliver by the sale, and, his petition being filed in the original partition suit, it was incumbent upon the court to protect him in his rights, to see that he received all that he paid for, to put him into possession thereof, and, if, between the time title passed and the deed was delivered and sole possession received thereunder, any injury occurred to the property by reason of the malfeasance of Lansing, it was the duty of the lower court to withhold from him a sufficient amount of the purchase-money then in its hands to compensate the purchaser for such damages.

We can not sustain the holding of the lower court that the subscription of certain citizens of Lincoln of part of the money which went to build and equip this theatre would create an estoppel as between the parties to this proceeding. Such question could only arise were such

subscribers in court, and until they are, no question of estoppel, in that respect, can arise.

William Oliver bought nothing but real estate at the partition sale. Although account was properly taken in such proceedings of all both parties expended in a way of erecting and equipping such theatre, nothing but real estate was ordered sold, and nothing but real estate would pass by such sale. It remains, then, to determine whether any of the property taken by appellant therefrom was a part of the realty, such as title thereto would pass to the purchaser at such sale, and, further, whether any of the articles which remained were personal property, and the rights of the parties thereto.

It is claimed that all of these articles are fixtures, either by actual or constructive annexation to the realty. It is easy to define a fixture, but often difficult to determine what particular article may fall within such definition. Decisions of courts are in conflict. It is unnecessary to cite any, holding either with, or contrary to, the rule already laid down by this court as early as the case of *Freeman v. Lynch*, 8 Nebr., 192. The rule there stated seems eminently sound, and will be adhered to by this court.

It is urged by counsel that principles of law must change with the times, and that modern progress demands that the law—those rules of law, ancient almost as our language, which define clearly real and personal property—should be so modified as to permit litigants to make almost any imaginable article real property, if it be connected with what is termed a "going concern," that is, as we understand it, some enterprise which is being carried on as a whole, and with some particular object in view. While fully alive to modern thought and progress, we can not deem it wise or expedient, in administering justice, to so modify the common law as to depart from the ancient landmarks which have been followed by the ablest jurists of the Anglo-Saxon race throughout the centuries. Whether this theatre was a

"going concern" or not, is unimportant, so far as the question of determining whether these articles were or were not realty. Some of the articles contained therein, and some of those removed, the court below was justified in holding to be real property, although the evidence may have been conflicting as respects most of them. The court was warranted in finding that the stage appointments, such as scenery etc., were fixtures, there being evidence to the effect that they had been built and fitted specially for this building, and, so far as their nature permitted, had been affixed to the realty. The same is true as to the opera chairs, the evidence sustaining the court in holding that they had been built on a plan and specially adapted to this particular building, and affixed thereto by screws. But we can conceive of no rule of the common law which would justify a court in holding that a piano, a desk and its chair, carpets, curtains, a baggage-truck, a step-ladder, a centre-table or a settee, under the evidence, were real property, although they may have been bought by the parties with the intention that they should remain permanently in this building, and be used in connection with it, until worn out and unfitted for service.

A portion of the property taken from the building by Lansing, as well as a part that was not removed, was unquestionably personalty, and did not pass to William Oliver under his purchase, and as to such personalty Lansing was entitled to have partition.

There being no question of estoppel, and the evidence not sustaining the findings of the lower court as to some of the property in this case, the decree is therefore reversed, and the court is directed to determine from the evidence already of record and such as may hereafter be adduced, if any, what articles in controversy are fixtures and what are personal property, according to the principles laid down by this court in said case of *Freeman v. Lynch, supra,* and to adjust the rights of the parties according to their interest. Henry Oliver having

filed a disclaimer, alleging that William Oliver is the owner of the property, such accounting should be between said Oliver and Lansing. We do not doubt the ability of the learned judge of the lower court to determine the question of what articles are real and what are personal property, the matter of estoppel being eliminated from the case, and therefore do not deem it essential to give further directions in the matter. The lower court has the power, and it is its duty, if any of the articles removed by Lansing were real property, to determine the damage done, and to repay said William Oliver out of the purchase-money the amount thereof.

For value of or damaged personal property, no compensation can be had out of the purchase-money. As to such articles, an accounting should be had in all respects as if no other action than the suit of Lansing for partition and for an accounting had been commenced.

For the foregoing reasons the decree is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FARMERS & MERCHANTS BANK OF HOLSTEIN ET AL. V. GERMAN NATIONAL BANK OF LINCOLN.

FILED NOVEMBER 9, 1899. No. 10,699.

1. Appointment of Receiver: NOTICE OF APPLICATION: WAIVER. Notice of an application for the appointment of a receiver is required to be given at least five days before the proposed hearing. The party adverse to the application may waive the statutory notice, and will be held to have done so, when he has appeared and resisted the application entirely upon other grounds.

2. ———: ———: ———. When proper notice has been given, or the parties interested have voluntarily appeared, the court may appoint as receiver a suitable person other than the one proposed or named by the plaintiff or applicant, without the giving formal notice of such proposed action to the parties.

3. **Receiver**: APPLICATION: VERIFICATION: WAIVER. The application or petition for a receiver should be verified by the applicant. But verification is not essential to jurisdiction, and the verification may be waived.

4. **Review**: REMANDING CAUSE: PROCEEDINGS BELOW. When a cause is remanded by this court with directions as to further proceedings, the court below has no power to do anything but carry out the directions thus given it.

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

Capps & Stevens and *F. A. Boehmer*, for plaintiffs in error.

Lamb & Adams, contra.

NORVAL, J.

This cause was before us on a former occasion. See *German Nat. Bank v. Farmers & Merchants Bank*, 54 Nebr., 593. The suit was to enforce the constitutional liability of the stockholders of the Farmers & Merchants Bank. When the cause was here before no receiver had been appointed to make the collections, and disburse the moneys to the creditors of the defunct bank. After the reversal of the judgment, the district court appointed Elmer B. Stephenson receiver to collect from the several stockholders of the defendant corporation the several amounts respectively assessed and decreed against each of them. The Farmers & Merchants Bank and the stockholders have severally prosecuted this error proceeding.

The point first made is that the receiver was appointed without notice to the defendants, and therefore such appointment is void. The statute requiring the giving of notice of an application for a receiver is mandatory, and an appointment made without such notice, in the absence or without the consent of the party affected thereby, is invalid. See Code of Civil Procedure, sec. 274; *Johnson v. Powers*, 21 Nebr., 292. But the requirements of the statute in regard to notice may be waived, and

should be so regarded where the parties have appeared in court, and resisted the application for receiver on grounds other than the want of proper notice. The object of the statute relative to the giving of notice was to afford the parties interested an opportunity to resist the application, and when there has been a voluntary appearance without notice the purpose of the statute is accomplished, and the giving of the statutory notice is waived unless the want of notice is at the time urged as a reason why a receiver should not be appointed. In the case at bar, five days' notice in writing was given the defendants of the time and place when the plaintiff would apply to the court for the appointment of a receiver, and such notice also proposed William A. Green as the receiver, and gave the names of his proposed sureties, as well as the name of the proposed surety for the plaintiff, in all respects as required by said section 267 of said Code. The defendants appeared and resisted the appointment, without making any objection that due and legal notice had not been given. It is true after the hearing was had, the court did not appoint the person named in the notice, but, on its own motion, designated Elmer B. Stephenson as receiver. Legal notice of the application for a receiver having been given, and the defendants having appeared and being at the time in court, jurisdiction was acquired, and having once attached, the court had undoubted power and right to appoint some person other than the one named or suggested by the plaintiff without any additional, other, or future notice.

It is also urged that the appointment was without jurisdiction and void, as no petition verified by the applicant was presented to the court for its action. The facts making the appointment of a receiver necessary were disclosed by the original petition filed by the plaintiff in the cause which was properly verified, but a receiver was not asked therein. An unverified motion was filed praying a receiver be appointed. When the cause was previously before us, it was pointed out in the opin-

ion that a receiver should be appointed. In conformity with such opinion and the mandate issued in pursuance thereof, the trial court took the action it did. The motion and original petition in the cause should be considered together; and it appearing therefrom that the appointment of a receiver was indispensable to a proper determination of the litigation and a preservation of the rights of the parties, it can not be successfully asserted that the application was insufficient to confer jurisdiction. The statute requires that the application for a receiver shall be verified by the applicant, but it cannot be doubted that verification may be waived by the other party. Verification was not essential to jurisdiction. See *Ellison v. Tallon*, 2 Nebr., 14; *Dorrington v. Meyer*, 8 Nebr., 211. The omission to verify the motion or application was therefore waived by the failure to make objection on that ground.

Complaint is made that the order appointing a receiver is not sustained by any evidence. No evidence was necessary, as the case was of such a nature that the appointment of a receiver was an indispensable necessity, as pointed out in the former opinion herein, and the cause was reversed and remanded to the court below "for modification of the decree, and such further proceedings as we have hereinbefore indicated, and as may be necessary to insure the proper relief herein." In appointing the receiver, the district court merely complied with the requirements of the said opinion and the mandate issued in the cause. The court below could not do anything but carry out the directions contained in the opinion and mandate. It required no evidence to authorize it to act. The law of the case was settled in the former appeal and was conclusive upon the court below, as well as upon this court on a new appeal. The order from which this proceeding was prosecuted is right and will be

AFFIRMED.

LUCINDA BRADY, ADMINISTRATRIX, v. CHICAGO, SAINT PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

FILED NOVEMBER 9, 1899. No. 10,749.

1. **Personal Injuries:** CONTRIBUTORY NEGLIGENCE. Where contributory negligence was the proximate cause of personal injury, there can be no recovery of damages.
2. **Negligence:** CONFLICTING EVIDENCE: REVIEW. Where there is no conflict in the evidence, and but one reasonable inference can be drawn from the facts, the question of negligence is for the court.

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

Robertson, Wigton & Whitham, for plaintiff in error.

John B. Barnes, Thomas Wilson and *L. K. Luse, contra.*

NORVAL, J.

At the January term, 1897, a judgment in favor of the administratrix was reversed and the cause remanded to the district court for further proceedings. See *Chicago, St. P., M. & O. R. Co. v. Brady,* 51 Nebr., 758. On the second trial a verdict in favor of the defendant was returned in response to a peremptory direction of the trial court. This proceeding was instituted by the plaintiff to obtain the reversal of the judgment entered thereon.

James Brady, on December 5, 1891, was run over and killed by one of defendant's trains in the city of Norfolk. This action was instituted by the administratrix of his estate to recover damages for his death. The only question presented is whether, under the evidence, the court erred in directing a verdict for the defendant. We do not think it did. The record discloses that the deceased and his son, on the afternoon of the date named, were engaged in hauling hay, and, while crossing the track of the defendant, the accident occurred; that after the wagon loaded with hay had crossed the track, the de-

ceased either jumped or fell off the wagon and was run over by one of defendant's passenger trains; that deceased for a distance of several hundred feet had an unobstructed view of the railroad track and approaching train, but did not stop, but crossed without stopping to look or to listen for the train. This constituted contributory negligence such as to prevent a recovery. See *Omaha & R. V. R. Co. v. Talbot*, 48 Nebr., 627; *Guthrie v. Missouri P. R. Co.*, 51 Nebr., 746; *Chicago, B. & Q. R. Co. v. Pollard*, 53 Nebr., 730. The evidence adduced established beyond controversy that the railroad company was not guilty of negligence, and that the engineer, as soon as he discovered the danger, put on the air brakes, and reversed his engine; in fact, did everything within his power to avoid the accident. Under the circumstances it was not error to direct a verdict for the defendant.

AFFIRMED.

SOPHIA L. BENNETT, ADMINISTRATRIX, ET AL. V. CHARLES C. MCDONALD.

FILED NOVEMBER 9, 1899. No. 10,422.

1. **Assignments of Error.** Alleged errors must be specifically assigned in a petition in error, or they will not be reviewed.

2. ———: RULINGS ON EVIDENCE. An assignment in a petition in error that the court erred in sustaining an objection to a question of a certain number, found on a page of a designated number, is sufficiently specific to present the ruling for review.

3. **Objection to Testimony.** An objection to testimony on the ground that it is "incompetent, irrelevant, and immaterial" is sufficiently definite and specific.

4. **Insolvency:** CONVEYANCE BY DEBTOR. An insolvent debtor may, if necessary, convey all his property to one creditor in payment of a just debt, although it may defeat the collection of other claims.

5. **Examination of Witness.** Questions propounded to a witness must not assume the existence of a fact not proven in the cause.

6. **Assignments of Error:** RULINGS ON EVIDENCE. An assignment in a petition in error that "the court erred in overruling the objections of plaintiff in error to each of the following questions," giving the number of the question and the page of the record where found, is sufficiently specific to entitle the party to have the same reviewed.

7. **Conversion:** MEASURE OF COMPENSATION. In an action for conversion, the fair market value of the property at the time and place where appropriated, with interest, is the measure of compensation.

8. **Hearsay Testimony.** A witness should not be permitted to give hearsay testimony.

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

Hall & McCulloch, for plaintiff in error.

W. W. Morsman, contra.

NORVAL, J.

At the September term, 1897, an opinion was filed in this cause, reversing the judgment of the district court of Douglas county. See *Bennett v. McDonald*, 52 Nebr., 278. During the pendency of the error proceeding, the principal defendant, George A. Bennett, died, and an order was entered in this court reviving the cause in the name of Sophia L. Bennett, as administratrix of his estate. A second trial has been had in the court below, in which the defendants were again successful, and they have again brought the record here upon numerous assignments of error.

George A. Bennett was sheriff of Douglas county, and, in his official capacity, levied upon property claimed by Charles C. McDonald a certain writ of attachment issued out of the district court of said county, in a cause therein pending, wherein Charles L. Chaffee was plaintiff and one W. L. Irish was defendant. Irish had owned the chattels seized under the attachment writ, and, while such owner, executed to McDonald two bills of sale conveying the

property. The latter instituted this action for conversion against the sheriff and the sureties upon his official bond. The bills of sale are assailed as being fraudulent and void as to the creditors of Irish. The validity of such transfers was the principal issue in the cause.

The assignments of error first argued in the brief of defendants below relate to the rulings of the trial court upon the admission and rejection of testimony. Of those assignments in the petition in error, it is contended by counsel for plaintiffs that they are too indefinite to require any notice to be taken thereof. Consideration will be first given to this contention. The first assignment in the petition in error—and the others are like unto it—is in this language: "The court erred in sustaining the objection made by the defendant in error to each of the following questions, to-wit: (*a*) Question number 1655, as found on page 189; (*b*) question number 1711, as found on page 196." The argument of counsel is that this assignment is not sufficiently specific, because it does not of itself "afford the least idea of what the alleged erroneous ruling is, and seems to have been framed upon the theory that it is sufficient to state where, in the record, this court can, by its own diligence, find the erroneous ruling." *Redman v. Voss*, 46 Nebr., 512, and *Phœnix Ins. Co. v. King*, 54 Nebr., 630, are brought forward to support the contention of counsel. In the first of these cases the assignment was "that the court erred in admitting irrelevant, immaterial and incompetent testimony"; and in the other case the assignment read, "The court erred in rejecting and refusing evidence offered on behalf of plaintiff in error, as appears at record, pages 209, 209½, 210, 211, 212, 216, 216½, 217, 220, 223, 224, 230, 238, 239, 240, 241, 243." Both assignments were held to be insufficient and too indefinite. But neither of these decisions would justify us in holding bad the assignment of error in the case at bar. In neither of the cases mentioned did the assignment convey the least idea or impression of the ruling relied upon for reversal, while here the assign-

ment challenges the attention of the court to the ruling made on a specified, numbered question found on a specified page. The assignment is as specific and certain as though the identical question had been copied into the petition in error, and does not leave in doubt or uncertainty the ruling of which complaint is made, as was the case in *Redman v. Voss*. The uniform holdings of this court require that alleged errors be specifically assigned in the petition in error, and the assignment assailed in this case, measured by that rule, is not bad; but it is urged that the assignment does not designate the page of the record where the question referred to in the assignment may be found. This is hypercritical. The number of the page mentioned in the assignment unquestionably refers to the page of the record in the cause, as that alone is before us to review. In the bill of exceptions the questions propounded to witnesses are numbered progressively, commencing with 1, and the pages are likewise numbered. To hold the assignment in question bad would be the adoption of a rule of practice entirely too technical, and which would not assist in the proper administration of justice.

Many of the objections interposed by the defendants to questions propounded to witnesses by opposing counsel were made on the ground that the testimony was irrelevant, incompetent and immaterial. It is urged that these objections were too general, in that they did not specify the particular grounds upon which the court was requested to exclude the answer to the questions. This contention is not well taken. See *First Nat. Bank v. Carson*, 30 Nebr., 104.

Question 1653, on page 189 of the bill of exceptions, referred to in the first assignment of error, was put to the plaintiff on cross-examination, and was as follows: "You don't know of any that weren't incumbered. Now then, in view of that fact, do you still say to the jury that you did not know that the effect of the transfers that were being made to you and to Mrs. McDonald would be

to prevent the other creditors of W. L. Irish from obtaining their money?" There was sustained an objection that the question was too immaterial. The ruling was entirely proper. Had McDonald known that the transfer in question had the effect to prevent the other creditors of the vendor from collecting their debt, it would not have invalidated the sales, if they were made in good faith and for a sufficient consideration. If McDonald was in fact a creditor of Irish at the time the transfers were made, he had the undoubted right to secure his claims or receive property in payment thereof, even though other creditors might be thereby prevented from obtaining their money. See *Jones v. Loree*, 37 Nebr., 816; *Brown v. Williams*, 34 Nebr., 376; *Landauer v. Mack*, 39 Nebr., 8; *Hunt v. Huffman*, 41 Nebr., 249. The question was objectionable because it assumed the existence of a fact not proven, as there had been introduced no evidence to show that any transfers of property had been made to Mrs. McDonald.

Question 1711, at page 196 of the bill of exceptions, which was also propounded on cross-examination of plaintiff, reads thus: "You may explain to the jury how it is that you have all of these notes, whether paid or unpaid; all of these receipts, whether yours or Mrs. McDonald's; all of these particular papers that pertain or relate to this deal between you and Mrs. Irish, and you have been unable to produce any other papers pertaining to any other matters in that business which I asked you about yesterday." An objection was sustained to the question, and the witness did not make answer. We are unable to discover that the ruling was erroneous. The question assumed the existence of a fact not proven, namely, that the witness interrogated had failed to produce papers which he had been requested to bring into court. If the witness omitted to produce a single paper counsel for plaintiff has not pointed the same out, and our own efforts have not enabled us to locate it.

We pass to a consideration of matters embraced in the

second assignment in the petition in error. Of this assignment counsel for plaintiff asserts that it is too general to require attention. The assignment assails the "sustaining" of the objections of plaintiff in error to each of the following questions, to-wit: (*a*) Question number 100, as found on page 15; (*b*) question number 102, as found on page 16; (*c*) question number 103, as found on page 16; (*d*) question number 104, as found on page 16; (*e*) question number 115, as found on page 18; (*f*) question number 116, as found on page 18; (*g*) question number 125, as found on page 19; (*h*) question number 130, as found on page 20. If the assignment were directed generally against a group of rulings on objections to questions, it would be bad (*Nye & Schneider Co. v. Snyder*, 56 Nebr., 754); but the assignment is to each objection to the several questions designated therein. It is in effect a separate and distinct assignment as to each ruling indicated, and is sufficiently specific to require an examination thereof by this court. We shall not attempt an examination of all the rulings challenged by the second assignment, but those only possessing the most merit.

Charles C. McDonald, the plaintiff below, while testifying in his own behalf, stated that he had an inventory taken of the stock of goods, recently, before the date of the bills of sale, by one Conroy, which inventory was produced and identified; that goods to the amount of $216 were therefore sold, and the remaining goods were levied upon by the sheriff. This question was then propounded to McDonald by his counsel: "State what were your instructions to Mr. Conroy at the time of taking the inventory, with reference to the price at which he should invoice the different items." The defendant objected to the question as immaterial and irrelevant, which objection the court overruled, and McDonald answered: "At cost price; that is, wholesale cost price." The instructions given by plaintiff below to Conroy as to the taking of the invoice were quite immaterial and irrelevant, and

did not tend to establish whether McDonald bought the goods in good faith. The question and answer may have prejudiced the cause of the defendants, in that the jury may have inferred therefrom that the sale was a *bona fide* one. Evidence of the taking of the invoice and prices at which the articles were appraised would have been pertinent and proper, but not so as to the directions given by plaintiff as to the mode of making the invoice.

Question 130, as put to McDonald by his counsel, asked the witness to state the fair, reasonable market value of the goods attached by the sheriff belonging to the stock on May 5, 1893, and at the place where the goods were. The defendants' objections, taken on the grounds of incompetency, immateriality and irrelevancy, the court overruled, and the witness answered: "I consider $2,581.78 would be a fair valuation." Thereupon the defendants moved that the answer be stricken out of the record, because not responsive, which request was denied. This motion should have been sustained, and the overruling thereof was manifest error. It was the fair value of the property the witness was asked to state, and not what he considered it worth. He may have, for reasons personal to himself, considered the property double the value it was actually worth in the market. But a reversal can not be predicated on this error, since the defendants were not prejudiced by the ruling in question. They introduced no evidence on the question of value, and the appraisement of the property made by the sheriff was introduced and read to the jury without objection, which placed the value of the goods seized at $3,195.37—a sum greater than was awarded the plaintiff by the jury. This appraisement was competent evidence of value. See *Maul v. Drexel*, 55 Nebr., 446. The defendants having introduced no evidence in conflict therewith, the ruling now under consideration could not have prejudiced the defendants.

The third and fourth assignments of error also relate to the rulings of the court below on the admission of

testimony. The following, among others, were the questions propounded to Mr. McDonald on his redirect examination:

"Q. 1195. You stated, on cross-examination, that you did not want to buy the property named in the small bill of sale. Just give to the jury an explanation of that. Just relate the circumstances and conversation between you and Mr. Irish.

"Mr. McCulloch: We object to what Mr. Irish said, as incompetent.

"The Court: You may proceed. The defendant excepts.

"A. But he insisted on my taking the balance; he did not want to be bothered with it; he wanted to sell the whole thing. I finally agreed to take it at the price we agreed upon.

"Q. 1347. At the time you transferred this note to M. E. McDonald,—this $200 note, dated June 10, 1887,—what, if any, agreement was made between M. E. McDonald and Mr. Irish with reference to that note of June 10, 1887?

"A. When that was assigned to her?

"Q. 1348. Yes, sir.

"A. There was an agreement between—

"By Mr. McCulloch: Q. 1349. Was that agreement in writing?

"A. No, sir.

"Q. 1351. Go ahead.

"A. It was an agreement made—

"Mr. McCulloch: We object to that, as incompetent, and not proper evidence in the case.

"The Court: He may answer the question. Defendant excepts.

"A. There was an agreement made between her and Mr. Irish that he should have the use of the $2,000 for one year without the interest, and he was to have my services for a year, with the consideration of one-third of the interest—one-third of the profits of the business.

"Q. 1436. What did you say to Mr. Irish was erroneous in settlement.

The defendant's objection on the ground of incompetency was overruled, an exception was noted to the ruling, and the witness answered: "I told him it was wrong, and that it would make a difference in the profits."

"Q. 1456. Well, now, after calling his attention to these items, what, if anything, did he say?

"Mr. McCulloch: Objected to, as incompetent.

"The Court: He may answer. Defendant excepts.

"A. He said he would look it up, and make it right.

"Q. 1506. You may state what was said between yourself and Mr. Irish at the time of that settlement with reference to the error you have just spoken about. Give the substance of the conversation.

"Mr. McCulloch: Objected to, as incompetent and immaterial and irrelevant."

The objection was overruled, an exception was taken, and the witness answered the question.

Each of the foregoing rulings of the court is assigned as error. Counsel for plaintiff insist that the objections to the question were too general to be available at this time. This contention is overruled, for the reason stated in disposing of the first assignment of error. We are all agreed that more than one of the questions copied above were incompetent, as calling upon the witness to give testimony of a hearsay character, not admissible under the rules for the admission of testimony. The testimony elicited by the questions was of a prejudicial nature, and should have been excluded. As the judgment must be reversed for the errors already indicated, we will not consider the numerous other assignments of error.

REVERSED.

IDA L. SNYDER V. PETER LAPP ET AL.

IDA L. SNYDER V. B. F. NORRIS & CO.

FILED NOVEMBER 9, 1899. No. 8,985.

1. **Transcript for Review**: AUTHENTICATION: JURISDICTION. The appellate jurisdiction of the supreme court depends upon the filing with the clerk of a duly authenticated transcript of the proceedings of the district court containing the judgment or final order sought to be reversed.

2. ———: ———: DISMISSAL. In the absence of such certificate, the court is without authority to pronounce judgment.

ERROR from the district court of Cass county. Tried below before RAMSEY, J. *Dismissed.*

A. N. Sullivan and *S. M. Chapman*, for plaintiffs in error.

Allen Beeson, Jesse L. Root and *Flower, Smith & Musgrave, contra.*

SULLIVAN, J.

It is a doctrine established by numerous decisions that the appellate jurisdiction of this court depends upon the filing with the clerk of a duly authenticated transcript of the proceedings of the district court, containing the judgment or final order sought to be reviewed. See *Moore v. Waterman*, 40 Nebr., 498; *McDonald v. Grabow*, 46 Nebr., 406; *Otis v. Butters*, 46 Nebr., 492; *Einspahr v. Exchange Nat. Bank*, 49 Nebr., 557; *Bailey v. Eastman*, 54 Nebr., 416. In this case there is no certificate of any kind attached to the papers before us. We are, therefore, without authority to do anything except to enter an order dismissing the petition in error. A judgment, should we assume to pronounce one, would be void. The petition in error is

DISMISSED.

PHILIP DUNN V. HARRIET BOZARTH ET AL.

FILED NOVEMBER 9, 1899. No. 8,984.

1. **Trial:** RECEPTION OF EVIDENCE. The reception of evidence tendered by the defendant after a decision against him on a demurrer to plaintiff's evidence is not error.

2. ———: AMENDMENT OF ANSWER: NEW DEFENSE. It is within the discretion of the court to permit a defendant, during the course of the trial, to amend his answer so as to present a new defense.

3. ———: ———: ———: CONTINUANCE. In such case, the plaintiff, if not prepared to meet the new issue, may have a continuance of the cause, upon such terms as the court may deem just.

4. ———: ———. On facts set forth in the opinion, *held* that an amendment to the answer was properly made, and became part of the record in the case.

5. **Rules of Trial Court:** JUDICIAL NOTICE: REVIEW. This court will not take judicial notice of the rules of practice of the district court. To be considered, such rules must be made a part of the record.

6. **Pleading:** INCONSISTENT DEFENSES: ELECTION: WAIVER. Where an amended answer presents inconsistent defenses, the appropriate remedy is to require defendant to elect upon which defense he will proceed. If there be no motion to require an election, the objection that inconsistent defenses are presented will be waived.

7. **Husband and Wife:** FRAUDULENT CONVEYANCES. A husband may transfer property to his wife in payment of a debt due her, provided it is not done with intent to hinder, delay or defraud his creditors; and even though he be guilty of fraud in the matter, such transfer will be valid, if the wife was ignorant of, or did not participate in, the fraudulent purpose of her husband.

8. ———: WIFE'S CLAIM AGAINST HUSBAND: ENFORCEMENT. A wife may enforce her just claims against her husband on the same terms, except as to the *quantum* of proof, as other creditors. In such case she must show that the debt was genuine, that her purpose was honest, and that she acted in good faith in obtaining payment.

9. ———: CREDITORS OF HUSBAND: RIGHTS OF WIFE: ESTOPPEL. Where credit was not obtained on the faith of property conveyed by an insolvent husband to his wife, there is, in an action by a creditor, no basis for an estoppel against her assertion of ownership of such property.

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

J. E. Cobbey and *G. M. Johnston*, for plaintiff in error.

George A. Murphy, contra.

SULLIVAN, J.

This action, in substance a creditors' bill, was brought by Philip Dunn against the defendants in error to annul a conveyance alleged to be fraudulent as to creditors, and to subject the property conveyed to the lien of plaintiff's judgment against John C. Bozarth. The district court found generally in favor of the defendants, and rendered a decree dismissing the petition. Among the errors assigned are some relating to questions of practice, which have been so frequently decided that we think it sufficient to say here that they have been considered and overruled.

The events in which this litigation had its origin may be sketched as follows: The Bozarths, who are husband and wife, formerly lived in Illinois. In 1878 Mrs. Bozarth received from her father's estate $3,000, which was turned over to her husband, and mixed with his funds. In 1883 they removed to Nebraska, and settled in Gage county. The same year the land, which is the subject of this suit, was bought by Bozarth and W. H. Tichnor. The title was taken in the name of the purchasers, but there was at the time an arrangement to the effect that Mrs. Bozarth, who protested against the investment, should be paid, from the proceeds of a resale, the money previously advanced to her husband, or else be given a deed to the property. In 1885 Mrs. Bozarth received $1,000 from the estate of a deceased brother, and in 1890 she received $4,500 from the sale of a farm in Illinois. Both of these sums were turned over to Mr. Bozarth, and used by him in his business. In July, 1893, Tichnor con-

veyed his interest in the land here in question to John C. Bozarth, who, on the 28th of the same month, transferred the title to his wife. In August, 1892, Tichnor purchased for himself and Bozarth a ranch in Kansas which was incumbered by mortgages to the amount of $9,000. These mortgages, among which was one for $2,000 in favor of the plaintiff, Philip Dunn, became, by the terms of the deed of conveyance, a personal charge against the purchasers. Out of this transaction came eventually a deficiency judgment, which is the basis of this suit. The petition filed by the plaintiff in this action is, except in one particular, in the usual form. The answer denies the material averments of the petition, and alleges that Mrs. Bozarth was the equitable owner of the property from the time of its purchase in 1883, and that the legal title thereto was held by Bozarth in trust for her.

On the trial of the issues raised by the pleadings there was a demurrer to plaintiff's evidence, on the ground that it was insufficient to warrant a decree in his favor. The court overruled the demurrer, and then, over objection, permitted the defendants to introduce their proofs. This ruling is the subject of complaint, but we do not hesitate to approve it. If it be doubtful whether the plaintiff is, on his own showing, entitled to succeed in the action, we see no good reason why the defendant may not, without risking a forfeiture, submit the question to the court before presenting his defense. The practice of challenging, by demurrer, the legal efficiency of the plaintiff's evidence tends to shorten trials, and to avoid unnecessary expense. In the interest of the public, as well as of the litigants, it ought to be encouraged rather than repressed. See 2 Thompson, Trials, sec. 2270.

During the progress of the trial the defendants asked leave to amend their answers to show "that monies arising from the separate estate of Harriet Bozarth, subsequent to the purchase of the land, was used by John C. Bozarth, her co-defendant and husband, and that it was repaid in the transfer of the property in controversy to

her in the year 1893, in addition to the consideration originally paid out of her separate estate and put in said land." The application to amend was resisted on the ground that the proposed amendment was inconsistent with the claim that Mrs. Bozarth was the equitable owner of the property. The court overruled the objection, sustained the application, and offered to postpone the trial so that plaintiff might prepare to meet the new issue. The offer to allow a continuance was not accepted; and the trial proceeded with the understanding that the amendment to the answer should be reduced to writing and filed at the noon recess. It is now asserted by the plaintiff that the answer was never actually amended, and that he, therefore, continued to try the case on the assumption that defendants had determined to proceed upon the theory that Mrs. Bozarth was the original owner of the land, and not on the theory that she had acquired it by purchase from her husband. It seems the amendment was prepared pursuant to the direction of the court, but was not at any time during the trial physically attached to the answer. The evidence, however, tends to show that it was placed with the answer among the files, and the court evidently found that to be the fact, for it afterwards directed the amendment to be made a part of the record. It is now contended that, under the rules governing procedure in the first district, the defendants are, by their conduct, precluded from relying on the amendment. The rules are not in the record. We do not take judicial notice of their existence, and consequently can not consider them. While the amendment was, of course, irregularly made, we can not say, under the circumstances, that the court erred in ordering it to be brought into the record as part of the answer. We see nothing to indicate that the cause was actually tried by the parties on different theories, and we think counsel for the plaintiff could, without any extraordinary diligence or alertness, have discovered the attitude of the court and the trend of the trial. They did not

trouble themselves to make any inquiry in regard to the amendment, and did not, by any specific objection to the introduction of evidence, or in any other manner, suggest to the court the idea that it was proceeding on a false assumption, and trying an abandoned issue. The court apparently found that, if there was any misunderstanding in regard to the condition of the pleadings, the fault was in a large measure chargeable to the plaintiff; and, with this view of the matter we are entirely satisfied. There was no reversible error in allowing the amendment, nor in the subsequent rulings in relation thereto. Conceding that the amended answer presented inconsistent defenses, the appropriate remedy was a motion to require an election between the two. The court did not compel the plaintiff to go to trial on both issues.

The finding in favor of the defendants on the merits is, we think, supported by sufficient evidence. The testimony clearly establishes the fact that Bozarth was indebted to his wife, and the conclusion is justified that the debt was satisfied by the transfer to her of the land in controversy. In other words, the court was warranted in finding that the transaction was a sale, and not a gift. This being so, the conveyance was valid as against Bozarth's creditors, unless the parties intended thereby to hinder, delay or defraud such creditors in the collection of their claims. There was direct and positive evidence that there was no such purpose. Some circumstances, it is true, tend to show that Bozarth was endeavoring to place his property beyond the reach of Dunn's judgment, but there is no very cogent proof that Mrs. Bozarth participated in, or knew of, her husband's design. There was ample ground for the conclusion that she received the property with the honest purpose of protecting herself. A wife may enforce her just claims against her husband on the same terms as other creditors. She must, of course, show affirmatively the genuineness of the debt due to her and the good faith of the transaction by which payment is obtained; but that being done, her rights are

not different from those of ordinary creditors. See *Cleghorn v. Obernalte*, 53 Nebr., 687.

A further contention of the plaintiff is that Mrs. Bozarth is estopped from asserting her claim, because her husband obtained credit on the faith of his ownership of the land. To this argument two answers may be made: First, Bozarth was the legal and equitable owner of the property, and we assume that the trial court so found; second, the evidence shows conclusively that Dunn never extended credit to Bozarth on any basis. The judgment is right, and is

AFFIRMED.

LINCOLN LAND COMPANY V. PHELPS COUNTY.

FILED NOVEMBER 9, 1899. No. 9,006.

1. **Taxation**: ASSESSMENT OF PROPERTY. In counties under the township system of government, an individual assessment of property must bear a just relation to the assessed value of all other property in the town; and if it does so, it will not be disturbed.

2. ———: ———: CORRECTIONS. The county board, in counties under township organization, is authorized to correct individual assessments only where the town board, having jurisdiction, has, upon proper application to it, refused to grant the relief demanded.

3. ———: ———: BOARD OF EQUALIZATION. In counties under township organization, the supervisors, sitting as a board of equalization, possess no greater authority to redress individual grievances than that possessed by the town board.

4. **Opinion Evidence.** Triers of fact are not generally bound by opinion evidence of value, even when it is not met by opposing proof.

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

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

A. J. Shafer and *S. A. Dravo, contra.*

SULLIVAN, J.

The Lincoln Land Company was the owner, in 1896, of 528 lots in the city of Holdrege. These lots were assessed for taxation at an average value of $43.79. The company, deeming the assessment unfair, presented its grievance to the town board of equalization, which, after a full hearing, refused to grant any redress. The complaint was then brought before the county board, sitting as a board of equalization. Evidence was there taken touching the correctness of the assessment, and an order made reducing the value of the company's property, for the purposes of taxation, to eighty-five per cent of the value fixed thereon by the assessor. A judgment of the district court affirming this order is the matter complained of in the petition in error.

It appears from the record that the assessors of Phelps county agreed among themselves to make the 1896 assessment on the basis of one-fifth the actual value of the property assessed. It likewise appears that the assessor for the town of Holdrege, in the performance of his duty, adhered to this arrangement, and, in the exercise of his best judgment, fixed values accordingly. His testimony is in part as follows:

"Q. In assessing property in Holdrege, Mr. Gainsforth, you may state whether you have not given the real estate and vacant lots a uniform valuation.

"A. I tried to as far as possible.

"Q. State whether or not you discriminated against non-resident lot owners.

"Mr. Morlan: The Lincoln Land Company claims that the lots owned by the Lincoln Land Company are assessed higher than improved real estate in said city and county, land in said county and personal property in said county, but does not claim that the assessor discriminated against the Lincoln Land Company in favor of any other lot owners owning vacant lots in the city of Holdrege or the first or second additions thereto.

"Q. You may state whether in assessing the vacant property you placed a fair valuation thereon.

"A. I tried to as best I could from what information I could find as to what the lots were held at. I inquired in the west and north and south and center of town about the prices of these lots. I was informed that a certain man in the second addition offered $1,000 for three lots and the Lincoln Land Company would not sell them, and I was informed that they were offered $650 for a back lot in the center of town and would not take it.

"Q. State whether or not the assessment of the vacant lots is in fair proportion to the improved lots.

"A. I suppose so."

Other witnesses testified in regard to the value of the complainant's lots, their estimates ranging all the way from $45 to $150. There was considerable evidence tending to show that the assessed value of the company's property was excessive in comparison with the assessed value of property generally in Phelps county. But there was no proof whatever that the assessed valuation of the lots in question did not bear a just relation to the assessed valuation of other property in the town of Holdrege. There were in the city of Holdrege 793 vacant lots, and the average value thereof, as fixed by the assessor, was $46.34. It may be that all property in the town was valued too high. It may be that the assessor's opinion of real estate values was influenced too much by a buoyant and optimistic temperament; but it can not be said that the company was aggrieved within the meaning of section 62 of the revenue act (Compiled Statutes, 1899, ch. 77, art. 1), unless the valuation of its property was disproportionate to the valuation of other property in the particular assessment district. The annual June meeting of the town board is held, as the statute expresses it, "for the purpose of reviewing the assessment of property of said town." The power conferred is to "review the assessment and correct the same as shall appear to them just." In other words, the authority is to

equalize individual assessments within the territorial jurisdiction of the board. By section 70 of the revenue law (Compiled Statutes, 1899, ch. 77, art. 1) the county board, sitting as a board of equalization, is authorized to adjust assessments so that the aggregate valuation of the property in each assessment district shall bear a just relation to the aggregate valuation of all the property in the county. Power is also given to adjust individual assessments, but it is expressly declared that such power shall not be exercised in counties under township organization until the party considering himself aggrieved shall have made an unsuccessful effort to secure redress from the town board. Clearly, then, the county board of a county under the township system of government is authorized to correct an individual assessment only where the town board, having jurisdiction of the matter, has, upon proper application, refused to grant relief. The authority of the county board in such case is only commensurate with that of the town board. Since there is in the record no substantial proof that the assessment of the Lincoln Land Company's lots does not bear a just relation to the assessed value of all other property in the town of Holdrege, the judgment of the district court is right and must be affirmed. If the aggregate valuation of all the property in the town was too high, the remedy was not by an application for the reduction of individual assessments.

While these considerations dispose of the case, it may be well enough to add that we have not overlooked the contention of counsel that the county board was not justified in finding that the assessor's estimate of the company's lots was only fifteen per cent too high. The assessor was chosen by the electors of his town with reference to his peculiar qualifications to perform well the duties of his office. He acted in good faith, under the sanction of an official oath, with knowledge of the situation and surroundings of the property, and his assessment, therefore, should not be disturbed except for

good and weighty reasons. It should not be set aside merely because some partisan witnesses differed with him in their estimates of values. The members of the board were authorized, in reaching a conclusion, to take into account their own general knowledge of the subject. The generally accepted doctrine of the courts is that triers of fact are not conclusively bound by opinion evidence of value even, when it is not met by opposing proof. See *Head v. Hargrave*, 105 U. S., 45; *Johnson v. Chicago, B. & N. R. Co.*, 37 Minn., 519; *McReynolds v. Burlington & O. R. Co.*, 106 Ill., 152; *Murdock v. Sumner*, 22 Pick. [Mass.], 156; *Walbridge v. Barrett*, 76 N. W. Rep. [Mich.], 973; *Nebraska Loan & Building Ass'n v. Marshall*, 51 Nebr., 534. The judgment of the district court is

AFFIRMED.

THOMAS F. SEAL, EXECUTOR, V. FARMERS & MERCHANTS INSURANCE COMPANY.

FILED NOVEMBER 9, 1899. No. 9,005.

1. **Insurance**: FAILURE TO DISCLOSE EXISTENCE OF LIENS. When an application for an insurance policy is oral and no inquiry is made as to the character and condition of the title to the property to be insured, a failure to disclose the existence of incumbrances will not, in the absence of fraud, avoid the policy.

2. ———: MISSTATEMENT IN APPLICATION. A misstatement, in an application for a policy of insurance, of a material fact, inducing the acceptance of the risk, will avoid the policy.

3. ———: ———: INCUMBRANCES. A misrepresentation as to the amount of incumbrance upon property sought to be insured, where the policy is conditioned that it will be void if the property be mortgaged or otherwise incumbered without notice to, and consent of, the company indorsed thereon, will, in the absence of a waiver, avoid the policy.

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

A. W. Scott, for plaintiff in error.

References: *Billings v. German Ins. Co.*, 34 Nebr., 502; *Preston Nat. Bank v. Michigan Mutual Fire Ins. Co.*, 73 N. W. Rep. [Mich.], 815; *Harding v. Norwich Union Fire Ins. Co.*, 71 N. W. Rep. [S. Dak.], 755; *Home Fire Ins. Co. v. Phelps*, 51 Nebr., 623; *Bellevue Roller Mill Co. v. London & Liverpool Fire Ins. Co.*, 39 Pac. Rep. [Idaho], 196; *Hartford Fire Ins. Co. v. Josey*, 25 S. W. Rep. [Tex.], 685; *Bergeron v. Pamlico Ins. & Banking Co.*, 15 S. E. Rep. [N. Car.], 883; *Slobodisky v. Phenix Ins. Co.*, 52 Nebr., 395; *Home Fire Ins. Co. v. Fallon*, 45 Nebr., 556; *Fitchner v. Fidelity Mutual Fire Ass'n*, 72 N. W. Rep. [Ia.], 530; *Phœnix Ins. Co. v. Ward*, 26 S. W. Rep. [Tex.], 763; *Hanover Fire Ins. Co. v. Bohn*, 48 Nebr., 743; *Ætna Ins. Co. v. Simmons*, 49 Nebr., 811; *Kettenbach v. Omaha Life Ass'n*, 49 Nebr., 842.

Halleck F. Rose and *Wellington H. England, contra:*

A breach of the policy stipulation against incumbrances was shown conclusively and without contradiction, and on this ground the direction of a verdict for the company should be upheld. See *Johansen v. Home Fire Ins. Co.*, 54 Nebr., 548; *Byers v. Farmers Ins. Co.*, 35 O. St., 606; *Hutchins v. Cleveland Mutual Ins. Co.*, 11 O. St., 477; *Hayward v. New England Mutual Fire Ins. Co.*, 10 Cush. [Mass.], 444; *Brown v. People's Mutual Ins. Co.*, 11 Cush. [Mass.], 280; *Jacobs v. Eagle Mutual Fire Ins. Co.*, 7 Allen [Mass.], 132; *Falis v. Conway Mutual Fire Ins. Co.*, 7 Allen [Mass.], 46; *Indiana Ins. Co. v. Brehm*, 88 Ind., 578; *Stevens v. Queen Ins. Co.*, 21 Ins. L. J. [Wis.], 443.

The grounds of forfeiture were not known to the company when the policy was issued; and proof of waiver was not sufficient to warrant a submission of the cause to the jury. See *German Ins. Co. v. Heiduk*, 30 Nebr., 288; *Home Fire Ins. Co. v. Wood*, 50 Nebr., 381; *Hughes v. Insurance Co. of North America*, 40 Nebr., 626; *Slobodisky v. Phenix Ins. Co.*, 52 Nebr., 395; *Farmers & Merchants Ins. Co. v. Graham*, 50 Nebr., 818.

SULLIVAN, J.

This was an action by Lydia G. Seal against the Farmers & Merchants Insurance Company to recover on a fire policy. The jury, in obedience to a peremptory instruction, found the issues in favor of the defendant, and a motion for a new trial having been denied, judgment was rendered on the verdict. The insured property, a dwelling-house in the city of Lincoln, was, at the date of the policy, owned by Harriet A. Coffman, and incumbered by a first mortgage in favor of the plaintiff for $2,300, and by a second mortgage in favor of J. H. McMurtry for $2,200. W. B. Seal, the plaintiff's agent, was engaged in the business of loaning money on real estate, and was in the habit of applying to the defendant's agent, B. W. Richards, for insurance to protect his loans. On July 19, 1894, Seal called on Richards, and made a verbal application for a policy on the Coffman property. What then transpired pertinent to the question here considered, is shown by the following testimony of Richards:

"Q. What inquiry did you make about incumbrance and what did Mr. Seal state to you about incumbrance?

"A. Why, I asked Mr. Seal this question, as I do invariably, for the amount of incumbrance upon the property, and he said it was $2,300. I think I asked him who the policy should be made payable to, and he said to Lydia G. Seal and J. H. McMurtry."

This testimony is not disputed. Neither is it claimed that there was any disclosure of the $2,200 mortgage, or that the company knew of its existence before the loss occurred. The policy provides that "if the property above mentioned, or any part thereof, be, or shall hereafter become, mortgaged or otherwise incumbered, * * * without notice to, and consent of, this company indorsed hereon, then and in every such case this policy shall be void." It is shown conclusively that E. A. Becker, the secretary and examiner of the company, was influenced to accept the risk, and issue the policy by the

representation that the incumbrance on the property was $2,300. He testified that, under the rules of the company, the risk would have been declined had the actual amount of the incumbrance been disclosed. What is commonly known as the "loss payable clause" is as follows: "Notice accepted of an incumbrance of $2,300 on premises herein described. Loss, if any, under this policy first payable to Lydia G. Seal, mortgagee, as her interest may appear. After the interest of Lydia G. Seal as mortgagee has been satisfied, loss, if any, payable to Jas. H. McMurtry, or assigns, mortgagee, as his interest may appear." The plaintiff contends that this clause advised the company that both she and McMurtry had mortgage liens on the property, and that, therefore, the representation in regard to the incumbrance should be construed as having reference to, and covering only the plaintiff's mortgage. We are not able to accept this view of the matter. The policy was issued at the instance of W. B. Seal, and the quoted testimony gives no indication, we think, that he intended to convey to the insurer the idea that the incumbrance mentioned was owned exclusively by his principal. The just interpretation is that the sum named was intended to cover all liens to which the property was subject. As there was nothing said about the amount of either mortgage, the natural inference would be that the aggregate of both liens was $2,300. There is nothing to show that the misstatement with respect to the incumbrance was fraudulently made, and we assume that it was the result of an honest mistake on the part of Mr. Seal. The question then is whether, under the conceded facts, the misrepresentation rendered the contract void. It has been held that when the application is oral, and no inquiry is made as to the character or condition of the title, mere silence will not avoid the policy. See *Insurance Co. of North America v. Bachler*, 44 Nebr., 549; *Hanover Fire Ins. Co. v. Bohn*, 48 Nebr., 743; *Slobodisky v. Phenix Ins. Co.*, 53 Nebr., 816. But we know of no case holding that the misstatement of a material fact, inducing the ac-

ceptance of the risk, will not vitiate the contract. When the insurer makes inquiry about facts material to the risk, he is justified in acting on the assumption that the information imparted by the applicant for insurance is correct. He is entitled to know whether the property to be insured is incumbered, and if so, to what extent, so that he may act intelligently in determining whether he will accept or decline the risk. The representations of the applicant become the basis of insurance, and if they be false, touching matters material to the risk, the contract obtained through their influence can not be enforced; and it is, in such case, quite immaterial whether the misstatement resulted from bad faith or from accident or ignorance. See *Davenport v. New England Ins. Co.*, 6 Cush. [Mass.], 340; *Hayward v. New England Mutual Fire Ins. Co.*, 10 Cush. [Mass.], 444; *Brown v. People's Mutual Ins. Co.*, 11 Cush. [Mass.], 280; *Jacobs v. Eagle Mutual Fire Ins. Co.*, 7 Allen [Mass.], 132; *Anderson v. Fitzgerald*, 4 H. L. Cas. [Eng.], 484; *Byers v. Farmers Ins. Co.*, 35 O. St., 606; *Ryan v. Springfield F. & M. Ins. Co.*, 46 Wis., 671; *Glade v. Germania Fire Ins. Co.*, 56 Ia., 400.

Our conclusion is that the company was induced to issue the policy in suit by the false representation as to a material fact connected with the subject-matter of the contract; that the condition against undisclosed liens was broken, and that the district court was, therefore, right in directing a verdict for the defendant. Since this conclusion leads to an affirmance of the judgment, other questions discussed by counsel need not be considered. The judgment is

AFFIRMED.

OMAHA BOTTLING COMPANY V. MICHAEL THEILER, JR.

FILED NOVEMBER 9, 1899. No. 9,011.

1. **Pleading:** AMENDMENT AFTER VERDICT: NEGLIGENCE. In an action for an injury resulting from alleged negligence of the defendant in failing to furnish suitable and safe machinery and appliances,

it is improper, after verdict, to permit plaintiff to amend his petition by alleging a distinct actionable wrong, unless the essential facts of the amendment were fairly contested at the trial and submitted to the jury under proper instructions.

2. ———: ———: INSTRUCTIONS. A defendant is entitled to have the jury instructed that the plaintiff must establish his case by a preponderance of the proof, and he cannot be deprived of this right by an amendment of the petition after trial and verdict.

3. **Infants:** RISKS OF EMPLOYMENT. Infants, like adults, assume the ordinary risks of the service in which they engage.

4. ———: ———: WARNING OF DANGER. But an infant engaging in a hazardous employment is entitled to warning of dangers which, on account of youth and inexperience, he does not fully comprehend.

5. **Master and Servant:** INJURY TO INFANT: LIABILITY OF EMPLOYER. A master is liable to an infant who has been injured in his service in consequence of being exposed to a danger which, on account of his youth and want of experience, he did not fully understand and appreciate.

6. ———: ———: ———. But if the infant, from the length and character of his previous service, was familiar with the dangers of the employment, he can not recover.

7. ———: MACHINERY AND APPLIANCES: NEGLIGENCE. It is not negligence for a master, in the conduct of his business, to use such machinery and appliances as are in common and general use.

8. ———: ———: PERSONAL INJURIES. And if a servant, conscious of the risks and dangers incident to a business conducted with such machinery and appliances, sustains an injury, he can not recover therefor.

9. ———: RISKS OF EMPLOYMENT. A servant who, from the length or character of previous service or experience, may be presumed to know the ordinary hazards attending the proper conduct of a certain business, is not entitled, as an absolute right, to the same or similar notice of dangers incident to the employment as if he were ignorant of, or inexperienced in, the particular work.

10. ———: PERSONAL INJURIES: RECOVERY BY SERVANT. Evidence examined and found not to sustain the verdict.

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

See opinion for statement of the case.

Albert S. Ritchie, for plaintiff in error:

Plaintiff, after verdict, was erroneously permitted to amend his petition in matter of substance. See *Louisville, N. A. & C. R. Co. v. Renicker*, 35 N. E. Rep. [Ind.], 1047; *Omaha & R. V. R. Co. v. Wright*, 47 Nebr., 886; *Dillon v. Starin*, 4 Nebr., 881; *Omaha Consolidated Vinegar Co. v. Burns*, 44 Nebr., 21; *Traver v. Shaefle*, 33 Nebr., 531; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Nebr., 90; *Anderson v. Oscamp*, 35 N. E. Rep. [Ind.], 707; *Newman v. Perrill*, 73 Ind., 153; *Bigelow v. Danielsons*, 78 N. W. Rep. [Wis.], 601; *McCarthy v. Mulgrew*, 77 N. W. Rep. [Ia.], 527; *Taylor v. Johnson*, 113 Ind., 164; *Reed v. Browning*, 130 Ind., 575; *McMillen v. Terrell*, 23 Ind., 163; *Lee v. Smart*, 45 Nebr., 318; *Lehman v. Van Nostrand*, 42 N. E. Rep. [Mass.], 1125; *Omaha S. R. Co. v. Leigh*, 49 Nebr., 782; *Kilpatrick v. Richardson*, 40 Nebr., 478.

The rule that a servant assumes the risks of his employment applies to a minor, and a minor's want of knowledge of danger, when relied upon, must be alleged and proved. See *Herold v. Pfister*, 66 N. W. Rep. [Wis.], 355; *Ciriack v. Merchants Woolen Co.*, 146 Mass., 182; *McGinnis v. Canada Southern Bridge Co.*, 49 Mich., 466; *DeGraff v. New York C. & H. R. R. Co.*, 76 N. Y., 132; *Buckley v. Gutta Percha & Rubber Mfg. Co.*, 113 N. Y., 540; *Stewart v. Patrick*, 30 N. E. Rep. [Ind.], 814; *Atlas Engine Works v. Randall*, 100 Ind., 293; *Pittsburgh, C. & S. L. R. Co. v. Adams*, 105 Ind., 151; *Hickey v. Taaffe*, 105 N. Y., 26; *Sjogren v. Hall*, 53 Mich., 274; *Anderson v. Morrison*, 22 Minn., 274; *Fones v. Phillips*, 39 Ark., 17; *Pratt v. Prouty*, 153 Mass., 334.

Defendant exercised ordinary care in adapting the machine. It was like those generally used by others engaged in the same business, and therefore defendant is not liable in damages for plaintiff's injury. See *Northern Central R. Co. v. Husson*, 101 Pa. St., 1; *Iron-Ship Building Works v. Nuttall*, 119 Pa. St., 149; *Titus v. Bradford, B. & K. R. Co.*, 136 Pa. St., 618; *Washington & G. R. Co. v.*

McDade, 135 U. S., 574; *"The Maharajah,"* 40 Fed. Rep., 784; *Lafflin v. Buffalo & S. W. R. Co.*, 106 N. Y., 136; *Georgia P. R. Co. v. Propst*, 83 Ala., 526; *Kelly v. Southern M. R. Co.*, 28 Minn., 99; *Louisville & N. R. Co. v. Hall*, 87 Ala., 722; *Kolsti v. Minneapolis & S. L. R. Co.*, 32 Minn., 134; *Michigan C. R. Co. v. Coleman*, 28 Mich., 448; *Daley v. Armstrong Printing Co.*, 152 Mass., 581; *Dingley v. Star Knitting Co.*, 134 N. Y., 555; *Goodnow v. Walpole Emery Mills*, 146 Mass., 261; *Bohn v. Chicago, R. I. & P. R. Co.*, 106 Mo., 429; *Ross v. Pearson Cordage Co.*, 41 N. E. Rep. [Mass.], 284; *Schroeder v. Michigan Car Co.*, 56 Mich., 132.

Failure to furnish a cover, shield or safer device is not negligence. See *Mackin v. Alaska Refrigerator Co.*, 58 N. W. Rep. [Mich.], 999; *Iron-Ship Building Works v. Nuttall*, 119 Pa. St., 149; *Ciriack v. Merchants Woolen Co.*, 146 Mass., 182; *Casey v. Chicago, St. P., M. & O. R. Co.*, 62 N. W. Rep. [Wis.], 624; *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y., 520; *Levy v. Bigelow*, 34 N. E. Rep. [Ind.], 13; *Carroll v. Williston*, 44 Minn., 287; *Graver v. Christian*, 36 Minn., 414; *Missouri P. R. Co. v. Lewis*, 24 Nebr., 848.

Where there is evidence tending to support the theory of a party, the case should be submitted on his theory as well as upon that of his opponent. See *Shroeder v. Flint & P. M. R. Co.*, 61 N. W. Rep. [Mich.], 667; *Wildey v. Crane*, 69 Mich., 17; *Miller v. Miller*, 97 Mich., 151; *Babbitt v. Bumpus*, 73 Mich., 331.

T. J. Mahoney, contra:

There was no error in permitting the amendment. See *Missouri P. R. Co. v. Baxter*, 42 Nebr., 793; *Hedges v. Roach*, 16 Nebr., 676; *Catron v. Shepherd*, 8 Nebr., 318; *Evarts v. Smucker*, 19 Nebr., 43; *Homan v. Steele*, 18 Nebr., 652; *Brown v. Rogers*, 20 Nebr., 547; *Roberts v. Taylor*, 19 Nebr., 189; *McKeighan v. Hopkins*, 19 Nebr., 34; *Carmichael v. Dolen*, 25 Nebr., 338; *Klosterman v. Olcott*, 25 Nebr., 390; *Anglo-American Land, Mortgage & Agency Co. v. Brohman*, 33 Nebr., 409; *Omaha & R. V. R. Co. v. Moschel*, 38 Nebr., 281.

SULLIVAN, J.

Michael Theiler, a minor, brought this action in the district court to recover damages of the Omaha Bottling Company on account of an injury to his right eye resulting from the explosion of a bottle filled with carbonated cider. The plaintiff, when injured, was in the service of the defendant, a corporation engaged in the business of manufacturing soda water, mineral waters, "patent cider," and other aerated beverages. He was about twenty years of age at the time of the accident, and had worked for the company in its bottling department during the greater portion of the five preceding years. In 1894 he had charge and supervision of the business for nearly nine months. In 1895, after being out of defendant's service for a short time, he was employed as an ordinary hand, and was injured while bottling cider charged with carbonic acid gas under a pressure of eighty pounds to the square inch. In the original petition it was alleged as negligence that the defendant had failed to provide a suitable screen for the bottles which were being filled at the time of the explosion. After the verdict was returned the following amendment was added by leave of court: "That at said time plaintiff was inexperienced in the work of bottling said drink, and was uninstructed therein; that he was at said time using the appliances furnished by defendant in obedience to the requirements of defendant, and did not know, or have means of knowledge, of any danger in using said appliances, but believed the same reasonably safe, though as a matter of fact they were not, as defendant well knew." The action of the court in admitting this amendment by the postern gate was unwarranted and can not be sustained. The case was submitted to the jury on the theory that the failure of the defendant to furnish the plaintiff with a proper screen for the cider bottles might, under the circumstances disclosed at the trial, constitute actionable negligence. The jury were, in sub-

stance, instructed that, unless contributory negligence was shown, they might find for the plaintiff, if the alleged negligence was established by a preponderance of the evidence. Was this instruction correct when considered with reference to the negligence charged in the amendment? Clearly not. The evidence bearing upon the question of contributory negligence was relevant, of course, to the matters stated in the amendment, and must have been considered by the jury in reaching their verdict; but the right to recover was not made to depend upon preponderant proof of any such matters. To make the amended petition the basis of the verdict would be to permit a recovery under instructions declaring, in effect, that all the essential facts of plaintiff's case need not be proved by the greater weight of the evidence. The general rule is that infants, like adults, assume the ordinary risks of the service in which they engage. They are entitled, however, to warning of dangers which, on account of their youth and inexperience, they do not fully comprehend; and if such warning be not given, or if it be inadequate, the master is in fault and must answer for the consequence. But whether the plaintiff in this case, by reason of his youth or lack of experience, was ignorant of the danger to which he was exposed—whether the liability of cider bottles to explode under high pressure was as to him a secret and hidden peril—was for the jury to determine from the evidence, and, in accordance with the general rule, the burden of proving the fact was upon the party asserting it. See *Sullivan v. India Mfg. Co.*, 113 Mass., 396; *Chicago Anderson P. B. Co. v. Reinneiger*, 140 Ill., 334. The court, therefore, was not within the limits of judicial discretion in permitting the petition to be amended, and its order in the premises, being prejudicial to defendant's rights, is sufficient to require a reversal of the judgment.

Having shown that the verdict can not properly rest on the facts introduced into the petition after the trial, we will now inquire whether the material averments of

the original pleading are supported by adequate proof. The evidence shows conclusively that screens for cider bottles were not in general use in factories like that of the defendant; that such bottles were expected to stand a pressure of 100 pounds, and were considered entirely safe at a pressure not exceeding seventy-five pounds. The regular course of the business was to do the work with pressure ranging from forty to sixty pounds. The accident resulting in plaintiff's injury occurred when the gauge indicated a pressure of eighty pounds. This was an extraordinary condition. It was a condition which does not seem to have been anticipated, and one which would not have existed but for the negligence of the person whose duty it was to regulate the pressure. It would seem, therefore, that the proximate cause of the accident, the cause to which Theiler's misfortune is naturally and primarily referable, was the failure to properly regulate the pressure, and not the failure to provide a screen, which under ordinary conditions could serve no useful purpose. The measure of defendant's duty to its servants was the care required by the usual and ordinary usage of the business. The standard of due care is the conduct of the average prudent man. The appliances of the company were those in common and general use. Handled with ordinary care they were not dangerous. This being indisputably established, it follows that the negligence alleged in the original petition is without any foothold whatever in the proof. See *Chicago, R. I. & P. Co. v. Lonergan*, 118 Ill., 41; *Shadford v. Ann Arbor St. R. Co.*, 111 Mich., 390; *Sisco v. Lehigh & H. R. Co.*, 145 N. Y., 296; *Titus v. Bradford, B. & H. R. Co.*, 136 Pa. St., 618, 20 Am. St. Rep., 944; *Hosic v. Chicago, R. I. & P. R. Co.*, 75 Ia., 683; *Hagan v. Chicago, D. & C. C. T. J. R. Co.*, 86 Mich., 615.

There is another reason why the plaintiff is not entitled to recovery. The duty to warn him of latent dangers, if any there were, was not an absolute one. The defendant was only required to do what a prudent mas-

ter naturally would do under like circumstances. See *Thain v. Old Colony R. Co.*, 37 N. E. Rep., 309, 161 Mass., 353; *Bohn Mfg. Co. v. Erickson*, 55 Fed. Rep., 943. The danger that cider bottles would explode while being filled was not, to say the least, one obviously beyond the comprehension of a boy of average intelligence, nineteen or twenty years old, who had worked at the business for years, and had recently been charged with the control and supervision of the bottling department of defendant's establishment. It would, indeed, be an exceptionally prudent and cautious master who would deem it necessary to give cautionary instructions to his servant in such a case. The plaintiff knew how the bottling business was conducted. He knew soda water and mineral water bottles would explode occasionally under an ordinary pressure; and it is scarcely possible that he was ignorant of the fact that cider bottles would also explode under high pressure. That he was ignorant of the hazards of the business we can not believe; and to hold that the defendant should have warned him of such hazards would, in view of the circumstances, be requiring it to conform its conduct to an unreasonable standard of care. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HENRY M. LIBBY V. STATE OF NEBRASKA, EX REL. LOUIS M. DAVIS.

FILED NOVEMBER 9, 1899. No. 10,861.

1. **Road Tax:** POWER OF COUNTY BOARD. By section 77, article 1, chapter 77, Compiled Statutes, 1899, the power conferred on the board of county commissioners to levy a road tax is limited to the levy of such tax for county purposes.

2. ———: COUNTY FUNDS. The money raised by the levy of such tax for county purposes belongs to the county road fund, to be expended under the direction of the county authorities, unless otherwise provided by statute.

3. ———: ———: MUNICIPAL CORPORATIONS. Section 84, article 1, chapter 14, Compiled Statutes, 1899, which provides that the county treasurer "shall pay over, on demand, to the treasurer of any city or village, all money received by him arising from taxes levied belonging to such city or village," is not applicable to moneys arising from the levy of road tax on property situate within the corporate limits of such city or village.

4. ———: ROAD DISTRICTS: MUNICIPAL CORPORATIONS. Incorporated municipalities are road districts within the meaning of section 76 of the road law (Compiled Statutes, 1899, ch. 78), and as such are, except where otherwise provided, entitled to one-half the moneys arising from the road tax levied by the county commissioners upon the property situate within their limits.

5. ———: ———: ———: MANDAMUS. Where it appears that a city of the second class, having less than five thousand inhabitants, has received from the treasurer of the county one-half the moneys collected on the county levy of a road tax on property situate within the limits of such city, an action of mandamus will not lie, on the relation of such city, to compel such county treasurer to pay over the remainder of the moneys so collected.

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

M. B. C. True, for plaintiff in error.

William H. Jennings, contra.

SULLIVAN, J.

The city of Tecumseh is a city of the second class having less than five thousand inhabitants. It is the county seat of Johnson county, which has not yet adopted the township system of government. The controversy now before us for determination is practically between these two municipal bodies. The action was instituted by Louis M. Davis, as treasurer of the city, to obtain a peremptory writ of mandamus commanding the respondent Libby to account for and turn over certain money held by the latter as treasurer of the county. The money

in question is the product of road taxes levied by the county commissioners against property situate within the corporate limits of the city. The trial court decided that all such taxes are city revenue, and gave judgment accordingly. The correctness of this conclusion is the only question raised by the petition in error, or discussed in the briefs of counsel. The authority of the county board to levy a road tax on city property is claimed under section 77 of the revenue act. See Compiled Statutes, 1899, ch. 77, art. 1, sec. 77. The pertinent provisions of the section are here set out: "On the last day of sitting as a board of equalization the county board shall levy the necessary taxes for the current year, including all county, township, city, school district, precinct, village, and other taxes required by law to be certified to the county clerk and levied by the county board; * * * the rate of tax for county purposes shall not exceed one dollar and fifty cents on the hundred dollars valuation, * * * and shall be as follows: * * * In counties not under township organization, for ordinary county revenue, * * * not more than nine mills on the dollar valuation; for roads, not more than five mills on the dollar valuation; for county bridge fund, not more than four mills on the dollar valuation; for county sinking fund, not more than three mills on the dollar valuation, and labor tax as provided in the following section." From the language quoted it is quite clear that the power conferred upon the commissioners to levy a road tax is limited to the levy of such a tax for county purposes. That a tax laid under this power extends to, and is a charge against, all the property in the county, is a conclusion resulting from both legislative and judicial constructions of the statute. The act of March 1, 1883, providing for the organization of cities of the second class having more than 5,000 inhabitants, declares that all the moneys arising from the levy of road tax against property in cities of the class to which the act relates shall be expended only upon the streets of such cities or

within three miles thereof. The case of *State v. Graham*, 16 Nebr., 74, involved the right of the city of Lincoln to road taxes levied against property situate within its borders. The court sustained the city's claim and awarded it the fund in controversy. Now it seems entirely clear, on principle, that money raised by the levy of a tax for county purposes belongs to the county road fund, and is to be expended under the direction of the county authorities, unless some statute otherwise provides. It would be eminently just, of course, to award a city or village the entire road tax paid upon property situate within its limits; but the matter is not to be decided upon equitable considerations, but by seeking out the legislative intent. In support of his contention that the entire fund produced by the tax belongs to the city, the relator refers us to section 84, article 1, chapter 14, Compiled Statutes, 1899, which reads as follows: "The treasurer of the county shall pay over on demand, to the treasurer of any city or village, all money received by him arising from taxes belonging to such city or village, together with all money collected as a tax on dogs from the residents of such corporation, for the use of the general fund therein." This provision of the charter would be applicable and of controlling influence if the money in dispute had arisen "from taxes levied belonging to such city"; but since the levy, according to the plain terms of the revenue law, was made for county purposes, the section is, we think, without relevancy. And such evidently was the view taken by the legislature of 1883, for, while it incorporated *verbatim* the section quoted into the charter of cities of the second class having more than 5,000 inhabitants, it added, in order to effectuate its policy, a further provision directing the payment to such cities of all moneys arising from the levy of road tax on property situate therein. The only authority, so far as we know, for paying any portion of the road tax into the treasury of cities or villages is found in section 76 of the road law. See Compiled Statutes, 1899, ch. 78,

sec. 76. It provides that half the moneys paid by the road districts in discharge of road tax shall constitute a county road fund, to be expended for the general benefit of the county in the improvement of its highways; and that the other half of such moneys shall constitute a district road fund, to be distributed among the road districts in proportion to the amounts paid by them severally into the county treasury. We have been referred to many other provisions supposed to have some bearing upon the question, but our examination of them has been without profit. In an earnest endeavor to discover the will of the lawmaking body, we have followed the learned counsel for respondent into a jungle of enactments, ancient and modern, among which the mind loses itself and can find no way out. The truth of the matter is that no very tangible evidence of the legislative purpose touching the disposition of money like that here in dispute is anywhere discernible. And yet we think there is enough to warrant us in holding that section 76 of the road law is applicable to incorporated municipalities, and that they are to be regarded as road districts within the meaning of that section. It is true that section 53 of the road law, which confers power on county commissioners to divide counties into road districts, expressly excepts incorporated territory from the terms of the grant. But it must be remembered that was done in view of the fact that cities and villages were invested, by other laws, with complete and exclusive jurisdiction over their streets. Municipal corporations, being possessed of ample resources to maintain their own highways, and being charged with the duty of their maintenance, are practically road districts created by the acts under which they were organized. It is, we think, a just and reasonable exposition of section 76 of the road law to hold that the legislature intended thereby to deal with and dispose of the entire product of the road tax. A construction that would leave the portion of the tax collected in

cities and villages undisposed of in the county treasury would be unreasonable and palpably unjust. Our conclusion is that the city of Tecumseh having already received one-half the road tax paid upon property within its limits, the balance belongs to the county road fund of Johnson county. The judgment of the district court is therefore

REVERSED.

WILLIAM J. SWEENIE V. STATE OF NEBRASKA.

FILED NOVEMBER 9, 1899. No. 10,943.

1. **Criminal Law:** WITNESSES: INDORSEMENTS ON INFORMATION. After the trial of a criminal action has commenced, it is error for the court to permit the name of a witness for the state to be indorsed on the information.

2. ———: CONFLICTING INSTRUCTIONS. The mischievous effect of giving an erroneous instruction to the jury is not cured by giving another which correctly states the principle of law involved.

3. **Adultery:** EVIDENCE: PRESUMPTIONS. No presumption of law, either conclusive or rebuttable, arises from the fact that an unmarried man and a married woman had sexual intercourse on one occasion while dwelling together in the acknowledged relation of master and servant.

4. ———: ———: ———. A jury might be authorized, in a proper case, to presume the existence of an adulterous relationship from sporadic acts of sexual commerce.

5. ———. By section 208 of the Criminal Code, it is unlawful for persons not joined together in wedlock to live in a state of adultery, either secretly or openly, whether they profess to live in the marital state or not.

ERROR to the district court for Butler county. Tried below before BATES, J. *Reversed.*

Hastings & Hall and *C. H. Aldrich*, for plaintiff in error.

C. J. Smyth, Attorney General, and *W. D. Oldham, Deputy Attorney General,* for the state.

SULLIVAN, J.

William J. Sweenie was convicted and sentenced under that provision of section 208 of the Criminal Code which makes it unlawful for any unmarried man to "live and cohabit with a married woman in a state of adultery." One of the assignments of error is based on the fact that the court, during the progress of the trial, permitted the prosecuting attorney to indorse on the information the name of Louis Straka, who, being afterwards called as a witness, gave material testimony in behalf of the state. The statute makes it the duty of the public prosecutor to indorse on the information at the time of filing the same the names of the witnesses by whom he expects to prove the crime charged, and it is further declared that "at such time before trial of any case as the court may, by rule or otherwise prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him." By the evident import of the language quoted the authority to indorse the names of witnesses on the information does not extend beyond the commencement of the trial. "There is no hardship in this rule," says MAXWELL, C. J., in *Stevens v. State*, 19 Nebr., 647, "and it is clearly in furtherance of a fair trial, and, being a provision of the statute, it can not be disregarded." Other cases affirming this view are: *Parks v. State*, 20 Nebr., 515; *Gandy v. State*, 24 Nebr., 716; *Miller v. State*, 29 Nebr., 437; *Rauschkolb v. State*, 46 Nebr., 658; *Fager v. State*, 49 Nebr., 439. The reception of Straka's testimony, over defendant's objection, was, therefore, reversible error.

It is conceded that Anna Lissa, with whom it is claimed the alleged crime was committed, lived as a servant in defendant's home during the period in question. This fact, together with the dissolute character of the woman and the testimony of her discarded paramour, tending to show the commission of a single adulterous act, constituted the salient features of the state's

case. Both Sweenie and Mrs. Lissa denied positively that there ever existed any criminal intimacy between them. They also disclosed circumstances indicating the existence of deterrent conditions and the lack of adequate opportunities. The court instructed the jury as follows: "Instruction No. 6. That if the jury find from the evidence, beyond a reasonable doubt, that the defendant and Anna Lissa had sexual intercourse during any portion of the time alleged in the information, then the rule of law is that it is presumed that the defendant and said Anna Lissa had sexual intercourse habitually as long thereafter as she was an inmate of defendant's dwelling-house." It being conceded that the parties lived in the same house, the practical effect of the instruction was to advise the jury to convict if a single act of adultery was proven beyond a reasonable doubt. This was error requiring a reversal of the judgment, notwithstanding the fact that in other paragraphs of the charge, given at the defendant's request, it was stated that habitual intercourse is an essential element in the crime of illicit cohabitation. The paragraph complained of stated a rule of evidence, while those, given at defendant's instance, related to matters of substantive law. The latter had no tendency to cure the error in the former. Besides it is well settled that they could not have had that effect even if they covered the same ground. See *Ballard v. State*, 19 Nebr., 609; *Barr v. State*, 45 Nebr., 458; *Metz v. State*, 46 Nebr., 547. Since the attorney general does not attempt to vindicate the action of the court in giving the instruction quoted, but contends merely that it was harmless when considered in connection with the instructions given at defendant's request, we pass the point without discussion. It may be well enough, however, to remark that a jury would be authorized, in a proper case, to presume the existence of an adulterous relationship, within the meaning of the statute, from sporadic acts of sexual commerce. But what we decide in this behalf, and all we decide, is that no presumption

of law, either conclusive or rebuttable, would arise from the fact that the defendant and Anna Lissa had sexual intercourse on one occasion while they were dwelling together in the acknowledged relation of master and servant.

It is contended by defendant that the statute does not cover cases like the one at bar. We think it does. We think the legislature intended by sections 208 and 209 of the Criminal Code to make it unlawful for persons not joined together in wedlock to live in a state of adultery or fornication, either secretly or openly, and whether they profess to live in the marital state or not. If they cohabit, if they live after the fashion of husband and wife, they are within the letter of the statute, and, likewise, it seems to us, within its spirit. Such seems to be the view taken in *State v. Way*, 5 Nebr., 283, where it is said by GANTT, J., in the course of the opinion: "To cohabit, according to the sense in which the word is used in the statute, means dwelling together as husband and wife, or in sexual intercourse." See, also, Clark, Criminal Law, p. 318; *Carotti v. State*, 42 Miss., 334; *Luster v. State*, 23 Fla., 339; *Commonwealth v. Leindsey*, 10 Mass., 153; *Wright v. Stewart*, 5 Blackf. [Ind.], 126.

It is further contended that the provision of the statute under which the prosecution was instituted is void for uncertainty, since there is no legislative definition of "a state of adultery." The contention is obviously without merit, and is only mentioned here to avoid the inference that it may have been entirely overlooked. The judgment of the district court is reversed, and the cause remanded.

REVERSED AND REMANDED.

AMERICAN BANK OF BEATRICE ET AL. V. LANCELOT HAND.

FILED NOVEMBER 9, 1899. No. 9,045.

1. **Default:** TRIAL: ERRONEOUS RULINGS: REVIEW. Alleged errors in rulings during the trial of a cause, or which are of the sufficiency of the evidence to support the findings and judgment, will not be reviewed in a proceeding in error or appeal by or for a party against whom the judgment was on default.

2. **Joint Assignments of Error.** Joint assignments of error in a petition not good as to all who join must be overruled. See *Levy v. South Omaha Savings Bank*, 57 Nebr., 312, 77 N. W. Rep., 769.

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

Griggs, Rinaker & Bibb and *George A. Murphy*, for plaintiff in error.

Hastings & Sands and *E. O. Kretsinger, contra.*

HARRISON, C. J.

In this action, commenced in the district court of Gage county, in which the plaintiffs in error were defendants, judgment was rendered in favor of the defendant in error for an amount asserted by him, and adjudged by the court, to be his due from the adverse parties. The bank, a plaintiff in error, failed to plead, and the judgment against it was on default. All parties against whom there was judgment, inclusive of the bank, have joined in a petition in error; and, in the argument before this court, the questions raised relate to no matter except alleged errors of occurrence during the trial of the cause, and the sufficiency of the evidence to sustain the findings and judgment, none of which are subject to review in a proceeding in error on behalf of a party against whom the judgment was on default. A consequence of this is the petition in error must be overruled as to the bank, and, not being good as to one who joins

as a party, it fails, and must be overruled as to all. See *Levy v. South Omaha Savings Bank*, 57 Nebr., 312, 77 N. W. Rep., 769, and cases cited therein. That a judgment on default will not be reviewed in relation to the questions herein urged, see *Troup v. Horbach*, 53 Nebr., 795, 74 N. W. Rep., 326; 6 Ency. Pl. & Pr., 223. The judgment is

AFFIRMED.

J. C. KNIGHT ET AL. V. E. E. FINNEY.

FILED NOVEMBER 9, 1899. No. 9,033.

1. **Appeal from County Court:** TRIAL IN DISTRICT COURT: CONFLICTING RULINGS OF JUDGES: REVIEW. Judgment in an action in the county court upon a promissory note was presented to the district court for review by petition in error, in which there were two assignments, one of which raised the question of the sufficiency of the pleadings for the plaintiff in suit to sustain the judgment. In the district of the court to which the cause was removed by petition in error there were several judges of the district court, one of whom heard and sustained the petition in error, reversed the judgment of the county court, and retained the cause for trial in the district court. At a trial of later occurrence another judge presided. The parties had, prior to the trial, stipulated that the trial be upon the pleadings which had been filed in the county court, and the trial so proceeded to verdict for the plaintiff, and a judgment thereon. *Held*, The judgment was not erroneous as a reversal of the ruling of the judge who sustained the petition in error, since another element entered into the consideration which led to the later ruling—that of the evidence.

2. **Note:** SUIT BY INDORSEE: DEFENSES: PLEADING: BURDEN OF PROOF. That for a promissory note in suit by an indorsee there was a lack or want of consideration, the consideration has failed, or that it has been paid prior to its transfer, of any or all of which the indorsee had notice at or prior to the acquirement of title to the paper, or for any other legal reason they exist as equities against the debt of the note in his hands, are defenses, and to be pleaded in the answer for the party defendant, a general denial in the reply to the answer will join the issues, and the burden of proof of such issues is with the defendant.

3. **Pleading and Proof.** Matters pleaded and admitted need no proof.

4. ———: VARIANCE. Variances between allegation and proof which are immaterial or not prejudicial do not call for a reversal of a judgment.

5. **Good Faith of Purchaser of Note:** EVIDENCE. Objections to testimony examined, and *held* without force.

6. **Note:** TITLE OF PURCHASER. A purchaser for value of a negotiable note from an innocent holder thereof acquires the title to it free from equities and defenses which existed against it as between the original parties to the paper. See *Koehler v. Dodge*, 31 Nebr., 328.

7. ———: INDORSEMENT: NOTICE OF DEFENSES. A statement in writing which appeared on the back of a negotiable promissory note (it is quoted in the opinion herewith) *held* not to be notice to purchasers of the note of infirmities of the paper, if any existent.

8. ———: GOOD FAITH OF PURCHASER. Evidence *held* sufficient to sustain the verdict.

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

A. H. Murdock and *Lane & Murdock*, for plaintiffs in error.

Thomas & Nolan, contra.

HARRISON, C. J.

This action was instituted by defendant in error in the county court of Douglas county to recover an amount alleged to be his due as the second indorsee of a promissory note. It was alleged in the petition that the note was executed of date August 1, 1887, due three months after date, and that on or about August 28, 1887, the payee of the note indorsed, sold and delivered it to J. W. Gross, who indorsed, sold and delivered it to the defendant in error. The lack of payment of the note was pleaded, also the amount due, etc. In the answer it was stated that the note in suit had its origin in some real estate transactions to which the plaintiff in error was a party, and as a part of which he executed ten promissory notes in the sum of $30 each, which were, per agreement of the real estate transaction, to accompany the con-

tracts merely to evidence the dates and amounts of payments to be made in compliance with the terms of the contracts, and were to have no separate existence or force; that the $300 note in suit was a renewal of the ten; that there was no consideration for either the ten notes or the one declared upon herein, and further, that the amounts due upon the real estate contracts had been fully paid; that the note sued upon was not transferred before its maturity, nor for value, but was fraudulently put into circulation with a purpose to cheat and defraud the parties who were sued, and that the defendant in error had notice of the infirmities of the note, or that it had been made without consideration, and that the amount, of which it was a mere memorandum, had been paid. It was further pleaded that the real estate contracts and the accompanying notes had been assigned to the Home Investment Company and which had thereby succeeded to all the rights of the payee of said contracts and notes; that the company had agreed to assume all liabilities under the terms and conditions of the contracts of E. E. Finney, the original party payee therein, and that the company was the owner of the note in suit when it was transferred. The reply was a general denial. As the result of a trial in the county court there was judgment for the defendant in error.

It appears that in the county court plaintiffs in error had moved that the Home Investment Company be made a party defendant, and the motion had been denied. An error proceeding was prosecuted to the district court of Douglas county, and in the petition it was set forth:

"1. Said county judge erred in overruling defendants' motion to make the Home Investment Company a party defendant, for the causes alleged in defendants' answer and cross-petition filed in said county court.

"2. That there is error, in that the judgment is not sustained by the pleadings and the note sued upon and filed in said county court, a copy of which is set out in the transcript filed herewith, for the reasons that plaintiffs,

as defendants in the court below, set out in their answer that said note was a part of a real estate contract, which contract had been paid in full, by virtue of which said note was also paid in full; that said note was without consideration; that said note was fraudulently obtained and put into circulation; that said James H. Kenny was not a *bona fide* holder of said note; that said note bears upon its face notice that it is a part of a real estate contract and without consideration; that said allegations are not denied as required by the rules of pleading, and are admitted and proven by the pleadings and records of this cause."

On hearing in the district court the petition in error was sustained, the judgment reversed, and the cause retained for trial. On the after occurrence of which, without further pleading, there was a verdict and judgment for defendant in error.

In an error proceeding to this court, on behalf of the parties defeated in the district court, it is asserted that the judge who heard the matters presented on error from the county court predicated his decision on the insufficiency of the pleadings for the successful party; that another judge who presided during the trial of the cause allowed the trial to proceed upon the same pleadings, and in rendering judgment assumed the attitude of overruling the prior adjudication; that this was error. From the record it appears that prior to the trial in the district court it was stipulated as follows: "It is agreed that the issues herein may be tried upon the pleadings filed in county court herein." The evidence was received, and with the whole case before him the judge who presided at the trial determined that the pleadings were sufficient to support the judgment. This was not error. The parties had agreed that the cause should be tried on the pleadings which had been transferred from the county court, and, after hearing the evidence and with it elemental of his consideration, the trial judge, if he concluded that on the pleadings, evidence and law ap-

plicable the verdict and accordant judgment were proper, might so decide, and do no violence to the prior adjudication of the other judge, which was upon the pleadings alone. See *Kleckner v. Turk*, 45 Nebr., 176.

It is now argued that the pleadings for defendant in error were insufficient; that the reply should necessarily have contained affirmative matter to show him a *bona fide* purchaser of the note. The answer, when fairly construed, alleged of the note in suit want of consideration and payment of the debt which it purported to evidence. There was no fraud or illegality pleaded in the inception of the note. The pleas in the answer were of matters such as must come from the defending parties and not from the plaintiff. A general denial in the reply joined the issues; and the burden of proof was not cast upon the plaintiff. See *Yenney v. Central City Bank*, 44 Nebr., 402; *Crosby v. Ritchey*, 47 Nebr., 925; *Violet v. Rose*, 39 Nebr., 660; *Kelman v. Calhoun*, 43 Nebr., 157; 14 Am. & Eng. Ency. Pl. & Pr., 641; *Haggerty v. Walker*, 21 Nebr., 596.

It is urged that the indorsements of the note, and particularly the one by the payee, were not shown. They were pleaded in both petition and answer, and admitted; hence needed no proof.

It is urged that the court erred in the admission of the testimony of a witness, J. W. Gross, who was the first indorsee of the note and the person from whom it was purchased by defendant in error. The testimony of this witness was on rebuttal on the issue of the *bona fide* character of the purchase and ownership of the paper by the defendant in error, and was entirely competent, material and relevant.

It is argued that there were fatal variances between the note in suit as pleaded and the one introduced in evidence. There were some differences, but none material to the issues, or the existence of which could in the least prejudice the rights of the complainant; moreover, the error, if any in this regard, was in no manner

the subject of notice, objection or exception in the trial court, and is not entitled to consideration here; moreover, the execution of the note sued upon, and all matters and facts in regard to its form, substance and indorsements were pleaded and admitted in the answer, and what was alleged to be a copy of the note and its indorsements was attached to and made a part of the answer. No proof of these things was necessary.

It is claimed there was a statement in writing upon the back of the note which was sufficient to give notice or warning to a prospective purchaser. The written matter referred to was as follows: "This note is secured by a contract on land in Douglas county, Nebraska, described as lots 4, 5, 6, 55, 56, 57, block 11, and lots 1 and 2, 59 and 60, block 1, of Northfield Add. to Omaha." This would serve to inform one who read it, or to lead to a belief, that the note was all the evidence of the debt and the contract but a security, rather than, as is contended for plaintiffs in error, to convey knowledge that the note had no real existence, and was but a part of the contract or a mere memorandum of a stipulation stated in the contract in regard to payments of moneys.

It fully appeared that J. W. Gross was an innocent purchaser and holder of the note, and, if the purchase of the defendant in error from Gross was or had been after the maturity of the note, he took it free of equities and defenses which may have existed between the original parties to it. He took the title of his indorser, that of an innocent purchaser, and was entitled to like protection and rights. The evidence fully sustained the verdict. The judgment is

AFFIRMED.

C. M. HENDERSON & COMPANY v. UNITED STATES NATIONAL BANK.

FILED NOVEMBER 23, 1899. No. 9,054.

Bank Check: PAYMENT: INSUFFICIENCY OF DEPOSIT. A bank will not be obligated to pay a check in a sum greater than the amount to the credit of the drawer in his account with the bank; nor does the check operate a transfer or an assignment of the lesser amount of the account.

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

Cavanagh & Thomas and *Edward P. Pettis,* for plaintiff in error.

W. D. McHugh and *J. C. Cowin, contra.*

HARRISON, C. J.

The plaintiff, also plaintiff in error in this action, commenced in the district court of Douglas county, alleged for cause that one C. E. Wilson, being indebted to it in the sum of $716.22, drew in its favor and delivered to it a check for said amount on the Commercial State Bank of Crawford, this state, which check was deposited for collection with the National Bank of America of Chicago, and by it forwarded to the defendant bank for collection, and by it forwarded to the Crawford Banking Company of Crawford, Nebraska, for collection, and by it collected; that the last mentioned bank drew its check on the defendant bank, payable to the order of M. T. Barlow, cashier of the defendant bank. On the day the check was received by the defendant the Crawford Banking Company had on deposit with the defendant $569.82. The check, when received, was stamped paid. This was in the morning of December 10, 1894, about 9 o'clock. The defendant held two notes of $500 each against the Crawford Banking Company, which, however, were not

due on the date last stated, and during the day, at a time later than the reception and stamping of the check, canceled the mark or stamp of "Paid," and applied the funds of the Crawford Banking Company on deposit with defendant in payment on the unmatured debts of the banking company to defendant. Demand on defendant for payment to plaintiff of the amount of the deposit with defendant in favor of the banking company at the time of the reception of the check was pleaded; also a refusal of such payment. The answer of defendant, after some preliminary statements of which further notice is unnecessary, was as follows: "Admits the indebtedness of Wilson to plaintiff, as therein alleged; admits the execution of the check therein mentioned, and that said check was transmitted to this defendant and by this defendant transmitted to the Crawford Banking Company, as in said amended petition alleged; admits that the said Crawford Banking Company accounted for said collection by inclosing to this defendant a check for $715.52 on this defendant to the order of M. T. Barlow, cashier; that said M. T. Barlow then was and now is the cashier of this defendant, but this defendant denies that at the time said check was received by this defendant the said Crawford Banking Company had any account whatever to its credit with this defendant. This defendant admits that the said check was stamped and marked paid, but denies that the same was stamped and marked paid by this defendant, and alleges that the said check was stamped and marked paid by a clerk, who had no authority whatever to pay said check or bind this defendant in respect thereto, and that the same was placed thereon by mistake of fact and in error, and that the same was not the act of this defendant or binding upon this defendant. This defendant further alleges that during all the times mentioned in the amended petition of the plaintiff herein, and for a long time prior thereto, there prevailed and was in the city of Omaha, where this defendant does business, and throughout the state of Ne-

braska, and in said city of Crawford, and among bankers generally, and there is now among bankers in said city and state and elsewhere, a general custom to credit upon indebtedness, whether due or otherwise, held by a bank the funds in the possession of the bank, the deposit to the credit of a debtor whenever said debtor becomes or is insolvent; that said custom was well known to the parties hereto and said bank of Crawford and all the parties mentioned in the amended petition herein, and that all the transactions named in said amended petition were taken and had with reference to said custom and subject to the same, and with full knowledge thereof and in complete acquiescence therein. Defendant further denies each and every allegation in said petition contained not herein admitted to be true." To this answer there was no reply. A trial resulted in a judgment for defendant.

The plaintiff, in an error proceeding to this court, contends that the check of the Crawford Banking Company on defendant operated an assignment of the amount of the former's deposit with the latter; that, as against the plaintiff's rights, the defendant could not apply the amount of said deposit in payment of the debts of the Crawford Banking Company to defendant not then due; that defendant could not refuse payment to plaintiff of the amount of the deposit, although it was less than the sum for which the check called. It has been decided by this court that "A check drawn on funds in a bank is an appropriation of the amount of the check in favor of the holder thereof,—in effect an assignment of the amount of the check,—and the holder, upon refusal of the bank to pay the same, where such funds have not been drawn out before its presentation, may bring an action thereon in his own name." See *Fonner v. Smith*, 31 Nebr., 107; also, *Columbia Nat. Bank v. German Nat. Bank*, 56 Nebr., 803. And further: "As against the holder of a check against an account of a depositor the bank of deposit may not apply the amount of the account to the payment

of the indebtedness of the depositor to the bank which is not yet due, although the depositor may be insolvent." See *Columbia Nat. Bank v. German Nat. Bank, supra.* But in each of the cases just cited the amount of the deposit to the credit of the drawer of the check exceeded the sum stated in the check. In the case at bar, the amount on deposit was less than the amount of the check; and the check being for a sum greater than stood to the credit of the drawer, the bank was under no obligation to pay the check or to make the partial payment. The check was not operative as an assignment, since the funds were not present to meet it. The bank was not obligated to pay it in whole or in part, and it did not transfer the fund. See *Rouse v. Calvin,* 76 Ill. App., 362; *Bank of Antigo v. Union Trust Co.,* 149 Ill., 343; *Coates v. Preston,* 105 Ill., 470; *Dana v. Third Nat. Bank,* 13 Allen [Mass.], 445; *In the matter of Brown,* 2 Story [U. S.], 512; *Jacobson v. Bank of Commerce,* 66 Ill. App., 470; 3 Am. & Eng. Ency. of Law [2d ed.], 835; *Beauregard v. Knowlton,* 156 Mass., 395. Counsel for plaintiff in error cite us to the decision in the case of *Bromley v. Commercial Nat. Bank of Pennsylvania,* 9 Phila. [Pa.], 522, to sustain their contention. We have examined this decision, but deem the doctrine of the opinions to which we have referred the better and sounder, and supported by superior reasons. The judgment of the trial court is

AFFIRMED.

WILHELM BOLDT ET AL. V. FIRST NATIONAL BANK OF WEST POINT.

FILED NOVEMBER 23, 1899. No. 9,038.

1. **Review:** DISMISSAL. A motion for dismissal of a proceeding to reverse the adjudication in an action by creditors' bill, the decree which determined the amount due the creditor a judgment debt, and annulled conveyances of titles to land as fraudulent,

will not be sustained, for the reason that the debt has, subsequent to the decree, been satisfied and released.

2. **Judgment on Pleadings.** To warrant affirmative relief to a party in a cause submitted upon the pleadings he must be entitled thereto upon the facts therein stated. The question is not upon whom is the burden of proof, but who is to be accorded judgment upon the facts pleaded. See *State v. Lincoln Gas Co.*, 38 Nebr., 33.

3. **Fraudulent Conveyances:** INTENT. The question of fraud or intent accompanying conveyances of title is one of fact.

4. ———: RELATIVES: BURDEN OF PROOF. That conveyances of title among relatives are without consideration does not establish them fraudulent, as a matter of law, in an attack upon them by creditors; it but casts the burden of proof of their *bona fides* upon the parties who desire to sustain it.

5. **Homestead:** PLEADINGS: EVIDENCE. The condition of the pleadings in regard to the homestead character of land *held* such as would have warranted the reception of evidence on the question of homestead right.

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

Fannie O'Linn, for plaintiffs in error.

J. C. Crawford and *E. K. Valentine, contra.*

HARRISON, C. J.

In the petition filed in this suit it was alleged that the bank recovered a judgment for a stated amount in the district court of Cuming county against Gust Will and Wilhelm Boldt, which remained of full force and unsatisfied; that execution for the enforcement of the judgment had been procured to issue, and had been returned by the sheriff of said county wholly unsatisfied; that the parties judgment debtors had no property liable to execution, and were insolvent; that on December 30, 1889, Wilhelm Boldt and Johanna Boldt, his wife, conveyed to their son Rudolph Boldt, who was then a minor, a quarter section of land, specifically described in the pleading, the conveyance being without consideration,

and its purpose the hindering and defrauding the bank and other creditors of Wilhelm Boldt; that on June 16, 1891, Rudolph Boldt, in furtherance of the scheme to defraud the bank and creditors of Wilhelm Boldt, conveyed the title of the land to his mother, Johanna Boldt, and for the conveyance there was no consideration; that on July 8, 1891, Johanna and Wilhelm Boldt, in further pursuance of the fraudulent purposes ascribed to them by the pleading, without any consideration therefor, conveyed the title of the land to Rudolph Boldt; that the several conveyances noticed were of dates prior to the bank's judgment, but subsequent to the existence of the debt upon which the judgment was predicated. The prayer was that the several conveyances be annulled, the land be ordered sold, and the proceeds applied to the satisfaction of the bank's judgment. For the Boldts there was filed an answer, in which it was stated that the land involved in the litigation was acquired from the United States by Wilhelm and Johanna Boldt by virtue of an entry under, and compliance with, the provisions of the homestead act, and that the patent was issued to Wilhelm Boldt November 1, 1873, and was at that time prior thereto, from time of entry and continuously to the date of the last conveyance to Rudolph Boldt, in the possession of, and improved and cultivated by, Wilhelm and Johanna Boldt as their homestead. It was further answered that during the month of April, 1879, and long prior to the time the judgment debt had its inception, and when Wilhelm Boldt was free from debt and he and his wife were in occupancy of the land as a homestead and it was exempt, it was agreed that the title to the property should be conveyed to the wife, to remunerate her for the labor which she performed in and about its acquisition; that the first deed to Rudolph Boldt was executed to in part carry out this agreement, the parties having been advised that a conveyance direct from the husband to the wife would be ineffective; that it was of the arrangement that Rudolph Boldt, the son, would

convey to Johanna, the mother, upon request that he do so; that he was asked to convey the title to her, and did so by the deed of date June 16, 1891. It was further of the answer that the second deed to Rudolph Boldt, the one of date July 8, 1891, was with the consideration that he would furnish support and maintenance to his father and mother during the remainder of their lives, also assume the payment of a mortgage on the land in the principal sum of $1,400. The contract in regard to the matters which we have last stated was in writing, and a copy of it was attached to the answer. There was a specific, also a general, denial of the fraudulent intent alleged in the petition, and it was pleaded affirmatively that all the conveyances drawn into question were executed prior to the note which had evidenced the judgment debt. The answer further contained an admission of the recovery of the judgment, and a general denial of each and every matter stated in the petition which the answer did not admit. The reply contained an admission of all things set forth in the first paragraph of the answer, except the statement that the original entry of the land under the homestead act had been by Wilhelm and Johanna Boldt jointly; as to each other plea of the answer the reply contained a general denial. This admitted the homestead entry by Wilhelm Boldt, the issuance of a patent for the land to him, and his and his wife's continuous possession of the land to the date of the conveyance to Rudolph Boldt. A motion on behalf of the bank for judgment upon the pleadings was sustained, and a decree was rendered, the journal entry of which was as follows: "Now, on this 18th day of February, A. D. 1896, this cause came on to be heard on motion of the plaintiff for judgment upon the petition, answer and reply, and was submitted to the court, on consideration whereof the court finds that the deeds set forth in said petition were made with the intent to hinder, delay and defraud creditors, of all of which said grantees had full knowledge at the time of receiving the

same. The court further finds that said grantees paid no consideration whatever for said deeds. The court also finds that there is due from the defendant Wilhelm Boldt to the plaintiff on the judgment set forth in said petition the sum of $3,061. It is therefore considered by the court that the deed of conveyance from Wilhelm Boldt and Johanna Boldt to Rudolph Boldt, the deed from Rudolph Boldt to Johanna Boldt, the deed from Johanna Boldt and Wilhelm Boldt to Rudolph Boldt, for the southeast quarter of section 25, in township 22 north, of range 6 east of the sixth P. M., in Cuming county, be, and the same are hereby, vacated, set aside, and annulled, and that said land be subjected to the payment of the debt set forth in said petition, and the sheriff of Cuming county is directed to proceed, as upon execution, to sell said land and bring the proceeds thereof into court for the purpose of having the same applied toward the payment of said judgment and costs of suit, taxed at $——."

The cause has been presented to this court for review. Prior to a submission of this case a dismissal of the proceeding was moved for the bank, on the ground that the amount of the judgment debt had been paid subsequent to the decree herein, and the debt judgment released, and the same matter is now argued. That the amount of the judgment against Wilhelm Boldt has been paid, and the judgment discharged since the decree in the present case is not effectual against the further prosecution of this proceeding by the other parties interested, or by all parties, the deeds by whom and to whom were annulled by the decree.

The main contention is that the determination of the trial court, that the bank was entitled to judgment upon the pleadings, was erroneous. It has been established that, where a cause is submitted in the manner this was, solely upon the pleadings, it must appear therefrom that the party seeking and to whom affirmative relief is granted was entitled thereto; and the question presented

is not upon whom is the burden of proof, but, upon the facts pleaded, who should recover judgments. See *State v. Lincoln Gas Co.*, 38 Nebr., 33.

That the conveyances in question were between relatives and alleged to be without consideration, if it be conceded, for the sake of the argument, that the answer pleaded no sufficient consideration, do not, as a matter of law, establish a fraudulent intent as accompanying their executions. The question of fraud is always one of fact; and in the transactions in litigation herein, as developed by the pleadings, the inquiry was one of fact, with the burden of proof cast upon the answering parties. See *Tillaux v. Tillaux*, 47 Pac. Rep. [Cal.], 69; *Smith v. Mason*, 55 Pac. Rep. [Cal.], 143; *Stevens v. Carson*, 30 Nebr., 544. There was sufficient alleged of the homestead character of the property—a portion of it being admitted, and part denied by the reply—to warrant or demand the reception of proof on the subject, notwithstanding there was no allegation of the value. See *Telschow v. House*, 32 S. W. Rep. [Tex.], 153; *Central Kentucky Lunatic Asylum v. Craven*, 32 S. W. Rep. [Ky.], 291; *Gallagher v. Keller*, 23 S. W. Rep. [Tex.], 296; *Mueller v. Conrad*, 52 N. E. Rep. [Ill.], 1031. It follows that the judgment for the bank upon the pleadings was wrong.

REVERSED AND REMANDED.

DEERE, WELLS & COMPANY V. P. F. HODGES ET AL.

FILED NOVEMBER 23, 1899. No. 9,014.

1. **Appeal Bonds:** APPROVAL. The requirement of statute that an appeal undertaking be approved by a county judge is mandatory, and it must be presented for approval within ten days from the rendition of the judgment.

2. **Legal Holidays:** SUNDAYS: COURTS. No court can be opened, nor any judicial business be transacted, on Sunday, or on any legal

holiday, except certain matters specifically designated in the statutes.

3. ——: ——: APPEAL BONDS: APPROVAL. Where the time for furnishing an appeal bond on the tenth day from the date of the judgment expires on a Sunday, ordinarily the approval may be of the following day, or Monday.

4. ——: ——: ——: ——. The approval by a county judge of an appeal bond on a legal holiday, if in the nature of a judicial act, is not within the inhibition of section 38, chapter 19, Compiled Statutes, which provides that "no court can be opened, nor can any judicial business be transacted, on Sunday, or on any legal holiday," and the approval is valid.

5. **Appeal Bonds:** AMENDMENTS. An appeal undertaking must be in double the amount of the judgment and costs. If insufficient in amount, it may be amended.

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

C. S. Rainbolt and *Mockett & Polk,* for plaintiff in error.

Lamb & Adams, contra.

HARRISON, C. J.

On March 7, 1895, an action of replevin was instituted in the county court of Lancaster county to recover the possession of certain articles of personal property. The property was taken under the writ issued, and, on execution and delivery of a bond, was delivered to the plaintiffs. Issues were joined in the county court, and the jury called, and before whom there was a trial, rendered the following verdict: "We, the jury, impaneled and sworn in this cause, find that the right of property and possession of the goods replevied in this cause was, at the time this action was commenced, in the plaintiff, and we assess its damages in the premises at $286.30." In the transcript of the proceedings the foregoing entry is immediately followed by this: "It is therefore considered that the plaintiff recover of the defendants its damages aforesaid, with costs of this suit, taxed at

$103.70." It further appears in the transcript that on April 22, 1895, an appeal bond was filed and approved; that it was in the sum of $100, and signed by Noah Hodges as surety, who was also a defendant in the action, and had answered therein disclaiming any interest except a claim of $5 due him for storage of the property involved in the suit. There is also an entry of date May 6, 1895, from which it appears that objection had been made to the appeal bond, and defendants, on motion, were granted leave to file a new appeal bond, which they did on May 7, 1895. The new bond was signed by a person who was not a party to the suit, and was in the same amount as the former undertaking—$100. After the cause had been transferred to the district court counsel for plaintiffs filed a motion to dismiss the appeal, which read as follows:

"Comes now the plaintiff and moves the court to dismiss the appeal in this cause for the following reasons:

"1. No appeal bond has been filed within ten days from the date of the judgment, as is required by law.

"2. No bond for the amount required by law has been filed.

"3. The court had no authority to file and approve the bond in said case filed on the 7th day of May, 1895.

"4. Noah Hodges, the surety on the bond filed for appeal, is and was a party to the suit."

On hearing, this motion was overruled, and for the plaintiffs there was filed the following: "Comes now the plaintiff and moves the court for an order requiring the defendants to file a good and sufficient appeal bond in the sum of $780, as required by law, for the reason that the bond now on file for $100 is wholly inadequate," which was overruled, as was also an application for a rehearing on the motion. The issues were then made up, a trial ensued, and there was a verdict and judgment for defendants. The plaintiffs have prosecuted an error proceeding to this court.

As we have seen, in the district court there was a mo-

tion to dismiss the appeal, several reasons being assigned why such action should be taken, one of which was that no appeal bond had been filed within ten days of the time of rendition of judgment, and another that what had been filed as an appeal bond was insufficient in amount. In regard to the first ground of the motion which we have stated, the record discloses that what at least purported to be an appeal bond was filed in the county court, and approved of date April 22, 1895. The date of the judgment was April 11, 1895. An undertaking should have been executed and approved by the county judge within ten days from the rendition of the judgment. See Code of Civil Procedure, sec. 1007; Compiled Statutes, ch. 20, sec. 26.

April 21 was the tenth day; but it was Sunday, and was to be excluded. See Code of Civil Procedure, sec. 895. If the tenth day of the time within which an appeal bond must be given falls on a Sunday, it shall be excluded, and the undertaking may be given on the following Monday. See *Monell v. Terwilliger*, 8 Nebr., 360. In the matter of the appeal in the case at bar, the following Monday, April 22, 1895, was a legal holiday, and "No court can be opened, nor can any judicial business be transacted, on Sunday, or on any legal holiday, except—1st. To give instructions to a jury then deliberating on their verdict. 2d. To receive a verdict or discharge a jury. 3d. To exercise the powers of a single magistrate in a criminal proceeding. 4th. To grant or refuse a temporary injunction or restraining power." See Compiled Statutes, ch. 19, sec. 38. The provisions of the statute, that the appeal undertaking be approved by the judge and filed within ten days, were mandatory. See 1 Ency. Pl. & Pr., 1007 and note; *Hier v. Anheuser-Busch Brewing Ass'n*, 52 Nebr., 144. The giving of an appeal bond was a proceeding in the cause (*O'Dea v. Washington County*, 3 Nebr., 118), and its approval may have been an act judicial in its nature, not merely ministerial; but was not a transaction of judicial business such as is prohibited

by the section of the statute we have quoted. See *Spaulding v. Bernhard*, 76 Wis., 368.

It has been determined in this state that an action of mandamus will lie, and the writ issue, to require the approval of an appeal undertaking by a justice of the peace (*State v. Clark*, 24 Nebr., 318), which indicates that the act of approval was viewed as somewhat ministerial in its nature, and subject to control.

The bond was insufficient in amount. The statute requires it to be double the amount of the judgment and costs. See sections of the law hereinbefore cited. It was in the sum of $100. This was not even double the amount of the costs, if we allow the credit of costs paid by the appellant as disclosed by the record; and there should have been an order to amend within a stated time, by a designated date, and, in the event of a noncompliance, that the appeal stand dismissed. For the error indicated the judgment of the district court is reversed, and the cause remanded.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. GERMAN SAVINGS BANK, APPELLANT.

FILED NOVEMBER 23, 1899. No. 10,878.

Appointment of Receiver: INSOLVENCY OF CORPORATION: RES JUDICATA. The order appointing a receiver for the defendant constituted an adjudication that the corporation was insolvent; and no appeal having been taken therefrom, the order was forever afterwards conclusive upon that question against the bank.

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

Joel W. West, for appellant.

Ralph W. Breckenridge, contra.

NORVAL, J.

Thrice this cause, or some phase of it, has made its appearance before this court, and twice opinions have been written upon questions presented for review. See *State v. German Savings Bank*, 50 Nebr., 734; *State v. Fawcett*, 58 Nebr., 371. A brief history of the case will assist in an understanding of the question now presented by the appeal. On July 18, 1896, the attorney general, on behalf of the state, presented a petition to the district court of Douglas county, in pursuance of the provisions of chapter 8 of the Compiled Statutes, entitled "Banks," for the appointment of a receiver to take charge of the assets of the German Savings Bank of Omaha, and to wind up the affairs of the corporation. Notice of the application was accepted by the bank, and, at the time and place fixed for the hearing, the corporation, by its president and cashier, appeared, but did not resist the action sought; and the court being of the opinion that the showing made in the petition or application was sufficient to justify the appointment of a receiver, and no cause having been shown in opposition thereto, Thomas H. McCague was by the court appointed receiver of said bank, who qualified by giving the required bond, and at once entered upon the discharge of the duties of his trust. Subsequently the receiver made a report of the assets, accompanied by his estimate of their value, from which it appeared that they were insufficient to pay the liabilities of the bank. The district court entered an order that an assessment of eighty per cent be made on the subscribers of the amount of their respective subscriptions, and the receiver was directed to institute actions against the stockholders who should make default in the payment of the assessments. The bank moved for a vacation of this order, which motion was denied, and the bank appealed to this court, which resulted in a reversal of the judgment of the district court. See *State v. German Savings Bank*, 50 Nebr., 734. October 29, 1897, the dis-

trict court ordered the sale of certain assets of the bank. The receiver made sale in compliance with said order, and on November 13, 1897, made report thereof to the court; and on the same day a rule was entered to show cause why such report should not be confirmed, a copy of which was duly served upon the bank. On November 18, 1897, the sale was in part confirmed. February 8, 1898, the receiver filed a report exhibiting an account of his receipts and disbursements, and an order was entered that "the court having examined said report, and that the same having been submitted to the German Savings Bank, and said bank having appeared in court by its president, C. J. Karback, two of its directors, George Heimrod and H. J. Meyer, and by its attorney, Joel W. West, Esq., and no objection having been made to said report, the same is hereby approved, and the disbursements therein set forth are ratified, and the items of expense are allowed." In November, 1898, certain creditors of the bank filed applications for an order directing a sale of the remaining assets of the bank in the hands of the receiver, and on January 14, 1899, the district court entered of record an order directing the receiver, at a date named, to sell all the assets belonging to the bank, including its real estate. The bank took exceptions to this last order, and prayed the court to fix the amount of supersedeas bond to be given by the corporation; and the court refused so to do, a proceeding in mandamus was instituted in this court. See *State v. Fawcett*, 58 Nebr., 371. The order of January 14, 1899, directing the sale of the bank assets, is now before us for consideration.

The sole question we are asked to determine is whether the district court had jurisdiction to make the order. It is argued by counsel for the bank that no such power existed until there had been entered a decree in the cause adjudging the insolvency of the corporation, and ordering the affairs to be wound up. It is true the record fails to disclose that there ever has been any specific

formal finding that the German Savings Bank was insolvent; but the orders made in the premises by the district court have, in effect, if not in so many words, adjudicated the insolvency of the corporation. The petition of the attorney general for the appointment of a receiver squarely tendered such issue. It was therein specifically alleged "that the said bank is in fact insolvent and doing an unsafe and unauthorized business, and is jeopardizing the interest of the depositors." At the time the order now assailed was made no pleading had been filed by the bank, or any person, controverting the said averment contained in the petition or application for a receiver, but up to that time the truthfulness of the allegation was admitted by the continued silence of the bank and its officers. The order appointing the receiver herein does substantially determine the question of solvency. We quote from the order the following: "And it appearing to the court that the defendant has accepted service of notice of the hearing upon said application and waived any objection upon its part to the time limited in the former order of the court within which defendant should show cause, if any there be, why the prayer of the petition should not be granted and a receiver appointed, as therein prayed, and said cause having been heard by the court, the defendant, by its president and cashier, being present in open court, being of the opinion that the showing made in the petition herein is sufficient for the appointment of a receiver, and no cause shown why said receiver should not be appointed, it is therefore hereby ordered and adjudged that a receiver be appointed for the defendant; * * * and upon due consideration Thomas H. McCague is hereby appointed receiver of said German Savings Bank" etc. The insolvency of the bank being the ground upon which a receiver was asked in the petition, and the court having found the averments of the petition sufficient, the finding and order of the court were an adjudication that the bank was insolvent. No appeal

was ever taken from that order, and the adjudication is final and conclusive upon that question. It is now too late to review the correctness of that decision, more than one year having elapsed since the order appointing the receiver was made. Suppose a petition for receiver should be presented in a mortgage foreclosure on the ground of the insolvency of the mortgagor and the inadequacy of the property to pay the mortgage, and the court, on the hearing, should find the application sufficient and appoint a receiver, and no appeal is taken from the order, could the mortgagor thereafter assail any order or directions given by the court to the receiver on the ground that his insolvency and the inadequacy of the mortgaged property to pay the debt had not been adjudicated? To state the proposition is to evoke an answer in the negative, for the very obvious reason that those matters were determined and set at rest by the order appointing the receiver. So in the case in hand, the order appointing McCague as receiver of the German Savings Bank determined that the corporation was insolvent, and the question is no longer an open one. The proper time for the bank to have made that defense was before the receiver was appointed. It can not do so now. The question of insolvency having been adjudicated, the court was not without jurisdiction to order the real estate sold. There is nothing in the two previous decisions, heretofore cited, which is inconsistent with the views herein expressed. The order is

AFFIRMED.

ANTON HYDOCK ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 23, 1899. No. 10,742.

1. Contempt: DISOBEDIENCE OF ORDER. One who willfully disobeys and defies a valid restraining order is guilty of contempt of court.

2. ———: PROCEDURE: CRIMINAL LAW. Proceedings in contempt are in their nature criminal, the rules of strict construction applicable to criminal prosecutions obtain therein, and presumptions and intendments will not be indulged to sustain a conviction for contempt of court.

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

H. H. Baldrige and *R. B. Montgomery*, for plaintiffs in error.

C. J. Smyth, Attorney General, and *Thomas & Nolan*, for the state.

NORVAL, J.

Thomas H. Ensor and Anton Hydock, respectively, mayor and policeman of South Omaha, were adjudged guilty of contempt of court upon an information charging them with the violation of a restraining order issued out of the district court of Douglas county, and a fine of $200 was imposed upon each of them. Each has prosecuted a petition in error, to obtain a reversal of the said judgment and sentence. The sole complaint is that the evidence adduced is insufficient to sustain the finding. On April 1, 1899, the registrars of the south ward of the city of South Omaha were engaged in the registration of the electors of said ward. Ed Johnson, who was a resident and elector of the ward, appeared at the place of registration, and, as he had the legal right to do, attempted to act as challenger. Some time in the afternoon of said day said Johnson was forcibly, and against his will, ejected from the place of registration by said Anton Hydock and one Patrick Morrissey, a police captain of said city, and was refused permission to appear before the registrars and challenge persons who presented themselves for registration. Thereupon Johnson obtained from the district court an order restraining Thomas H. Ensor, mayor of South Omaha, John C. Car-

roll, chief of police in said city, Patrick Morrissey, a captain of the police, and said Anton Hydock, a policeman, and all members of the police force of said city, and all persons acting under them, from interfering with Johnson in the exercise of his right as challenger at the registration. This order was served upon Hydock at 5:13 P. M. of said day, upon Morrissey at 5:15, upon Ensor at 6:34 and upon Carroll at 6:57. Almost immediately after the restraining order was served upon Hydock and Morrissey, and before the same was served upon Ensor, Johnson was seized by Hydock and one Aley and taken from the place of registration. They claimed to have arrested Johnson for disturbing the peace, but the evidence fails to disclose any infraction of the law by him. On the other hand, it appears that Johnson merely attempted to go into the room where the registrars were in session at the time he was seized. The evidence fully establishes that Hydock willfully violated and disobeyed the restraining order of the district court, after he had received actual notice of the issuance thereof, and the same had been personally served upon him. Hydock was, therefore, guilty of contempt of court. The proofs as to Ensor are entirely different. He was not present at the session of the registrars when Johnson was ejected from the building, but was more than half a mile distant. The restraining order had not then been served upon him, and there is an entire failure of proof to show that Ensor even knew that a restraining order had been allowed. On the other hand, Ensor testified positively that he was not aware of the granting of the order at the time it was violated by Hydock. After the restraining order had been disobeyed by the latter, Ensor was apprised of the fact and, when the restraining order was served upon him, he was in the act of writing a note to the police officers not to interfere with Mr. Johnson, but to obey and respect the order of the court. We have repeatedly held that proceedings in contempt are in their nature criminal, and no intendments will be in-

dulged to sustain a conviction for contempt of court. See *Hawes v. State*, 46 Nebr., 149; *Wilcox v. State*, 46 Nebr., 402; *O'Chandler v. State*, 46 Nebr., 10; *Zimmerman v. State*, 46 Nebr., 13. It is therefore necessary to establish guilt beyond a reasonable doubt. As to Hydock, the evidence of guilt meets the standard required; but as to Ensor, his guilt is not established beyond a reasonable doubt. The judgment as to Hydock is affirmed, but the judgment against Ensor is reversed for the want of evidence to sustain it.

JUDGMENT ACCORDINGLY.

WILLIAM RICHARDSON V. FRANK THOMPSON, EXECUTOR, ET AL.

FILED NOVEMBER 23, 1899. No. 10,622.

Proceeding in Error: PARTIES: DISMISSAL. All the parties to a joint judgment, or who may be affected by the modification or reversal thereof, must be made parties in this court upon proceeding in error, and a failure to do so is a ground for dismissal, if the objection is seasonably made.

ERROR from the district court of Douglas county. Tried below before SCOTT, J. Heard on motion to dismiss the proceeding in error. *Motion sustained.*

W. T. Nelson and *Rush J. Thomson*, for the motion.

McCabe, McGilton & Rath and *McGilton & Herring*, *contra.*

NORVAL, J.

This is a motion to dismiss the petition in error because, while Boswell R. Wiles and Elizabeth E. Wiles, defendants in the court below, were made defendants in error, no summons in error has been served upon either of them. The suit was instituted in the district

court by Frank Thompson, executor, and Joe R. Lane, administrator with the will annexed of James Thomson, deceased, to foreclose a mortgage executed by Boswell R. and Elizabeth E. Wiles. William Richardson was also made a defendant, who filed a cross-petition praying the foreclosure of a tax-sale certificate upon the mortgaged premises. A general demurrer to the cross-petition was interposed by the plaintiffs, and the cross-petition dismissed. William Richardson prosecuted error to this court, making all the other parties to the suit in the district court defendants in error herein; but no summons in error has been served on either of the Wiles, nor have they made a voluntary appearance in this court.

We have repeatedly held that in an error proceeding all the parties to a joint judgment must be made parties, either plaintiff or defendants in error, and if not, the petition in error will be dismissed when the objection is seasonably made. See *Wolf v. Murphy*, 21 Nebr., 472; *Hendrickson v. Sullivan*, 28 Nebr., 790; *Curten v. Atkinson*, 29 Nebr., 612, 36 Nebr., 110; *Consaul v. Sheldon*, 35 Nebr., 247; *Andres v. Kridler*, 42 Nebr., 784; *Polk v. Covell*, 43 Nebr., 884; *Farney v. Hamilton County*, 54 Nebr., 797. As we understand the doctrine of the cases, it is that all parties to a cause in the trial court who may be affected by the modification or reversal of the judgment must be made parties to the proceeding to review said cause. If one can not be affected by the error proceeding, he need not be made a party, although a party to the record in the court below (*Kuhl v. Pierce County*, 44 Nebr., 584), and this doctrine is abundantly sustained by the authorities.

Hunderlock v. Dundee Mortgage & Trust Investment Co., 88 Ind., 139, was a suit to foreclose a real estate mortgage, the mortgagors and prior mortgagee being made defendants. A decree of foreclosure was entered, a personal judgment was rendered against the mortgagors, and the lien of plaintiff was made junior to the lien of a prior mortgage. Plaintiff appealed, without making the

mortgagors parties to the appeal. On motion of the appellee, the prior incumbrancer, the appeal was dismissed because the mortgagors were not made parties to the appeal, the court holding that all parties to the judgment below affected thereby must be made parties to the appeal, or the appeal will be dismissed when the question is seasonably made upon the omission. To the same effect are *State v. East*, 88 Ind., 602; *Garside v. Wolf*, 135 Ind., 42; Elliott, Appellate Procedure, 138; *Equitable Mortgage Co. v. Lowe*, 53 Kan., 39; *Central Kansas Loan & Investment Co. v. Chicago Lumber Co.*, 53 Kan., 677; *Hyde Park Investment Co. v. First Nat. Bank*, 56 Kan., 49. There can be no doubt that Boswell R. Wiles and Elizabeth E. Wiles might be prejudicially affected by a reversal of the judgment. Richardson, by his cross-petition, sought to establish a tax lien upon their property; and a reversal of the judgment might lead to the establishing of a lien for taxes, which was denied by the trial court. The dismissal of the cross-petition was a judgment in favor of Boswell R. and Elizabeth E. Wiles, as well as in behalf of the plaintiffs below. As the record discloses that two of the parties who may be affected by the reversal of the judgment have not been served with process, nor made their appearance in this court, and as it is now too late to bring them into court, more than a year having elapsed since the rendition of the judgment sought to be reviewed, the petition in error is

DISMISSED.

JARVIS N. BURR V. HARRIET M. HENRY.

FILED NOVEMBER 23, 1899. No. 9,041.

Transcript for Review: AUTHENTICATION: DISMISSAL. A proceeding in error will be dismissed where a copy of the final judgment included in the transcript is not authenticated by the certificate of the clerk of the trial court.

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

James McNeny, J. S. Gilham and *R. McNitt,* for plaintiff in error.

J. M. Chaffin and *George R. Chaney, contra.*

NORVAL, J.

This cause originated before a justice of the peace of Webster county, where the plaintiff obtained judgment. The defendant appealed to the district court, and from the briefs we learn that he was again unsuccessful. He has come to this court for redress.

The petition in error must be dismissed, for the reason that copies of the pleadings and final judgment are in no manner authenticated by the certificate of the clerk of the trial court. Appended to the record lodged in this court is the certificate of the clerk of the district court stating "the foregoing to be a true, correct and perfect copy of the transcript in the case of Harriet M. Henry v. Jarvis N. Burr, as appears from the files and record of my office." This is merely an authentication of the copy of the transcript of the justice of the peace, made for the purpose of appealing to the district court, and such certificate does not include either the pleadings filed in the district court or the final judgment therein rendered. For the omission of a proper certificate we have not acquired jurisdiction of the cause. See *McDonald v. Grabow,* 46 Nebr., 406; *Union P. R. Co. v. Kinney,* 47 Nebr., 393. The petition in error is, therefore,

DISMISSED.

. . . . . .

OMAHA LOAN & TRUST COMPANY, APPELLEE, V. MARY ANN FITZPATRICK, APPELLANT.

FILED NOVEMBER 23, 1899. No. 9,024.

1. **Conflicting Evidence:** REVIEW. A finding of the trial court upon conflicting evidence will not be disturbed or reviewed.

2. **Judicial Sales:** APPRAISEMENT. The appraisement of property for the purposes of judicial sale, as being too low, can be assailed only for fraud.

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

I. J. Dunn, for appellant.

Francis A. Brogan, contra.

NORVAL, J.

This appeal was taken from an order confirming a sale of real estate, the sole objection being that the property was appraised too low. The evidence adduced by the defendant tended to establish that the real estate was worth a much larger sum than was fixed in the appraisement, while the proof introduced on behalf of the plaintiff was to the effect that the property was not worth more than the figure at which it was appraised. We must refrain from weighing conflicting evidence, farther than to ascertain that it sustains the finding. There is an entire lack of evidence to establish fraud in making of the appraisement. The order appealed from is

AFFIRMED.

FIRST NATIONAL BANK OF BROKEN BOW V. JAMES STOCKHAM ET AL.

FILED NOVEMBER 23, 1899. No. 9,035.

1. **Review:** ERROR: PRESUMPTIONS. Error will not be presumed, but must be affirmatively revealed by the record.
2. **New Trial:** TIME TO FILE MOTION. Except upon the ground of newly-discovered evidence, a motion for a new trial must be filed within three days after the verdict or decision was rendered, unless the filing in time was unavoidably prevented.

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

G. L. Gutterson, for plaintiff in error.

John S. Kirkpatrick, L. E. Kirkpatrick and *A. R. Humphrey, contra.*

NORVAL, J.

Frank Decious executed a promissory note in the sum of $150, and James Stockham and C. T. Halliday signed the note with him as sureties. The First National Bank of Broken Bow instituted an action on the note against all the makers. A trial to a jury terminated in a verdict against Decious in favor of the bank, and against it and in favor of the other defendants. The plaintiff prosecuted a petition in error against all the defendants below, but on the special approvance of Decious objecting to jurisdiction over his person, the proceeding in error was dismissed as to him. Numerous alleged errors are assigned in the petition in error, and argued in the brief, but they can not be now considered, because it does not appear that plaintiff filed a motion for a new trial, presenting the questions now sought to be reviewed, to the trial court within three days after the verdict was returned. The trial was had and a verdict

rendered on April 2, 1896. The record discloses that on May 1, following, there was filed a substituted motion for a new trial for one alleged to be lost. There is nothing in the record to indicate when the original motion was filed, if one was ever filed. We can not indulge the presumption that it was filed within the time fixed by statute. On the other hand, the presumption is in favor of the judgment below. Errors are never presumed, but must be disclosed by the record. See *Wright v. State*, 45 Nebr., 44; *American Investment Co. v. McGregor*, 48 Nebr., 779; *Ætna Ins. Co. v. Simmons*, 49 Nebr., 811. The district court may have refused plaintiff a new trial because his motion therefor was not in time. Except for newly-discovered evidence, which is not the grounds relied upon herein for reversal, a motion for a new trial must be filed within three days after the verdict or decision, unless unavoidably prevented. See *Roggencamp v. Dobbs*, 15 Nebr., 620; *Davis v. State*, 31 Nebr., 240; *Fitzgerald v. Brandt*, 36 Nebr., 683; *Brown v. Ritner*, 41 Nebr., 52. The judgment is

AFFIRMED.

SAMUEL S. BEEBE ET AL. V. GEORGE A. LATIMER.

FILED NOVEMBER 23, 1899. No. 9,026.

1. **Conversion:** RIGHTS OF LIENOR. A person having a contract lien on chattels, coupled with possession, may maintain an action for conversion against the owner of the property who has seized it in violation of the pledgee's rights.

2. **Defective Petition:** ANSWER. A defective or ambiguous petition may be aided and its infirmities cured by the averments of the answer.

3. **Ruling on Motion.** A motion which can not be granted in the form in which it is made is properly denied.

4. **Attorney's Lien:** AMOUNT: REMITTITUR. Evidence examined, and *held* to sustain a finding and judgment in favor of plaintiff for a certain amount

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

A. R. Oleson, Barnes & Tyler and *Oleson & Oleson,* for plaintiffs in error.

Isaac Powers and *George A. Latimer, contra.*

SULLIVAN, J.

This action was brought by George A. Latimer against Samuel S., John L. and Frederick Beebe, on the theory that the defendants had converted to their own use certain property upon which the plaintiff had a contract lien coupled with possession. The district court tried the cause without a jury, found the issues in favor of the plaintiff, and rendered judgment accordingly.

Briefly stated, the events out of which the litigation arose are as follows: Frederick Beebe was the owner of a stock of merchandise in the city of Norfolk, and Mrs. C. M. Jones was the owner of some real estate and other property. Mr. J. J. Jones, acting under a limited agency from his wife, agreed to trade her property for Beebe's stock of goods. In pursuance of this agreement possession of the store and stock was surrendered to Mr. Jones, who immediately turned over to Beebe a deed for the Omaha realty, together with the other property covered by the contract. By the terms of the contract it was further provided that Mrs. Jones should execute to Beebe her promissory notes for the difference between the agreed value of her property and the invoice value of the goods. This agreement Mrs. Jones refused to perform and repudiated at once the entire transaction on the ground that it was not within the limits of her husband's authority. Beebe declining to accept a return of the goods, and, refusing to reconvey the Omaha real estate, an action was commenced in the district court of

Douglas county to cancel the deed from Mrs. Jones and to compel restitution of the other property delivered by her husband in part performance of his contract. While the action was pending, Latimer, who is a lawyer doing business at Norfolk, rendered professional services for Mrs. Jones, and received from her the key to the store in which the goods were kept with assurance that he might retain possession of the property until his bill should be paid. After the Douglas county litigation had been pending some months a compromise was effected, by the terms of which Beebe agreed to take back the stock of merchandise and surrender to Mrs. Jones all the property obtained in the trade, except the Omaha real estate, which, on account of the incumbrances against it, was considered only of slight value. This agreement was consummated, and Beebe took possession of his goods, disregarding entirely Latimer's alleged lien and possessory right. The plaintiff, contending that all the defendants were participants in the act by which he was dispossessed, has proceeded against them for conversion.

It is quite evident that the validity of Latimer's lien depended on the title of Mrs. Jones. If she had no title, then, of course, he had no lien. The record shows that Jones had authority to make an exchange of his wife's property for Beebe's stock of goods. It also shows that his authority was limited; but there is nothing to indicate that the special limitation, which related to the value of the goods, was known to Beebe. It also appears that Mr. Jones was in possession of the store for several days; that he sold goods in the usual course of business and received the proceeds of the sales. It is not disclosed that the money so received was tendered back at the time of the alleged rescission of the trade, or at any other time. There is evidence to the effect that Beebe was, during a considerable period, holding fast to the property received from Jones, and in other respects conducting himself as though he regarded Mrs. Jones as the

owner of the merchandise. By putting Latimer in possession of the store, and giving him a lien on the stock as security for his claim, Mrs. Jones did an act which indicated that she did not consider the attempted rescission effective. She testified that when the compromise was made she exacted of Beebe a promise to pay all claims against the property. If the trade had been rescinded, and the title to the goods had become again vested in Beebe, or if the title had never passed to Mrs. Jones, why should she trouble herself to make such an agreement? Everything considered, we think the finding of the trial court, that Latimer had a valid lien, is sustained by sufficient evidence; but we think the court erred in awarding him a lien for $100. The value of plaintiff's services, according to the evidence, was $30. His fees for taking depositions amounted to $25. He paid out for the benefit of Mrs. Jones $13, making his entire claim against her $68. Upon this amount he has been paid $5, and there is still due him the sum of $63, with interest thereon at the rate of seven per cent per annum from the date of the conversion, August 8, 1895. Plaintiff claims that he guaranteed the payment of other sums due from Mrs. Jones to persons who had rendered services for her; but if he did so, it is perfectly clear that his contingent liability was not covered by his lien on the property in question.

It is claimed that the petition does not state a cause of action against all the defendants, and that the judgment is, therefore, erroneous. We think the pleadings, construed together, disclose an alleged joint liability; but if we are wrong upon this point, still the judgment is not for that reason subject to reversal, as the parties all joined in the motion for a new trial. A motion which can not be sustained in the form in which it is presented is properly overruled. See *Knight v. Darby*, 55 Nebr., 16; *Cortelyou v. McCarthy*, 53 Nebr., 479; *Minick v. Huff*, 41 Nebr., 516; *Gordon v. Little*, 41 Nebr., 250. If the plaintiff shall, within thirty days from this date, remit from the

judgment the sum of $37 and the interest thereon, the judgment will be affirmed; otherwise it will be reversed.

AFFIRMED CONDITIONALLY.

LESSERT & STEELE V. J. F. SIEBERLING & COMPANY ET AL.

FILED NOVEMBER 23, 1899. No. 9,030.

1. **Judgment:** LIEN ON LAND SUBSEQUENTLY PURCHASED. Real property, purchased by a judgment debtor subsequent to the rendition of judgment against him, is subject to the lien of such judgment as soon as the title vests in the debtor.

2. ——: ——: VENDOR AND VENDEE. Purchasers from such judgment debtor, who have actual or constructive notice of the lien, take the property charged with the lien.

3. ——: ——: IMPROVEMENTS. Permanent improvements erected upon such property which partake of the character of realty, whether constructed by the judgment debtor or his grantees, are bound for the satisfaction of the judgment lien.

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

Thomas L. Redlon, for plaintiffs in error.

W. W. Wood and *Stewart & Munger, contra.*

SULLIVAN, J.

A transcript of a judgment recovered by Sieberling & Co. against Emily S. Hoyt and Edward B. Hoyt in the county court of Sheridan county was filed in the office of the clerk of the district court for said county, and entered upon the judgment record therein April 23, 1890. On June 28, 1892, Edward B. Hoyt purchased and became the owner of a vacant lot in the village of Rushville, to which the judgment attached as a lien, under the provisions of section 18, chapter 20, Compiled Statutes, 1899. This property was afterwards sold and conveyed to Lessert & Steele, who constructed upon it a large

store building which cost, with other improvements, about $2,000. The Hoyts being insolvent, this action was instituted by Sieberling & Co. to establish the lien of their judgment against the lot conveyed to Lessert & Steele, to have the amount and rank of other judgment liens determined, and to have the property sold for the satisfaction of all the liens against it. The several defendants filed separate answers, and the cause having been submitted upon the pleadings and evidence, the court rendered judgment in accordance with the prayer of the petition. Lessert & Steele complained of the decision, and by this proceeding in error bring the record here for review. They insist that the court erred in awarding the plaintiffs a lien on the property for an amount greatly in excess of its value at the time they purchased it of Hoyt. They claim that, to the extent they enhanced the value of the vacant lot by building on it and otherwise improving it, their equity is superior to that of the plaintiffs.

The question to be decided is neither novel nor difficult of solution. The governing principles are well established. The plaintiffs' judgment became a lien on the lot as soon as the title to the property vested in Hoyt. See *Colt v. DuBois*, 7 Nebr., 391; *Berkley v. Lamb*, 8 Nebr., 392; *Duell v. Potter*, 51 Nebr., 241. Lessert & Steele took their conveyance with constructive notice of the lien, and, for aught that appears to the contrary, with actual notice. If they saw fit to improve the premises under such circumstances, they can not well complain of the action of the plaintiffs in enforcing their judgment against the lot and the building which, by physical attachment, had become a part of it. The general rule of law, supported by numerous adjudications both in this country and in England, is that, if the owner of real estate build a dwelling or other structure thereon with the intention of making it a permanent annexation to the soil, such building becomes immediately parcel of the land and subject to the liens and incumbrances existing

against the same. This rule is held to be applicable to conscious wrong-doers, and it has been enforced even against strangers to the title who had expended money in making improvements in consequence of a mere mistake. See *Bradley v. Osterhoudt*, 13 Johns. [N. Y.], 404; *Ogden v. Stock*, 34 Ill., 522; *Coombs v. Jordan*, 3 Bland Ch. [Md.], 284; *Webster v. Potter*, 105 Mass., 414; *Dame v. Dame*, 38 N. H., 429; *Ryall v. Rolle*, 1 Atk. [Eng.], 175; *Steward v. Lombe*, 1 B. & B. [Eng.], 505. The precise question here presented for determination was decided adversely to the contention of the plaintiffs in error in *Rounsaville v. Hazen*, 39 Kan., 610, and in *Taylor v. Morgan*, 86 Ind., 295. In the latter case it was said: "A purchaser of real estate must take notice of judgment liens, and if, in actual ignorance thereof, he purchases and makes valuable improvements, he can not, by paying upon the judgment the value of the property without the improvements, release the property from the lien of the judgment if not fully paid." The same principle was declared in *Martin v. Beatty*, 54 Ill., 100. We know of no case sustaining the view for which Lessert & Steele contend. The conclusion of the trial court is right, and its judgment is, therefore,

AFFIRMED.

HENRY C. PREDOHL ET AL. V. MARY O'SULLIVAN.

FILED NOVEMBER 23, 1899. No. 9,036.

1. **Lien of Judgment for Costs:** CRIMINAL LAW. By section 524 of the Criminal Code a judgment of the district court in favor of the state for costs is a lien on all real estate, within the county, owned by the accused at the time of docketing the cause.

2. ———: ASSIGNMENT: STATUTE OF LIMITATIONS. The statute of limitations begins to run against the assignee of a judgment in favor of the state from the time of the assignment.

3. ———: EXPIRATION. Such judgment becomes dormant and ceases to be a lien on real estate at the end of five years from the date of the assignment.

4. **Executions:** SALE OF REALTY: INJUNCTION. Injunction is the appropriate remedy to prevent an execution sale of land for the satisfaction of a judgment which is neither a lien on the property nor a personal charge against the owner.

ERROR from the district court of Cuming county. Tried below before EVANS, J. *Affirmed.*

Fannie O'Linn, for plaintiffs in error.

P. M. Moodie, contra.

SULLIVAN, J.

This was an action by Mary O'Sullivan against Predohl, Melcher and Phillips to enjoin an execution sale of certain Cuming county real estate of which the plaintiff claims to be the owner. The trial court overruled a general demurrer to the petition, and, defendants having failed to answer, judgment was rendered against them. The essential averments of the petition are as follows: That Daniel Crellin was convicted in the district court of Cuming county of the crime of manslaughter, and, on July 28, 1885, sentenced to imprisonment in the penitentiary, and to pay the costs of the prosecution, taxed at $646.33; that on the same day Jay D. Briggs, acting under a power of attorney from Crellin, conveyed to Edward K. Valentine the real estate in controversy; that on September 28, 1893, Valentine sold, and by deed of general warranty conveyed, said real estate to the plaintiff, who has ever since owned and occupied the same; that the judgment for costs in favor of the state was a valid lien on the tract in question, and an apparent lien on another tract in Cuming county; that the last mentioned tract was sold to the defendant Predohl by the sheriff to satisfy an execution issued on the state's judgment against Crellin; that this sale was confirmed and satisfaction of the judgment entered of record in the office of the clerk of the district court on October 8, 1885; that the land sold to Predohl did not belong to Crellin,

and was not subject to the lien of the state's judgment; that some time prior to 1890 a judgment was rendered against Predohl, quieting the owner's title to the property sold on execution; that in 1895, in proceedings to which the plaintiff herein was a stranger, Predohl obtained orders of the district court of Cuming county canceling the entry of satisfaction in the case of the state against Crellin, reviving the judgment in his own name, and for the issuance of process to sell the real estate purchased by the plaintiff of Edward K. Valentine. It is further alleged in the petition that the plaintiff was without notice that the judgment against Crellin was unpaid, and that she bought the land on the faith of an abstract of title showing that there were no judgment liens against it. It is also alleged that, through the agency of the defendants, the plaintiff's property is about to be sold to satisfy said judgment.

Notwithstanding the very able and ingenious arguments of the learned counsel for the defendants, we are persuaded that the trial court was right in overruling the demurrer to the petition and making the temporary injunction perpetual. By the provisions of section 524 of the Criminal Code the judgment in favor of the state for costs was a lien upon the real estate conveyed by Briggs to Valentine. It was not a lien upon the land sold under the execution, and consequently Predohl acquired no title by the sheriff's deed. His money, however, was rightfully received by the state, and properly applied to the satisfaction of its judgment. The rule of *caveat emptor* applied to the sale. The entry of satisfaction on the record terminated the state's interest in the judgment. It may be that the purchaser, having acquired no title to the property, became subrogated to the rights of the state. For the purposes of this decision we will assume that he did become, by operation of law, substituted for the judgment plaintiff. But it was by the fact of payment, and not by the order of the court, that he became the equitable assignee and owner of the

judgment. The order of subrogation was, at most, a judicial confirmation of a previously existing equitable right. See *Oliver v. Lansing*, 57 Nebr., 352, 77 N. W. Rep., 802. When Predohl became owner of the judgment the statute of limitations commenced, of course, to run against his right to enforce it by execution. At the expiration of five years the right was barred, the lien upon plaintiff's land became extinguished, and the court was powerless to restore it by an order of revivor. See Code of Civil Procedure, sec. 482; *Flagg v. Flagg*, 39 Nebr., 229. Another reason why the judgment of the district court should be affirmed is this: Mrs. O'Sullivan took her conveyance on the faith of the record, which declared that there were no unpaid judgment liens against the property; and her equities are, therefore, superior to those of a party seeking to enforce a secret lien. Subrogation being a doctrine of equitable origin, its operation is always controlled by equitable considerations. See 3 Pomeroy, Equity Jurisprudence [1st ed.], sec. 1419.

It is suggested that the plaintiff has an action against Valentine on the covenants of warranty contained in his deed, and that she may also sue the abstracter for making a false certificate, and thus obtain, by legal remedies, indemnity for the loss of her land. We think it entirely clear that the plaintiff, under the facts disclosed, was entitled to the relief awarded by the district court. Since the judgment to which Predohl became subrogated was not a lien on the plaintiff's land, the only effect of the execution sale would be to cloud her title. The judgment of the district court is right, and is

AFFIRMED.

SAMUEL R. KOCHER V. ISABEL CORNELL.

FILED NOVEMBER 23, 1899. No. 9,044.

1. **Married Women:** CONTRACTS. At common law a *feme covert* was incapable of contracting a personal obligation

2. ——: ——: SEPARATE PROPERTY. In equity, prior to the enactment of the married woman's act, the separate property of a *feme covert* was liable for the satisfaction of her engagements made with reference to it.

3. ——: ——: ——. By the enactment of chapter 53, Compiled Statutes, 1899, married women were given, as a legal right, the power to bind their separate property which, in equity, they already possessed.

4. ——: ——: ——. A married woman can bind her separate property by contract to the same extent only that she could formerly bind it in equity.

5. ——: ——: ——. The contract of a married woman can only be enforced against the separate estate which she possessed at the date of the contract.

6. ——: ——: ——. A mere hope of succession to an estate is not property.

7. ——: ——: ——: SUBSEQUENTLY ACQUIRED PROPERTY. Authority to contract with reference to, and upon the faith and credit of, the separate estate of a married woman does not include an inheritance acquired after the making of a contract by her.

8. ——: ——: ——: ——. And in such case it is immaterial what the intention of the parties was at the time of the execution of the contract.

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

Warren Switzler, for appellant:

On a contract of a married woman there may be rendered against her a personal judgment, which will bind subsequently acquired property. See *Jones v. Crosthwaite*, 17 Ia., 393; *Richmond v. Tibbles*, 26 Ia., 476; *Van Metre v. Wolf*, 27 Ia., 345; *Williamson v. Cline*, 20 S. E. Rep. [W. Va.], 917.

George W. Cooper, contra.

SULLIVAN, J.

This action was brought by Samuel R. Kocher against Isabel Cornell and her husband to recover a money judgment. The question propounded by the record is this: Is the property which a married woman acquires by inheritance, after the execution by her of a contract of suretyship binding her separate estate in general terms, liable for the satisfaction of such contract? According to the doctrine of the common law, a *feme covert* was incapable of contracting a personal obligation. Her ownership of property was not even recognized. In equity, however, a different rule prevailed. Although she could not, according to the equity doctrine, create a personal liability against herself, her separate estate was liable for the satisfaction of engagements made with reference to it. Her contract was regarded as binding, not upon her, but upon her estate. The property, as was said in *London Chartered Bank v. Lempriere*, 4 L. R., P. C., 597, was considered the real debtor. Our statute has greatly enlarged the capacity of married women to contract, but it has not entirely removed her ancient disabilities. The authority given her by section 2, chapter 53, Compiled Statutes, 1899, is authority to contract with reference to her separate estate. Its practical effect, since imprisonment for debt has been abolished, is to give legal recognition to the previously existing equitable power. In other words, the legislative design, it seems to us, was to give to married women, as a legal right, the power over their property which in equity they already possessed. If we are right in regard to this, a married woman can bind her separate property now by contracts with reference to it, only to the same extent that she could formerly bind it in equity. Whether she possessed power independent of statute to bind by contract property subsequently acquired, has been before the

English courts in several cases. In *Pike v. Fitzgibbon*, 17 L. R., Ch. D. [Eng.], 454, Brett, L. J., discussing the question, said: "The decisions appear to me to come to this, that certain promises (I use the word 'promises' in order to show that in my opinion they are not contracts) made by a married woman, and acted upon by the persons to whom they are made on the faith of the fact known to them of her being possessed at the time of a separate estate, will be enforced against such separate estate as she was possessed of at that time, or so much of it as remains at the time of judgment recovered." In the same case James, L. J., after observing that the point was not necessarily involved, took occasion to remark: "It is therefore sufficient to state as a warning in any future case that the only separate property which can be reached is the separate property * * * that a married woman had at the time of contracting the engagement which it is sought to enforce." The question was afterwards directly presented for decision in *King v. Lucas*, 23 L. R., Ch. D. [Eng.], 712, and it was there held that the contract of a married woman could only be enforced against the separate estate existing at the date of the contract. Following these precedents it was decided in *Ankeney v. Hannon*, 147 U. S., 118, that, in the absence of special legislation, the property which a married woman obtained by inheritance after the execution of the contract upon which the action was brought was not bound, although there was an express declaration of her intention to charge "her separate estate, both real and personal." Other authorities supporting this view are: *Crockett v. Doriot*, 85 Va., 240; *Filler v. Tyler*, 91 Va., 458; *Roberts v. Watkins*, 46 L. J., Q. B. [Eng.], 552; Clark, Contracts, 280; 3 Pomeroy, Equity Jurisprudence [1st ed.], sec. 1123. A mere hope of succession to an estate is not property; and authority to contract with reference to, and upon the faith and credit of, the separate estate of a married woman can not be said, by any fair construction of language, to include it. The estate which Mrs.

Cornell acquired by inheritance was not her separate property at the time the obligation in suit was given, and, therefore, it can not be said that the contract was made with reference to it. What the intention of the parties was in regard to the matter is not material, since the power to bind after-acquired property did not exist.

In conferring upon married women a limited capacity to contract, it was quite natural that the legislature should make the grant of power commensurate only with the necessity for it. The fundamental doctrine of liability being that the wife's separate estate should be held to answer for debts contracted on the faith of it, the requirements of the situation were fully met by the adoption of a statute making such debts a charge upon the estate in existence when the contract was entered into. Indeed, this conclusion seems to be the logical result of the past adjudications of this court holding that the engagements of a woman under coverture are without binding force, except to the extent that they have been made a specific or general charge upon her separate property. See *Grand Island Banking Co. v. Wright*, 53 Nebr., 574; *State Savings Bank v. Scott*, 10 Nebr., 83; *Eckman v. Scott*, 34 Nebr., 817; *Godfrey v. Megahan*, 38 Nebr., 748; *Buffalo County Nat. Bank v. Sharpe*, 40 Nebr., 123. While, under the provisions of section 3, chapter 53, Compiled Statutes, 1899, a married woman may be sued upon her contracts, the theory of the law still is that the property, on the faith of which she obtained credit, is the real debtor, and consequently constitutes the only fund from which a creditor may obtain satisfaction of his claim. The judgment of the district court is

AFFIRMED.

FRED A. MILLER V. CHARLES E. WAITE ET AL.

FILED NOVEMBER 23, 1899. No. 9,039.

1. **Voluntary Assignments:** PARTNERSHIP PROPERTY. A deed of assignment which purports to convey to the assignee all the assigning partnership's property, except such as is exempt from attachment or execution, is valid, and transfers the title to all the firm property to the assignee.

2. ———: ACTION BY ASSIGNEE: CONVERSION. An assignee for the benefit of creditors, to whom possession of the trust property has been delivered, may maintain an action for conversion against one who wrongfully seizes such property.

3. ———: ———: REGISTRATION OF DEED. Such right is not divested by the mere failure to file the deed of assignment for record within twenty-four hours after its delivery.

4. **Partnership Property:** EXEMPTION. Individual partners can not claim as exempt any portion of the partnership property until after partnership debts have been liquidated.

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

Mockett & Polk, Stewart & Munger, Doyle & Stone, E. M. Coffin, Darnall & Kirkpatrick and *C. S. Rainbolt,* for plaintiff in error.

Willard E. Stewart and *Stearns & Tyrrell, contra.*

SULLIVAN, J.

This action was brought by Fred A. Miller in the district court of Lancaster county to recover of the defendants, Charles E. Waite and others, the value of a stock of merchandise. The material averments of the petition are that the plaintiff, being the sheriff of Lancaster county, received on August 1, 1894, a deed of assignment whereby the Muir-Cowan Company, a partnership, organized for the purpose of trade, and doing business in the city of Lincoln, transferred to him all of its property for the benefit of firm creditors; that the plaintiff took im-

mediate possession of the assigned estate, and on August 11, 1894, filed the deed of assignment for record in the proper office; that after plaintiff had taken possession of the property here in question, and while he was exercising exclusive control and dominion over the same, the defendants wrongfully seized and converted all of said property to their own use. The deed of assignment, which is made a part of the petition, is in the usual form, except that it contains this claim for exemptions: "The property claimed by us as exempt is five hundred dollars of the stock of Muir-Cowan & Co. for James Muir, and five hundred dollars of the stock of Muir-Cowan & Co. Louis A. Cowan." The court sustained a general demurrer to the petition, and, the plaintiff electing to abide by his pleading, judgment was rendered in favor of the defendant.

The judgment is manifestly wrong, and must be reversed. Section 2 of the act regulating assignments (Compiled Statutes, 1899, ch. 6) provides that the assignment shall cover all the property of the assignor, except so much thereof as may be exempt from levy and sale on execution. Section 29 of the same law declares that every assignment which shall reserve to the assignor any interest in the assigned property shall be void. The defendants contend that under these provisions of the statute the deed from the Muir-Cowan Company to the plaintiff was ineffective as a transfer of the partnership property. We think the deed was valid. It, in express terms, conveyed to Miller all the property and effects of the firm "not exempt from attachment and execution." No part of the property was exempt (*Wise v. Frey*, 7 Nebr., 134; *Lininger v. Raymond*, 9 Nebr., 40), and the title to the whole of it, therefore, vested in the assignee, and was held by him in trust for creditors, notwithstanding the statement in the deed that each of the partners claimed an exemption.

Another contention of the defendants is that the assignment was void because of the failure to record the

deed within twenty-four hours from the time of its execution. Our view of the matter is that the title to the property passed to the assignee when the deed was delivered; and the precedents, so far as we know, are all to that effect. See *Wells v. Lamb*, 19 Nebr., 355; *American v. Frank*, 62 Ia., 202; *Paulson v. Clough*, 40 Minn., 494; *Thompson v. Ellenz*, 58 Minn., 301; *Warner v. Jaffray*, 96 N. Y., 248; *Nicoll v. Spowers*, 105 N. Y., 1; *Betz v. Snyder*, 48 O. St., 492. The failure to file a deed of assignment for record within the time fixed by statute would not, *ipso facto*, divest the assignee's ownership of the trust estate. If such failure be regarded as a condition subsequent, it would not, under the provisions of section 6 of the assignment law (Compiled Statutes, ch. 6), work a forfeiture of the assignee's title in favor of a creditor who had not acquired a lien on the property. See *Seal v. Duffy*, 4 Pa. St., 274; *Weber v. Samuel*, 7 Pa. St., 499.

According to the allegations of the petition, the seizure of the stock of merchandise in question was a lawless act—an act done without color or claim of right; and the plaintiff might, therefore, on his mere possessory title, sue the defendants for conversion. Whatever may be the infirmities of Miller's title, the defendants, even if they were creditors of the Muir-Cowan Company, could not lawfully seize the assigned property without legal process. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

GERMAN-AMERICAN BANK OF MILWAUKEE V. J. H. STICKLE ET AL.

FILED NOVEMBER 23, 1899. No. 9,015.

1. **Review:** EVIDENCE. A verdict, supported by competent evidence, will not be set aside simply because it does not comport with

the conclusion which this court, as triers of fact, might have reached.

2. **Evidence:** MOTIVE. Evidence is admissible which tends to show that a person had a motive for doing an act.

3. **Note:** EXECUTION: EVIDENCE. In the trial of an action on a promissory note, the execution of which is denied, evidence of facts and circumstances surrounding the parties, and attending the giving of the note is relevant.

4. **Default:** PARTIES: JUDGMENT. In an action against two or more persons, some of whom are in default, the court should, on the trial, render judgment against such as are in default, regardless of the finding on the issues between the plaintiff and contesting defendants.

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

Richards & Dinsmore, for plaintiff in error.

O. H. Scott and *T. C. Marshall, contra.*

SULLIVAN, J.

The German-American Bank of Milwaukee sued J. H. Stickle, M. H. Weiss, C. M. Weiss and Frank Prachar upon a promissory note for $12,000. Prachar answered, denying the execution of the note. The other defendants did not plead, and were defaulted. The issue of fact raised by the pleadings was tried to a jury, and decided in favor of the answering defendant. The bank then moved for a new trial, but the application was denied, and a judgment rendered dismissing the action. It is now claimed, on behalf of plaintiff, that the verdict is not sustained by sufficient proof. We are not altogether satisfied with the finding of the jury; but, since it is supported by a fair measure of competent evidence, and approved by the trial court, we would not be justified in setting it aside on the ground that, as triers of fact, we would have reached a different conclusion. C. M. Weiss testified that the note was signed by Prachar in his presence. Several experts in chirography called by the bank

added the weight of their opinions to his testimony. Prachar positively denied that the signature in question was his, and produced evidence bearing somewhat against the reputation for veracity of C. M. Weiss in the neighborhood where he lived. The jury compared the disputed signature with signatures of Prachar conceded to be genuine. This being, in substance, the whole of the evidence, we can not say that the finding based upon it is manifestly wrong. See *People v. Gale*, 50 Mich., 237; Rogers, Expert Testimony [2d ed.], 489.

But it is asserted that the court erred in rejecting the plaintiff's offer to prove by the witness Pullen that the note in suit was given in renewal of another note for the same amount signed by all the defendants. We think the proffered testimony was relevant, and should have gone to the jury for what it was worth. The evidential fact was so related to the fact in issue that it would, in the state of the proof, logically influence the decision. Evidence is always admissible which shows that a person had a motive for doing an act. The obligation in suit was an accommodation note given at the instance, and for the benefit, of the Blue Valley Bank of Hebron. This being so, it doubtless would, in the absence of any explanation, severely tax the jury's faith to believe that Prachar, a Thayer county farmer, assumed, from mere complaisance, so serious a risk. But it is very easy to perceive that the improbability of the transaction would be materially lessened, if it were shown that he was already bound for the debt, and that by signing the renewal note the day of payment was postponed. In Stephen, Digest of Evidence, article 3, it is said: "Facts which, though not in issue, are so connected with a fact in issue as to form a part of the same transaction or subject-matter are deemed to be relevant to the fact with which they are so connected." In a note to section 52, 1 Greenleaf, Evidence, the rule is stated as follows: "It will generally be found that the circumstances of the parties to the suit, and the position in which they stood when the matter in controversy oc-

curred, are proper subjects of evidence." In discussing the subject of relevancy, in his work on the law of evidence, Wharton says: "If the hypothesis set up by the defendant is forgery, then all facts which are conditions of forgery are relevant. A party, for instance, sued on a bill, sets up forgery; to meet this hypothesis, it is admissible for the plaintiff to prove that the defendant, at the time of the making of the bill, was trying to borrow money." See 1 Wharton, Evidence [3d ed.], sec. 20. In *Dowling v. Dowling*, 10 Ir. Com. Law [Ir.], 241, it was held, in an action to recover for money loaned, that the poverty of the alleged lender was a relevant fact. In *Marcy v. Barnes*, 16 Gray [Mass.], 161, the question was whether the signature of Barnes to the note sued on was genuine. The note was given for money loaned to Baker & Co., and the defendant contended that his name was not on the note when it was delivered to the plaintiff. Evidence was received tending to show that before the loan was made Marcy ascertained, by inquiry, that Baker & Co. were worthless and that Barnes was financially responsible. The reasoning of the court in support of its conclusion that the proof was relevant is here given: "It was competent for the plaintiff to show that, before parting with his money, he exercised the reasonable precaution of making himself acquainted with the pecuniary responsibility of the parties to whom it was to be lent; and proof that he obtained information from a person, upon whose knowledge and judgment he believed he could confidently rely, that Baker & Co. were worthless and unfit to be trusted, but that Moses Barnes was a man of undoubted credit and ability, would have a tendency to create a high degree of probability that the loan would not have been made without the security afforded by his becoming a party to the note, and thus to show that his name must have been upon it when it was taken. This would be in conformity to the common experience that men of ordinary prudence consult their own interest, and use reasonable care in securing and preserving their own

property, and therefore was a circumstance which, though by no means conclusive, yet had an important bearing upon the question at issue. See 1 Starkie, Evidence [1st Am. ed.], 487. And upon such a question, evidence of inquiries made by the party in interest, and of the information obtained in reply, is not obnoxious to the objection that it is mere hearsay, but it is primary and original. The whole, taken together, is a fact which, like any other fact, may be shown and established by any competent means of proof. See 1 Greenleaf, Evidence, sec. 101." In the syllabus of *Blomgren v. Anderson*, 48 Nebr., 240, this general rule is laid down: "The circumstances surrounding the parties, their relations toward each other and the subject of the controversy at the time of the transaction involved, are proper subjects of proof." That was a case in which the dispute was whether the plaintiff had a contract for wages or was working for his board and lodging. The trial court admitted evidence to show that at the time the plaintiff entered defendant's service he was offered employment in the neighborhood at good wages. This court, holding the testimony to be relevant, remarked: "It bears directly upon the reasonableness of the defendant's claim, and is accordingly in some degree corroborative of the plaintiff's evidence in his own behalf." Other cases strongly supporting our conclusion that the rejected testimony of the witness Pullen should have been received are: *Stevenson v. Stewart*, 11 Pa. St., 307; *Trull v. True*, 33 Me., 367; *Nickerson v. Gould*, 82 Me., 512; *Woodward v. Buchanan*, 5 L. R., Q. B. [Eng.], 285; *Huntsman v. Nichols*, 116 Mass., 521.

Complaint is made because the jury were not instructed to return a verdict against the defendants who were in default. The course pursued by the trial court was entirely correct. The business of the jury was to try issues of fact, and, as between the plaintiff and the defaulted defendants, there was no issue of fact to try. The claim of the bank against J. H. Stickle, M. H. Weiss and C. M. Weiss was confessed, and judgment should have been

rendered accordingly. The court therefore erred in dismissing the action. If this were the only error committed, the cause would be remanded with direction to the trial court to render a proper judgment; but since the other error pointed out lies back of the verdict, the judgment is reversed, and a new trial awarded.

REVERSED AND REMANDED.

EDWIN E. BURR V. DONALD MCCALLUM.

FILED DECEMBER 6, 1899. No. 9,040.

1. **Replevin:** ISSUE: DAMAGES. In an action of replevin the inquiry is of the property in the possession of and wrongfully withheld from the plaintiff by the defendant at the commencement of the suit. There can be no recovery of damages by plaintiff for property of which the defendant had not possession or control when the case was begun.

2. ———: ———: ———: EVIDENCE. The verdict, to the extent it was for damages for property not taken under a writ of replevin, *held* not sustained by the evidence, but the contrary decided in regard to property taken.

3. **Instructions:** EVIDENCE. Actions of the trial court in giving and refusing to give instructions determined without prejudicial error, to the extent they embodied statements or matters relative to the portion of the verdict which there was evidence to sustain.

4. ———: ———: REQUESTS. A jury should be charged to base its finding solely upon the evidence; but a failure in this regard is a non-direction and not fatal, if, for the complainant, there was not prepared and asked an instruction on the subject.

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

James McNeny, J. S. Gilham and *R. McNitt,* for plaintiff in error.

George R. Chaney, H. D. Walden and *J. M. Chafin, contra.*

HARRISON, C. J.

It appears that during a number of months prior to October 3, 1893, Ruth A. McCallum had in cribs belonging to plaintiff in error, in Guide Rock, this state, some "ear corn," and on or about the date mentioned the defendant in error, who was acting for Ruth A. McCallum, who was his mother, was informed by plaintiff in error that he desired the corn removed from the cribs, and he offered to aid in procuring another place to which the corn might be transferred and stored. The two saw one C. Trimble, who was in charge of an elevator in Guide Rock for I. A. Mason, of Hastings, Iowa, and made an arrangement that the corn be put into the elevator, there to be kept for an indefinite time at a charge for storage of $1 per month. The corn was shelled and, pursuant to agreement, placed in the elevator, there being of it a trifle more than 653 bushels. Mrs. McCallum died, and the defendant in error was appointed executor of her estate. This was subsequent to the commencement of this action, one of replevin to obtain possession of the corn, and there was a revivor of the action in the name of the executor. There was a jury trial of the issues, a verdict and judgment in favor of the executor, and the adverse party has removed the cause to this court for review. Errors are assigned of the giving by the court of certain instructions on its own motion, also of refusals to embody in the charge a requested instruction for plaintiff in error. It is also urged that the evidence was insufficient to sustain the special findings and verdict.

The evidence disclosed that when the corn was put into the elevator Trimble was in charge, also that, in the springtime of 1894, he was not actively conducting the elevator and grain business; but the plaintiff in error was then attending to it in Trimble's stead. When grain was purchased, a check was given on the local bank, to which

the name of I. A. Mason was signed by the plaintiff in error, and returns from sales of grain were credited in the bank to the account of I. A. Mason. At the time the corn was deposited in the elevator, the defendant in error knew that the elevator belonged to, and believed the business was being transacted for, I. A. Mason. The defendant in error testified that on April 3, 1894, he saw the plaintiff in error and asked him if the corn was then in the elevator, and was answered that it was. The defendant in error also testified that he further asked who was responsible to him for the corn, and the plaintiff in error replied that he was, and would then give a check for it, if the defendant in error desired it; and he then stated that he did not want the check if the corn was all right. He also testified that he did not then wish to sell the corn. About August 7, 1894, the defendant in error made a contract of sale of the corn to one Montgomery, but when the would-be purchaser went to the elevator to get the corn he could not "find it." Defendant in error further stated that he then went to the bank and inquired if "I. A. Mason had any money in the bank," and the answer was "No"; that he asked plaintiff in error where Mr. Trimble was, and was told he had gone away; that plaintiff in error also informed defendant in error there was no money in the bank. This was on August 13, 1894. This action was then commenced, and, after the sheriff had received the writ of replevin, he and defendant in error went to the elevator, but found it almost empty. It contained about fifty bushels of corn, of which possession was taken by the officer, and the same was delivered to the defendant in error.

It is insisted that the evidence was insufficient to sustain the verdict. In regard to the corn sought to be recovered in excess of what was discovered in the elevator, taken under the writ and delivered to the defendant in error, this contention must be sustained. It is clear from the evidence that no other corn was in the possession of the plaintiff in error, and no verdict or judgment against

him was warranted for corn other than he had under his control when this suit was commenced. It is the condition of things at the beginning of the suit which furnishes the ground of the action. It was not proved that the plaintiff in error had, when this suit was brought, either actual or constructive possession or control of any corn other than the fifty or more bushels then in the elevator. There could be no recovery of damages for any corn which he did not have or control at the time of the institution of the suit. See *Heidiman-Benoist Saddlery Co. v. Schott*, 59 Nebr., 20, 80 N. W. Rep., 47. Relative to the fifty or more bushels of corn found in the elevator and taken by the officer by virtue of the writ of replevin, there was sufficient proof to support a verdict against the plaintiff in error; that is to say, he was in possession of it and detained it from the defendant in error.

It is argued that no demand on plaintiff in error for the corn was shown. The testimony on this subject is not as clear and definite as in some cases, but there were facts which would warrant and sustain a conclusion that a demand, probably not in strict terms or so many words, was made for the corn and refused.

Objections are urged to the substance of the charge of the court on its own motion to the jury; also of its refusal to give certain instructions prepared and requested for plaintiff in error. To the extent those given and refused referred to the corn other than was discovered by the officer in the elevator the instructions given were defective, but relative to the corn which was taken there was in them no error which was prejudicial to the complainant, nor was there any prejudicial error in the refusal to read those proffered for plaintiff in error.

It is contended that the instructions, considered consecutively or as a whole, were erroneous, in that the jury was not directed that their findings must be from the evidence. It is true that the instructions did not by a general statement or direction, nor in any or each paragraph of the charge, require the findings to be from a consider-

ation of the evidence. A jury is sworn to a true verdict given according to the evidence, but there should be in the charge an injunction that their conclusions be drawn from the evidence, and it is error not to so instruct; but it is a non-direction and not a misdirection. If a party desires an instruction on this point, he must present it and request that it be given; or that it was not, will not work a reversal of a judgment. There was no instruction asked on the point that the jury, in its deliberations and decisions, must be confined to and governed by the evidence, and the error is not available. The defendant in error may, within forty days, file a remittitur of the sum of $301 as of the date of judgment. If this is done, the judgment, as thus reduced, is affirmed; if not done, the judgment is reversed, and the cause remanded.

JUDGMENT ACCORDINGLY.

MCCORMICK HARVESTING MACHINE COMPANY V. J. A. CUMMINS.

FILED DECEMBER 6, 1899. No. 9,056.

1. **Summons:** DEFENDANTS IN DIFFERENT COUNTIES. After service of summons, in a personal action in the county where commenced, upon a party who by the pleading filed is a real defendant, summons may properly be issued to any other county of the state for service upon other defendants.

2. ———: ———: SHERIFFS AND CONSTABLES. The summons issued by a county court for service upon a defendant of a county other than the one in which the action is commenced is correctly directed to the sheriff or any constable of the county.

3. ———: ———: NAMES OF PARTIES. The summons so issued is not void because the names of all defendants in the action do not appear therein.

4. **Statute of Limitations:** WAIVER OF PLEA. The defense of the bar of the statute of limitations, if not presented by a plea, is waived. *Hobson v. Cummins*, 57 Nebr., 611, followed.

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

Ricketts & Wilson, for plaintiff in error.

George C. Gillan and *W. S. Morlan, contra.*

HARRISON, C. J.

In this action, instituted in the county court of Red Willow county September 3, 1894, judgment was demanded for plaintiff, now plaintiff in error, for the amount alleged to be due upon a negotiable promissory note in the principal sum of $60. The suit is against the payor, or maker of the note, and one "Tom Hayden," who had indorsed it. The latter was served with process in the county in which the action was commenced, and the former in Dawson county. There was no appearance for the defendants, and judgment on default was rendered against them October 10, 1894. October 7, 1895, the cause was removed to the district court of Red Willow county by an error proceeding on behalf of J. A. Cummins, and, on hearing, the judgment was reversed. The case is presented by plaintiff for review in this court of the judgment of reversal of the adjudication of the county court. The questions raised by the petition in error, and upon which no doubt the deci ion of the district court was predicated, were of the power of the county court of Red Willow county to issue a summons for service upon Cummins in Dawson county, of the authority of the said county court to direct the summons to the "sheriff or any constable of Dawson county"; also, that the summons sent to Dawson county was fatally defective, in that it did not contain the names of all the parties defendants in the action. It is now urged, in addition to the foregoing, that the bill of particulars did not state a cause of action. In an action brought by J. A. Cummins in the district court of Dawson county against Henry Hobson, as sheriff of

said county, an injunction was sought against the enforcement of the collection, by levy of an execution issued thereupon of a judgment rendered in the county court of Red Willow county. Doubtless the same judgment involved in the present litigation, and the contention of defendant in error, were, in the proceeding in error in that case from the decree of the district court, urged, considered and adjudicated (*Hobson v. Cummins*, 57 Nebr., 611); and it was settled that there was disclosed by the pleading filed in the county court that Hayden, who had indorsed the note, was a proper party to, and liable in, the suit; that, after service upon him, a summons was properly issued to Dawson county for service upon Cummins, directed to the sheriff or any constable of Dawson county, and it was not void because it did not contain the names of all the defendants to the action; and the defense of the bar of limitations, not raised by answer or plea, was waived. We were then, and now are, satisfied of the correctness of that decision; and it is governable of the disposition of the matters for consideration and settlement herein. It follows that the judgment of the district court must be reversed, and that of the county court affirmed.

JUDGMENT ACCORDINGLY.

MCCORMICK HARVESTING MACHINE COMPANY V. J. A. CUMMINS.

FILED DECEMBER 6, 1899. No. 9,057.

Summons: DEFENDANTS IN DIFFERENT COUNTIES: NAMES OF PARTIES: STATUTE OF LIMITATIONS.

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

Ricketts & Wilson, for plaintiff in error.

George C. Gillan and *W. S. Morlan, contra.*

HARRISON, C. J.

This case was submitted with one of the same title (*McCormick Harvesting Machine Co. v. Cummins*, 59 Nebr., 330), the decision and disposition of the one to govern in both. In accordance with the submission the judgment of the district court is reversed, and the judgment of the county court affirmed.

REVERSED.

ABSALOM VANDEVEER V. DANIEL HIGGINS ET AL.

FILED DECEMBER 6, 1899. No. 9,050.

1. Will: MARRIED WOMEN: ESTATE BY CURTESY. Whether the devise of her separate real estate by a married woman will exclude the husband's estate by curtesy, not decided, because not directly involved.

2. ———: REVOCATION BY MARRIAGE. A will executed by a single woman is revoked by her subsequent marriage, at least to the extent it would operate to exclude her husband from his right as tenant by curtesy in any lands of which she dies seized in her own right of an estate of inheritance.

ERROR from the district court of Nemaha county. Tried below before LETTON, J. *Reversed.*

George W. Cornell, for plaintiff in error.

W. H. Kelligar, contra:

A wife may, if she chooses, dispose of her separate property by deed or will, and thereby defeat curtesy, and the husband takes curtesy in that property only of which the wife died seized and intestate. See *Hatfield v. Sneden*, 54 N. Y., 280; *Ransom v. Nichols*, 22 N. Y., 110; *Porch v. Fries*, 18 N. J. Eq., 204; *Silsby v. Bullock*, 10 Allen [Mass.], 94; *Cole v. Van Riper*, 44 Ill., 58; *Stewart v. Ross*, 50 Miss., 776; *Bagley v. Fletcher*, 44 Ark., 153; *Milwee v. Milwee*, 44 Ark., 112; *Roberts v. Wilcoxon*, 36 Ark., 355; *Mason v.*

Johnson, 47 Md., 347; *Tilden v. Barker*, 40 O. St., 418; *Breeding v. Davis*, 77 Va., 639; *Neelly v. Lancaster*, 47 Ark., 175.

References as to revocation of will by changes in circumstances: *In re Ward*, 35 N. W. Rep. [Wis.], 731; *Noyes v. Southworth*, 20 N. W. Rep. [Mich.], 891; *In re Tuller*, 22 Am. Rep. [Ill.], 164; *Fellows v. Allen*, 49 Am. Rep. [N. H.], 328; *Negus v. Negus*, 26 Am. Rep. [Ia.], 157.

HARRISON, C. J.

The facts in which the matters in litigation in this case originated are undisputed. It appears that Eliza M. Kimberly, a widow, the owner of some real estate to which she had title in fee, made her will, by which she devised to certain of defendants in error the lands. She subsequently intermarried with the plaintiff in error, and some time afterward died. After her death the will was presented to the county court of Nemaha county, and, in the due course of regular procedure in such matters, was admitted to probate. The plaintiff in error, by what is designated a petition filed in the county court, in which certain of the facts were stated, asserted his claim to the real estate as tenant by curtesy. Answers were filed by the adverse parties, to which there were replies for the plaintiff. A trial in the county court resulted in the defeat of the plaintiff, who appealed to the district court, where judgment was rendered against him on the pleadings. The will involved in controversy was of date November 6, 1893. The marriage of plaintiff and Eliza M. Kimberly occurred November 13, 1894, and her death was on February 6, 1895.

The two questions raised and argued are, the main one, Did the marriage of Eliza M. Kimberly to plaintiff revoke her prior will? Another, on the answer to which it is contended the settlement of the first necessarily depends or hinges, Can a married woman, by devise of her separate real estate, defeat the husband's rights to take at her death, as tenant by curtesy? It is argued that if

the will of a married woman, by which there is a devise to a person other than her husband, of real estate of which the wife is seized in her own right, will exclude the husband as tenant by curtesy, the reason for the rule by which the marriage would have revoked a will of the woman, made before that event, by which real estate was devised, ceases; for if she could, after marriage, make a will with the same effect as before, no reason exists for a revocation, by law, of the prior will. The questions must be solved, probably mainly, by an application of our statutory provisions on the subject involved, and it may be best to review, to some extent, the course and history of legislation which has culminated in the present statutory provisions.

In 1855 it was of the enactments that any person of full age and sound mind might by will dispose of all of his property, except sufficient to pay his debts, and the allowance as a homestead, or otherwise, given by law to his wife and family; the revocation to be by cancellation, actual destruction with intention to revoke or by subsequent will. See Session Laws, 1855, p. 63. In act approved January 26, 1856, it was stated all persons of full age, except idiots and persons of unsound mind, may by will dispose of all their property. The marriage of a testator after the will made and issue born either before or after his death, if his wife were living at his death, revoked the will, unless the issue was provided for by some settlement or in the will. A will of an unmarried woman was revoked by her subsequent marriage. See Session Laws, 1856, p. 93. In 1860 it was enacted that a married woman might by will dispose of any property to which she was entitled in her own right, and alter or revoke the same in like manner that a person under no disability might, provided, to be valid, the will or any alteration or revocation of it must have the consent of the husband in writing annexed to it executed with the same formalities as the will. There was also a general provision in regard to revocation of wills, which was as follows:

"No will, nor any part thereof, shall be revoked, unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codicil in writing, executed as prescribed in this chapter; or by some other writing signed, attested, and subscribed in the manner provided in this chapter, for the execution of a will; excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." This general provision has been continually in force to, and inclusive of, the present time. See Session Laws, 1860, p. 78, ch. 5, sec. 10. The portion of the statute in regard to the will of a married woman to which we have just referred was so amended in 1881 that no consent of the husband was necessary to either the will or its voluntary revocation. See Session Laws, 1881, p. 233. As then amended, the section has been continued and is now in force. In an enactment on the subject of real estate and its alienation, approved January 26, 1856, there appeared a section, 50, which was as follows: "Any real estate belonging to a married woman may be managed, controlled, leased, devised, or conveyed by her by deed or by will in the same manner and with like effect as if she were *sole*." See Session Laws, 1856, p. 88, ch. 31, sec. 50; Session Laws, 1864, p. 67, ch. 12, sec. 48. This, with no change except the use of the word "single" instead of "*sole*," has been and is now in force. See Revised Statutes, 1866, p. 290, ch. 43, sec. 47; General Statutes, 1873, p. 880, ch. 61, sec. 42. In 1855 it was enacted, in regard to the disposition of real estate of decedents, that the one-third of all real estate in which a husband at any time, during the existence of the marriage, had a legal or equitable interest, not sold on execution or judicial sale, and to which the wife had not relinquished her rights, should be set apart to her after the death of her husband, if she survived him, to be so set off as to include a home and homestead;

and in another section this appears: "All the provisions hereinbefore made in relation to the widow of a deceased husband shall be applicable to the husband of a deceased wife. Each is entitled to the same rights of dower in the estate of the other, and like interest shall in the same manner descend to their respective heirs. The estate by curtesy is hereby abolished." See Session Laws, 1855, p. 75, sec. 185. The following was approved January 26, 1856: "When any man and his wife shall be seized in her right of any estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life, as tenant thereof, by the curtesy provided." See Session Laws, 1856, p. 133, ch. 44, sec. 31. In 1887 this was so amended as to read: "When any married woman seized in her own right of any estate of inheritance in lands shall die, leaving no issue, the land shall descend to her surviving husband during his natural lifetime as tenant by curtesy." See Session Laws, 1887, p. 383, ch. 34, sec. 29. It has been since and is now the same. In 1871 (Session Laws, 1871, p. 68) was passed the act relating to the rights of married women, by which they were given the right to bargain, sell, convey, control and manage all the property they had at time of the marriage and which they acquired thereafter by descent, devise or bequest, or the gift of any person except the husband, and it was to remain their sole and separate property. This, with some amendments which do not materially affect the main purpose, is now the law. The estate of a husband by curtesy was, in an early day, abolished. See Session Laws, 1855, *supra.* Then by act approved January 26, 1856, an estate by curtesy was created. See Session Laws, 1856, *supra.*

The estate is then a statutory one. The other matters, of the execution of a will by a married woman and its revocation, and the revocation of the will of a woman made before marriage, by the latter event, are also subjects of statutory provisions. As we view the matter before us, it may be conceded that a married woman may

make a will, and it will, with like effect as if she was at the time single, pass at her death the whole estate and cut off the husband's rights by curtesy which would otherwise accrue. We do not decide this, however, as it is not directly involved. In the decision of the case of *In re Tuller* (see opinion in 79 Ill., 99, 22 Am. Rep., 164) it was stated: "It is the old and well settled rule of the common law, that the will of a *feme sole* is revoked by her subsequent marriage, and it is contended that, under this rule, the will was revoked. The reason of the rule was that a will is, in its nature, ambulatory during the testator's life, and can be revoked at his pleasure. But the marriage destroys the ambulatory nature of the will and leaves it no longer subject to the wife's control, and that it is against the nature of a will to be absolute during the testator's life. It is, therefore, revoked, in judgment of law, by such marriage. See 4 Kent, Commentaries, 527; 2 Greenleaf, Evidence, 684. That reason does not exist under our present statute of 1872, which gives to every female of the age of eighteen years the power to devise her property by will or testament." In *Baacke v. Baacke*, 50 Nebr., 18, some of the cases were cited which countenanced the doctrine just quoted, and it was held: "The common law doctrine, that the revocation of a will may be implied from subsequent changes in the condition or circumstances of the testator, obtains in this state, in so far as it has not been modified by statute."

It but remains for us now to determine whether or not the will here in question was, by the subsequent marriage of the testator, revoked—at least to the extent, by its terms and effect, it would exclude the husband's estate by curtesy; and it seems that the query mainly is, what was the intention of the legislature in its enactments on the subject of revocation of wills. It will be borne in mind, as we have hereinbefore shown, there was a specific provision that marriage subsequent to the making of a will by a woman worked a revocation, and there was also a statement of the changes of condition and cir-

cumstances which revoked a prior will of the man, of which marriage in connection with the occurrence of another event was mentioned; and further, that a subsequent legislature enacted the general rule in lieu of the specific one, and this general provision has been continued throughout the legislation by which all the restrictions which existed upon the power of a married woman to convey and dispose of her separate property have been removed. The only difference in the specific rules in regard to the revocation of wills, to which we have directed attention, and the general one is that the former more clearly expressed the intention than the latter. The first were expressed, the second implied. From a review which we have given a somewhat wide range of the legislation directly or indirectly affecting the subject-matter of the litigation, we are convinced that the intention of the lawmakers was to continue in force the rule as generally understood, *i. e.*, that changes of conditions and circumstances included that of marriage. It follows that the marriage of the testatrix revoked her prior will to the extent it would have excluded her husband from an estate by curtesy in the real estate of which she died seized, and the judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

JOHN LETT ET AL. V. CHARLES HAMMOND.

FILED DECEMBER 6, 1899. No. 9,062.

1. **Right to Jury Trial.** In a law action a party is entitled to a jury trial as a matter of right.

2. **Nature of Action:** PLEADING. The nature of an action, whether legal or equitable, is determinable from its main object as disclosed by the averments of the pleading and the relief sought.

3. ———: JURY TRIAL. A law action is not triable without a jury because there are issues incidental to, or elemental of, the main one which are equitable in their nature.

4. ———: ———. The hearing and favorable determination of a motion to transfer a cause to the equity docket of a court, and that it is placed on such docket, do not necessarily decide the right of the party opponent to the motion to a jury trial in a law action. If a demand for a jury is proffered at or prior to the time the case is called for trial, its denial is error.

5. ———: ———. The refusal of a demand for a jury trial in the case at bar *held* an error which calls for a reversal of the judgment.

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

Stewart & Munger and *N. V. Harlan,* for plaintiffs in error.

Lamb & Adams, contra.

HARRISON, C. J.

In this action, commenced by plaintiffs in error in the district court of Lancaster county, it was alleged for cause that the defendant and plaintiffs had entered into a contract, in accordance with the terms of which the defendant was to, and did, purchase at judicial sale a quarter section of land situate in York county, this state. The title, as it was stipulated it should be, was taken in the name of John H. Gunsolus. It was also pleaded that it was of the further conditions of the contract that the defendant should enter into possession of the farm, manage or lease and, if opportunity offered, sell it, and account and pay to plaintiffs any sum of the consideration received which remained after payment of certain liens existent against the land; also, for improvements made on the farm while in defendant's care, and the adjustment of other matters noticed in the contract. It was pleaded that the defendant had violated the contract, had realized from the sale of the land a considerable sum,

which, by an observance of the agreement, was due the plaintiffs, and for which they prayed a judgment. Issues were joined, and a motion was made for defendant that the cause be transferred to the equity docket of the court, on the ground that it involved an accounting, which motion, on hearing, was sustained, and the case was ordered placed on the equity docket of the court. To this order the plaintiffs excepted. When called for trial the plaintiffs demanded a jury, which request was denied, as having been an element of the consideration on the hearing of the motion to docket the suit as an equitable one, and then passed upon by a judge other than the one before whom the case had been called for trial. The trial progressed without a jury, and resulted in a finding that the contract, upon which the suit was predicated, had been made (its existence had been put in issue by the answer); also, that, prior to the sale of the land, upon which sale the claim of plaintiffs was based, the farm had been sold to the wife of the defendant, and insufficient money realized therefrom to wholly pay the liens against the land, and other matters which were to be satisfied before plaintiffs could assert any right to any of the proceeds of the sale. The sale to the wife was one of the things elemental of the whole transaction between plaintiffs and defendant, the true character of which was made, by the pleadings, an issuable fact. Conformable to the finding that there was no excess or surplus of the proceeds of the sale of the land to Mrs. Hammond, judgment was rendered against the plaintiffs.

In an error proceeding to this court it is of the assignments that the trial court erred in its denial of the plaintiffs' demand for a jury to try the cause. In a strictly law action a party is entitled to a jury trial as a matter of right. See Constitution, art. 1, sec. 6; Code of Civil Procedure, sec. 280; *Mills v. Miller*, 3 Nebr., 94; *Lamaster v. Scofield*, 5 Nebr., 148. It is urged for defendant that there were issues in the case which were in their nature equitable. If so, they were but incidental to the main

one, which was purely legal. The relief sought was the recovery of money asserted to be due because of a breach of the contract. No equitable relief was asked. With such prevailing conditions of the issues the plaintiffs had a right to a jury trial. See *Yeager v. Exchange Nat. Bank*, 52 Nebr., 321; *Ashley v. City of Little Rock*, 19 S. W. Rep. [Ark.], 1058; *Cole v. Mettee*, 47 S. W. Rep. [Ark.], 407.

It is asserted for defendant that, when the cause was, on motion of defendant, placed on the equity docket, it necessarily settled the question of the right of a trial to a jury. With this view we can not agree. When the case was called for trial, or prior thereto, the plaintiffs, not having waived their rights to have the issues submitted to a jury, or been denied a jury trial, could demand it on whatever docket the case appeared.

It is urged for defendant that the court determined all the issues in favor of the plaintiffs as to which a jury trial could have been demanded, and this being true the error, if any, in the refusal of such a trial was without prejudice to the rights of complainant. It has been said by the supreme court of Iowa: "Where the evidence would have warranted the court in directing the verdict, error in ordering it tried to the court is not ground for reversal." See *Garretson v. Ferrall*, 61 N. W. Rep. [Ia.], 251. But this question need not be decided at this time. The action was one at law. The main and all the incidental or elemental issues were properly herein triable to a jury, and at least one that was very material was determined against the plaintiffs; and further, on the whole evidence, we can not say that fair and reasonable minds might not as to this issue have disagreed.

It was error to refuse a jury trial. The judgment must be reversed, and the cause remanded.

REVERSED AND REMANDED.

W. M. G. CERVENA ET AL. V. WILLIAM THURSTON.

FILED DECEMBER 6, 1899. NO. 9,047.

1. **Verdict:** OBJECTION TO FORM: REVIEW. Objections to the form of a verdict must be made at the time of its rendition, to be available in the appellate court.

2. ———: DESCRIPTION OF REALTY. A verdict for the plaintiff in ejectment, finding that he was the owner and entitled to the possession of "the property described in the petition," is sufficient as to description when the property is clearly and accurately stated in such pleading.

3. **Adverse Possession:** TIME: TITLE. One who has been in the actual, continuous, open, notorious, exclusive, adverse possession of real estate under claim of ownership for ten years, thereby acquires a perfect title to the property, which is not divested by the fact that another person thereafter occupied the premises under claim of right for a period of less than ten years.

4. ———: TITLE. To acquire real property by adverse possession it is not essential that entry should have been made under claim of ownership, if the occupancy was with intent to claim against the true owner.

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

Samuel Rinaker and *R. S. Bibb*, for plaintiffs in error.

George A. Murphy and *William C. Le Hane, contra.*

NORVAL, J.

William Thurston brought ejectment to recover a small strip of land, the petition containing the usual averments in an action of that kind. The defendants answered by a general denial, and also pleaded ten years' adverse possession. This last defense was put in issue by the reply. Verdict was for plaintiff, and defendants have prosecuted error from the judgment entered thereon.

It is first insisted that the verdict was insufficient.

No objection as to the form of the verdict having been made at the time it was returned into court, the point is not available here. See *Parrish v. McNeal*, 36 Nebr., 727; *Roggencamp v. Hargreaves*, 39 Nebr., 540; *Crooker v. Stover*, 41 Nebr., 693. It is true, objection to the verdict was first made in the motion for a new trial; but this was too late to be of any avail. See *Brumback v. German Nat. Bank*, 46 Nebr., 547. The verdict, however, was sufficient in form and substance, although a specific description of the real estate was not therein given. The jury, in their verdict, found that plaintiff was the owner and entitled, at the commencement of the action, to "the strip and parcel of land described in the plaintiff's petition." The real estate in controversy was specifically described in the petition, and the description referred to and made a part of such verdict. This was sufficient.

Objection is made to the giving of the following instruction tendered by the plaintiff: "1. If you find from the evidence in the case that the plaintiff has a deed to the whole north half of the northeast quarter of section 35, and that he used said eighty acres continuously and uninterruptedly, including the strip in question, for any considerable portion of the time during the last ten years before the filing of this petition, then your verdict should be for the plaintiff, unless you find that the strip in question belongs to the south half of the northeast quarter of said section 35; and the fact that the defendant may have used the strip of land in dispute, in common with the plaintiff, during the whole period of ten years, will not vest the title of the land in him, and he can not recover under a claim of adverse possession." This instruction was faulty, in that it advised the jury that the defense of adverse possession could not avail, if they found that the plaintiff, continuously and uninterruptedly, used the strip of land in controversy for any considerable portion of the time, during the ten years before the bringing of this action. This was an incorrect statement of the law. Defendants did not plead title by reason of adverse oc-

cupancy of the premises merely, for the ten years immediately before suit, but pleaded such occupancy for more than ten years. Under this instruction, if the defendants had been in the actual, continuous, exclusive and adverse possession of the strip of land in dispute for the full period of ten years, they could not thereby acquire title if, after such adverse holding for ten years, the plaintiff had occupied the property as his own for a considerable length of time. This is not the law. The title is acquired by the adverse occupancy during the stated period of ten years, and is not divested by reason of the fact that some one else subsequently occupied the premises as owner for a period of less than ten years.

Complaint is also made of this instruction: "4. You are instructed that, to constitute adverse possession which will ripen into title in ten years, it is necessary that an entry be actually made upon the land under some claim of ownership, and that the possession be actual, visible, open, notorious, adverse and exclusive for the full period of ten years." The law is not correctly enunciated in the foregoing instruction. To acquire title by adverse possession it is not indispensable that possession of the land be taken under a claim of ownership. A person who goes upon land as a mere trespasser may acquire title by adverse possession if he remains in the visible, open, notorious, adverse and exclusive possession of the premises under claim of ownership for ten years. The intention to acquire title by adverse possession must obtain at the time the statute commences to run. The intention to claim the land need not be entertained when possession is taken. See *Omaha & R. V. R. Co. v. Rickards*, 38 Nebr., 847. It is the occupancy with intent to claim title against the true owner which renders the entry and occupancy adverse. The judgment, for the reasons stated, is

REVERSED.

FRANK HUMPERT V. ALEXANDER MCGAVOCK.

FILED DECEMBER 6, 1899. No. 9,043.

1. **Rulings on Evidence:** NEW TRIAL: REVIEW. Rulings of the trial court in the admission or rejection of testimony are not reviewable in the appellate court, where the attention of the trial court was not challenged thereto in the motion for a new trial.
2. **Instructions:** EXCEPTIONS: REVIEW. Instructions to which no exceptions were taken at the time they were given to the jury are not reviewable in this court.
3. **Sufficiency of Evidence:** ASSIGNMENTS OF ERROR. This court will not review the evidence to ascertain whether it is sufficient to support the verdict, when the question is not raised by the assignments contained in the petition in error.
4. **Assignments of Error:** REVIEW. Assignments of error not argued at the bar, or in the briefs filed, are waived.

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

John T. Cathers, for plaintiff in error.

Guy R. C. Read and *Francis A. Brogan, contra.*

NORVAL, J.

One Oliver Davis was awarded the contract for the grading of certain streets in the city of South Omaha, and he entered into a written contract for the performance of the work in the manner and time agreed upon between the city authorities and himself. The contract purports to have been signed by Leopold Dall and Alexander McGavock as parties of the third part. The contract contained the following stipulations: "Said parties of the third part hereby guaranty that the said party of the second part will well and truly perform the covenants 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 (Davis), that the said parties of the third part hereby agree to pay for said labor, or

any part thereof, which shall not be paid by said second party within ten days after the money becomes due and payable; and this provision shall entitle any and all laborers, performing labor on the improvements to be done under the 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. But said third party shall not be liable on this guaranty, on account of said labor, beyond $15,000, the estimate cost of labor on said work." Davis did the grading in question, employing numerous men in the performance of the work. He paid the laborers for a portion of the time they were in his employment, and issued to them checks for the remainder, which were sold by the men, but were not redeemed or paid by Davis. Some of these time checks were purchased by Frank Humpert, who brought an action on the contract against Dall and McGavock to secure the amount due and unpaid the laborers whose time checks had been transferred and assigned to him. The answer put in issue the material averments of the petition, and several other defenses were also pleaded, which were controverted by the reply. A verdict for the defendants was returned under the direction of the court, upon which judgment was subsequently entered. Plaintiff, being dissatisfied with the outcome of the trial, has brought the record of the cause to this court for review.

The plaintiff offered as evidence exhibits 2 to 145, which, on motion of defendants, were excluded by the court below, and the ruling is now assailed. Whether those exhibits were or were not erroneously excluded from the consideration of the jury can not now be adjudicated, for the reason no complaint of the ruling or decision was made in the motion for a new trial. Such motion not only does not contain the usual assignments of "errors of law occurring at the trial," but in no way challenged the attention of the court below to its rulings upon the admission or rejection of testimony; hence such rulings are not reviewable. See *Johnson v. Ghost*, 11

Nebr., 414; *Cruts v. Wray*, 19 Nebr., 581; *Yates v. Kinney*, 25 Nebr., 120; *Dillon v. State*, 39 Nebr., 92; *Becker v. Simonds*, 33 Nebr., 680.

Complaint is made of the giving of the instruction to return a verdict for defendant. No exception was taken by the plaintiff in the district court to the giving of the instruction; therefore we are precluded from its consideration. This is a well settled doctrine, and the following authorities support it: *Scofield v. Brown*, 7 Nebr., 221; *Brooks v. Dutcher*, 22 Nebr., 644; *Johnson v. Swayze*, 35 Nebr., 117; *Darner v. Daggett*, 35 Nebr., 696; *Bouvier v. Stricklett*, 40 Nebr., 792; *Levi v. Fred*, 38 Nebr., 564; *Glaze v. Parcel*, 40 Nebr., 732. The sufficiency of the evidence to sustain the verdict is one of the assignments contained in the motion for a new trial. But we are precluded from the consideration of such question, because the same is not raised in the petition in error. See *Wiseman v. Ziegler*, 41 Nebr., 886.

There are other alleged errors assigned in the petition in error, but their consideration is waived by the failure to argue them in the briefs filed, or at the bar. See *Peaks v. Lord*, 42 Nebr., 15; *Bishop v. Middleton*, 43 Nebr., 10; *Madsen v. State*, 44 Nebr., 631; *Erck v. Omaha Nat. Bank*, 43 Nebr., 613. The judgment is

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE, V. FIRST NATIONAL BANK OF OMAHA, APPELLANT.

FILED DECEMBER 6, 1899. No. 8,840.

Trusts: PURCHASE OF LAND: TITLE: STATUTE OF FRAUDS: ATTACHMENT. A rehearing having been granted in this case, the record is re-examined and the conclusions reached on the former hearing adhered to.

REHEARING of case reported in 58 Nebr., 548. *Affirmed.*

Winfield S. Strawn, for appellant.

Greene & Breckenridge, contra.

SULLIVAN, J.

Aided by exceptionally lucid and forceful arguments, we have again carefully examined the record in this case, and have again reached the conclusion that the judgment of the district court is adequately supported by competent and credible proof, and should, therefore, be affirmed. The original opinion (*Chicago, B. & Q. R. Co. v. First Nat. Bank of Omaha*, 58 Nebr., 548, 78 N. W. Rep., 1064) contains what is believed to be a substantially accurate statement of the main facts; and, since counsel for appellant expressly conceded in the oral argument that no disputed question of law is involved, we think it sufficient at this time to announce the result of our deliberations. The judgment in favor of the appellee will stand

AFFIRMED.

HOME FIRE INSURANCE COMPANY V. CHARLES JOHANSEN.

FILED DECEMBER 6, 1899. No. 10,643.

1. **Pleading:** CONFESSION AND AVOIDANCE: BURDEN OF PROOF. The burden of proof as to new matter pleaded by way of confession and avoidance of the allegations of an adversary's pleading is on the party setting forth such new matter.

2. ———: REPLY: CONSTRUCTION. A reply which refers in vague and general terms to the allegations of the answer should be construed as responding to the particular matters set forth in such answer.

3. ———: CONFESSION AND AVOIDANCE. A party, by pleading in avoidance of matter set forth in his adversary's pleading, concedes the truth of such matters in seeking to avoid their legal effect.

4. **Insurance:** CHATTEL MORTGAGE. The giving of a mortgage on in-

sured chattels, in violation of a condition of the policy against incumbrances, renders such policy void.

5. ———: ———: DISCHARGE OF LIEN. In such case the cancellation or discharge of the lien before loss occurs revives the contract.

6. ———: ———: ———. And the burden of proving such cancellation of the lien is on the insured.

7. **Review**: SECOND TRIAL: LAW OF THE CASE. The determination of questions presented to this court in its review of the proceedings of an inferior tribunal becomes the law of the case, and, ordinarily, will not be re-examined in a subsequent review of the proceedings of the inferior tribunal on a second trial of the case.

ERROR from the district court of Washington county. Tried below before POWELL, J. *Reversed.*

Byron G. Burbank, for plaintiff in error.

Dolezal, Cook & Cook, contra.

SULLIVAN, J.

Charles Johansen sued the Home Fire Insurance Company in the district court of Washington county to recover upon a fire policy. The cause was tried to a jury, and resulted in a verdict and judgment in favor of the plaintiff. The question for decision, presented in a variety of forms, is the sufficiency of the evidence to sustain the verdict. The policy forbade, under penalty of forfeiture, the mortgaging of the property insured. One of the defenses presented by the answer was "that subsequent to the issuance of said policy of insurance the plaintiff, in violation of the terms, stipulations and warranties contained in said policy, incumbered by three chattel mortgages all the property described in said policy and damaged by said fire; such chattel mortgages being for the sums of $7,160, $7,165 and $1,805,—all of which said mortgages were valid, subsisting liens on said property at the time of said fire." The plaintiff replied, denying the averments of the answer not expressly admitted; denying that any of the chattels covered by the policy were incumbered when the policy was issued; and

alleging "that, at the time of the loss by fire set forth in plaintiff's petition, all and singular the chattels covered by said policy of insurance set forth in plaintiff's petition were free from all mortgages and were, prior thereto, released and discharged from the lien of all mortgages whatsoever; and said chattels, at the time of said fire, were unincumbered by any mortgage whatsoever." The plaintiff, at the trial, produced witnesses to sustain the controverted averments of the petition and rested. The defendants offered no evidence, and the cause was submitted to the jury without any proof touching the execution or release of the mortgages referred to in the pleadings. Counsel for the defendant contends that the giving of the mortgages as charged in the answer was admitted by the reply, and that, in the absence of any evidence upon the subject, the presumption is the property was still incumbered at the time of the fire. We think counsel is right. We see no escape from the conclusion that the plaintiff, in his reply, confessed that he had broken a vital condition of the policy. The company alleged that the insured chattels were mortgaged after the policy was issued, and that the mortgages were in force at the time of the fire. The plaintiff was called upon to meet this allegation. It was his duty to admit or deny it. Fairly construed, we think the reply was intended as a confession and avoidance of the new matter contained in the answer. It was evidently the intention of the pleader to admit the execution of the mortgages, and to show, by way of avoidance, that they were not liens on the property at the time of its destruction. It is true that the plaintiff does not refer in his pleading to any particular mortgage; but we must assume that the reply was designed to perform its proper office by responding fairly to the allegations of new matter contained in the answer. The purpose of the plaintiff was to avoid the legal consequences of the alleged fact that he had incumbered the insured chattels after the issuance of the policy; and that, of course, he could not do

without admitting that the mortgages had been given. He could not allege new facts showing a release or discharge by payment, or otherwise, without impliedly conceding that the alleged lien once existed. See *Dinsmore v. Stimbert*, 12 Nebr., 433; Gould, Pleadings [5th ed.], 34; 1 Boone, Code Pleading, sec. 59; Bliss, Code Pleading [1st ed.], sec. 340; 4 Ency. Pl. & Pr., 667; *State v. Hill*, 47 Nebr., 456. The giving of the mortgages was the breach of a substantial condition of the policy, and its legal consequence was to render the contract of indemnity null. The release of the mortgages would, according to our decisions (*State Ins. Co. v. Schreck*, 27 Nebr., 527; *Omaha Fire Ins. Co. v. Dierks*, 43 Nebr., 473; *Johansen v. Home Fire Ins. Co.*, 54 Nebr., 548), reanimate the contract. But clearly the burden of showing such release was upon the plaintiff. While the defendant alleged that the mortgages were in force at the time of the fire, that allegation was not essential to its defense. It was neither necessary to plead nor prove it. See *Phenix Ins. Co. v. Bachelder*, 39 Nebr., 95; *State Ins. Co. v. Schreck, supra.*

We are asked in this case to overrule the former decisions of this court, holding that the release of a chattel mortgage, given upon insured property, in violation of an express condition of the policy, revives the contract, and renders it effective from the date of the release. The question having been presented for decision and decided when this case was here before (*Johansen v. Home Fire Ins. Co., supra*), we will not now inquire into the correctness of the rule announced. If our former conclusion was erroneous, the defendant should have obtained a correction of the error by presenting a motion for rehearing. The settled doctrine of this court is that the determination of questions presented to this court, in reviewing the proceedings in a cause in the district court, becomes the law of the case for all subsequent proceedings, and, ordinarily, will not be made the subject of reexamination. See *Ripp v. Hale*, 45 Nebr., 567; *Coburn v.*

Watson, 48 Nebr., 257; *Fuller v. Cunningham*, 48 Nebr., 857; *Omaha Life Ass'n v. Kettenbach*, 55 Nebr., 330; *Mead v. Tzschuck*, 57 Nebr., 615; *Hayden v. Frederickson*, 59 Nebr., 141, 80 N. W. Rep., 494. And this rule applies, not only to all points actually decided, but to all questions presented by the record, and necessarily involved in the decision. See *Richardson Drug Co. v. Teasdall*, 59 Nebr., 150, 80 N. W. Rep., 488; *Hayden v. Frederickson, supra.* The judgment of the district court is reversed, and the cause remanded.

REVERSED AND REMANDED.

KATE DIRKS V. CORA JUEL ET AL.

FILED DECEMBER 6, 1899. No. 9,049.

1. **Bringing Money Into Court.** Bringing money into court is the act of depositing money in the hands of the proper officer of the court for the purpose of satisfying a debt or duty.

2. ———: CLERK. The clerk of the court is the proper custodian of money paid into court pursuant to an order or judgment of the court.

3. ———: ———: PARTITION. Money paid to the clerk of the district court by referees in partition proceedings, in obedience to an order directing the money to be brought into court, is received by such clerk in his official capacity.

4. ———: ———: CONVERSION BY TRUSTEE: DEPOSIT IN BANK. A trustee who deposits trust funds in a bank to his private account is, in the absence of special authority so to do, guilty of conversion.

5. ———: ———: ———: ———: LIABILITY OF SURETIES. And in such case the sureties on his official bond for the term of office, during which such conversion occurred, are liable to the party injured.

6. **Conversion by Trustee:** REMEDY. In case a trustee has converted trust funds, the *cestui que trust* may either pursue the fund or sue for the conversion.

ERROR from the district court of Nemaha county. Tried below before LETTON, J. *Reversed.*

The facts are stated in the opinion.

George W. Cornell and *W. H. Kelligar*, for plaintiff in error:

When the clerk received the money under an order directing it to be brought into court, he received it in his official capacity, and the sureties are liable. See *McDonald v. Atkins*, 13 Nebr., 568; *Heppe v. Johnson*, 14 Pac. Rep. [Cal.], 835; *Walters-Cates v. Wilkinson*, 60 N. W. Rep. [Ia.], 514.

The act of the clerk in depositing in his own name money held as trustee amounts to conversion. See *Pine County v. Willard*, 39 N. W. Rep. [Minn.], 72; *State v. Alsup*, 4 S. W. Rep. [Mo.], 31.

Defendants can not escape liability on the ground that the clerk had the money when he entered upon his second term of office. See *Sidner v. Alexander*, 31 O. St., 378; *District Township of Fox v. McCord*, 6 N. W. Rep. [Ia.], 536; *Thompson v. Dickerson*, 22 Ia., 360.

Delay in taking the money from the clerk did not release the sureties. See *State v. Alden*, 12 O., 59; *Boice v. Main*, 4 Denio [N. Y.], 55.

H. A. Lambert, contra:

Sureties on an official bond are answerable only for such acts of their principal as are done by virtue of his office. See *Ottenstein v. Alpaugh*, 9 Nebr., 237; *Kendall v. Aleshire*, 28 Nebr., 707; *McCormick v. Thompson*, 10 Nebr., 484; *Huffman v. Kopplekom*, 8 Nebr., 344.

Defendants are liable only for money received by the clerk within the line of his official duty. See *Waters v. Carroll*, 9 Yerg. [Tenn.], 102; *Rogers v. Odom*, 86 N. Car., 432.

The court can not by an order increase the liability of the sureties on the official bond of the clerk. See *Scott v. State*, 46 Ind., 203; *State v. Givan*, 45 Ind., 267.

Officer's depositing of money to his individual credit

does not amount to a conversion, where the funds can be traced and identified. See *Cassilly v. Cochran*, 13 S. W. Rep. [Ky.], 824.

The use of public funds in a private business is not alone a breach of an official bond. See *Brown v. State*, 78 Ind., 239; *Bocard v. State*, 79 Ind., 270; *Dumas v. Patterson*, 9 Ala., 484.

Where an officer has collected money during his first term of office, and such money remains in his custody when he enters upon the discharge of the duties of his second term, the sureties for the latter term become immediately liable therefor, and those of the former term are relieved from further liability concerning such money. See *Board of Education v. Fonda*, 77 N. Y., 350; *State v. Van Pelt*, 1 Ind., 305; *De Hart v. McGuire*, 10 Phila. [Pa.], 359; *Moore v. Madison County*, 38 Ala., 670; *Kelly v. State*, 25 O. St., 567; *Miller v. Moore*, 3 Humph. [Tenn.], 189.

It is the time of the defalcation, and not the time of the receipt of the money, that determines which set of sureties are liable where an officer has held two or more successive terms. See *Townsend v. Everett*, 4 Ala., 607.

The sureties on the bond at the time of the actual misappropriation or squandering of the funds are the ones liable therefor. See *Dumas v. Patterson*, 9 Ala., 484; *Ingraham v. McCombs*, 17 Mo., 558.

References as to non-liability of first-term sureties: *Bruce v. United States*, 17 How. [U. S.], 437; *Governor v. Robbins*, 7 Ala., 79.

SULLIVAN, J.

From January, 1888, to December 4, 1894, Edward Juel was the duly constituted clerk of the district court for Nemaha county. During his first term, which expired January 7, 1892, he received in his official capacity the proceeds of a partition sale of real estate, and deposited the same in the Carson National Bank to the credit

of his individual account. A portion of the fund so deposited was afterwards paid out on the order of the court to the persons entitled to receive it. Kate Dirks, one of the co-owners of the partitioned estate, having failed to receive her share of the money paid into court by the referees, instituted this action against Juel's sureties for the first term, on the theory that the act of depositing the money in the bank without anything to denote its trust character amounted in law to a conversion. The sureties answered, denying (1) that their principal received the avails of the partition sale by virtue of his office; and (2) that if there was any defalcation, it occurred during Juel's second term. The court, having tried the cause without a jury, found the issues, and rendered judgment, in favor of the defendants.

The petition in error presents two questions for decision. It is first insisted that in receiving the money from the referees Juel did not act in his official capacity, and that his sureties were, therefore, not liable on their bond. After carefully considering the arguments and authorities brought forward in support of this contention, we are entirely satisfied that the act in question was done in performance of an official duty, and was, consequently, within the purview of the defendants' contract. Section 889 of the Code of Civil Procedure declares: "The clerk of each of the courts shall exercise the powers and perform the duties conferred and imposed upon him by the other provisions of this Code, by other statutes, and by the common law. In the performance of his duties he shall be under the direction of his court." By section 12 of chapter 10, Compiled Statutes of 1899, all official bonds are made obligatory upon the principal and sureties for the faithful discharge of all duties required by law of such principal. The order of the court in the partition suit directed the referees to sell the "land as provided by law and bring the proceeds into court." Bringing money into court, says Bouvier, is "the act of depositing money in the hands of the proper officer of the

court for the purpose of satisfying a debt or duty." See 1 Bouvier, Law Dictionary, 267. That the clerk of the court is the proper custodian of the money paid into court in pursuance of an order or judgment of the court is a proposition upon which, so far as we know, there is no diversity of judicial opinion. See *McDonald v. Atkins*, 13 Nebr., 568; *Moore v. Boyer*, 52 Nebr., 446; *Commercial Investment Co. v. Peck*, 53 Nebr., 204; *State v. Watson*, 38 Ark., 96; *Walters-Cates v. Wilkinson*, 92 Ia., 129; 6 Am. & Eng. Ency. Law [2d ed.], 142.

After confirmation of the sale in the partition suit it was entirely proper for the court to discharge the referees. They were appointed to make partition, and not for the purpose of acting for an indefinite period as custodians of a fund which might come into their hands in consequence of being obliged to make a sale, instead of a division, of the property. It was never contemplated that the custodianship of referees should in every case continue until all the owners and incumbrancers should call for and receive their shares of the proceeds of the sale. See *Walters-Cates v. Wilkinson, supra.* Mrs. Dirks was an absent owner, and by the express terms of section 844 of the Code of Civil Procedure the court was directed to hold her share, or invest it for her benefit. The law imposed upon Juel, as clerk, the duty of receiving the money which the court directed the referees to pay in; and it imposed upon him the further duty of holding such money in his official capacity, and accounting for it to the persons to whom it belonged. This being so, it is clear, on the conceded facts, that the plaintiff's money was lost through official misconduct, for which the defendants must answer if the default occurred during the first term. It appears that Juel had to his credit in the Carson National Bank at the commencement of his second term more than the amount due from him to Mrs. Dirks, and that he expressed at one time a willingness to pay her out of the funds on deposit in the bank. The defendants contend that, although the money paid into

court by the referees was deposited by Juel to his personal credit, it was, nevertheless, the plaintiff's money; that it was still in the bank after the expiration of Juel's first term, and that the plaintiff might have then claimed and received it. We concede all this; but do not accept the defendants' conclusion that the sureties on the first bond are, therefore, exonerated.

While the fund might be traced and identified as the property of the plaintiff, a court would, at her instance, impress it with a trust in her favor. But she was not obliged to pursue the fund. By depositing plaintiff's money to his individual credit Juel converted the money to his own use, and plaintiff had a right to sue him and the sureties on his bond for conversion. She had an election of remedies, and she has chosen to proceed against the defendants for the wrongful act of their principal. According to all the authorities, the act of Juel in dealing with the proceeds of the partition sale was wrongful, and constituted a technical conversion, entirely irrespective of his intentions. The rule is that a trustee who deposits trust funds in a bank to his own private account is, in the absence of special authority so to do, guilty of conversion. See *School District v. First Nat. Bank*, 102 Mass., 174; *Pine County v. Willard*, 39 N. W. Rep. [Minn.], 71; *Williams v. Williams*, 55 Wis., 300; *Hammon v. Cottle*, 6 S. & R. [Pa.], 290; *Cartmell v. Allard*, 7 Bush [Ky.], 482; *Bartlett v. Hamilton*, 46 Me., 435. In *Commonwealth v. McAllister*, 28 Pa. St., 480, it is said that if a trustee depositing trust funds in a bank wishes to avoid liability as a wrong-doer, the entry must go down in the books of the institution in such terms as not to be misunderstood that they are the funds of the specific trust to which they belong. In *Naltner v. Dolan*, 108 Ind., 500, it was held that if the trustee puts the trust fund in such shape as to invest himself with the legal title to it, the *cestui que trust* has his election to treat the fund as belonging to the trustee, and regard the latter as his debtor, or else to assert ownership in himself.

Whatever may have been the intention of Juel, he did not preserve the trust character of the fund in question. He invested himself with the legal title to plaintiff's money, and this act constituted a breach of his official bond. The judgment is reversed, and the cause remanded.

REVERSED AND REMANDED.

H. J. HARMS V. F. H. FREYTAG ET AL.

FILED DECEMBER 6, 1899. No. 9,051.

Note: ACKNOWLEDGMENT OF INDEBTEDNESS: STATUTE OF LIMITATIONS. A letter in which a surety on a note states to the payee that he is informed that the note, describing it, is not paid, and asks the payee to collect the money due upon it, and declares that he "will not longer be held good for the note" in case it be not promptly collected, is a sufficient acknowledgment of the indebtedness to arrest the running of the statute of limitations.

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

G. W. Cornell, W. H. Kelligar and *Edgar Ferneau,* for plaintiff in error.

H. A. Lambert, contra.

SULLIVAN, J.

H. J. Harms brought this action in the district court of Nemaha county to recover on a promissory note executed by F. H. Freytag as principal, and by D. Oestman and F. Schlange as sureties. Oestman was not served with summons. Freytag made default, and Schlange answered, alleging that the action was barred by the statute of limitations. The court tried the case without a jury, and found the issue raised by the answer in favor of Schlange. Judgment was rendered on the finding, and the plaintiff, being dissatisfied, brings the record

here for review. Whether the trial court reached a correct conclusion depends entirely on the meaning of two letters written by Schlange to Harms in regard to the note in suit. These letters, which were written in the German language, were held to be insufficient as an acknowledgment of a subsisting liability to arrest the running of the statute of limitations. The first one, as translated, is as follows:

"SOUTH AUBURN, NEB., April 12, 1894.

"DEAR FRIEND H. HARMS: You have written me, last harvest, that the note from Fr. Freytag is not yet paid, the one that I and Oestman have undersigned. I would like to ask you to collect in the money as soon as possible, for I will no longer be held good for the note. If you will let him have the money any longer; so let him [Freytag] give you a new note. I like you to tarry no longer with the matter, for it is high time, for the note is very likely due for quite a long time. If you do not collect in the note now, then I will not have anything no more to do with it.

"Your friend, F. SCHLANGE."

This writing is, we think, a sufficient acknowledgment, within the meaning of section 22, Code of Civil Procedure, which declares: "In any cause founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise." In the letter above set out Schlange says that he is informed the note has not been paid. He asks Harms to collect the money due upon it, and declares that he "will not longer be held good for the note," in case it be not promptly collected. This is a plain admission that he was liable on the note when the letter was written, but that his liability would presently cease unless payment should be enforced. In *Elder v. Dyer*, 26 Kan., 604, it was held that a letter con-

taining the statement, "I do not want to be held longer on the note," was an acknowledgment of an existing liability, within the meaning of the Kansas statute, which is substantially identical with our own. Valentine, J., delivering the opinion, said: "No set phrase or particular form of language is required. Anything that will indicate that the party making the acknowledgment admits that he is still * * * held for its liquidation and payment, is sufficient to revive the debt or claim." In *Devereaux v. Henry*, 16 Nebr., 55, the following letter, written by the signer of a note to the payee, was held to be a sufficient acknowledgment to take the case out of the operation of the limitation law: "If I ever get able, I will pay every dollar I owe to you and all the rest. You can tell all, as soon as I get anything to pay with, I will pay. As for giving a note, it is of no use. I will pay just as quick without a note as with it." We are not able to distinguish the cases cited from the case at bar, and therefore hold, without reference to the second letter written by Schlange to Harms, that the finding and judgment are erroneous, and should be set aside.

REVERSED AND REMANDED.

WILLIAM BARR, APPELLANT, V. MARTHA A. POST ET AL., APPELLEES.

FILED DECEMBER 6, 1899. No. 10,950.

1. **Vacating Judgment:** FALSE TESTIMONY. The intentional production, by a litigant, of false testimony to establish a cause of action or defense amounts to such a fraud as will, in a proper case, entitle the adverse party, if unsuccessful, to the vacation of the judgment rendered against him.

2. ———: ———: PLEADING. In an original suit to annul a judgment, on the ground that it was fraudulently obtained, the plaintiff must allege and prove that he exercised due diligence at the former trial, and that his failure to secure a just decision of the issues was not attributable to his own carelessness or inaction.

3. **Trial:** PREPARATION: EVIDENCE. A party must, in preparing for trial, proceed on the assumption that his adversary will produce evidence to support his contention.

4. **Review:** FORMER TRIAL: EVIDENCE. Where all the evidence given on a former trial is not contained in the record under review, the court can not determine whether the judgment rendered on such trial was the result of false testimony.

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

Burr & Burr and *Morning & Berge,* for appellant.

J. S. Kirkpatrick, Thomas Darnall and *Stewart & Munger, contra.*

SULLIVAN, J.

This action was instituted by William Barr to secure the cancellation of a judgment for damages recovered against him by Martha A. Post in the district court of Lancaster county. The issues having been decided in favor of the defendants, the plaintiff brings the record here for review by appeal. The question to be determined is the sufficiency of the evidence to sustain the decision. After a careful perusal of the record, we are entirely satisfied that the conclusion of the trial court is correct. The judgment assailed is based on an alleged assault and battery committed by Barr upon Mrs. Post. The reasons assigned for the annulment of the judgment are that it was procured by perjured testimony, and by a fraudulent concealment of material facts. It seems to be conceded that the general finding of the trial court in this case settles, in favor of appellees, the right of Mrs. Post to a judgment against appellant for some amount; but it is claimed that the jury, relying on false testimony, were induced to award excessive damages. The false testimony, which appellant insists unjustly augmented the recovery, was given by Mrs. Post and related to the character and extent of her services at a public lunch room

in the city of Lincoln, during a period of about five months after she was injured. Her testimony in the law case was to the effect that she did not do cooking or other heavy work, and that her services were intermittent. The evidence given on the trial of this cause shows that she acted both as a waitress and a cook, and that her services were continuous. We are committed by the case of *Munro v. Callahan*, 55 Nebr., 75, to the doctrine that the intentional production by a litigant of false testimoney to establish a cause of action or defense amounts to such a fraud as will, in a proper case, entitle the adverse party, if unsuccessful, to the vacation of the judgment rendered against him. But actions of this character are not to be encouraged. Public policy demands that there shall be an end of litigation. A party is informed by the pleadings of the issue for trial, and he must be ready. He is not justified in assuming that his adversary will not produce evidence in support of his contention, whatever it may be. Barr was advised in the law action that Mrs. Post claimed to have been seriously injured, and he should have been prepared with his evidence to show that she was, soon after the alleged battery, engaged in manual labor that required for its performance good health and considerable physical strength. When, at the trial, he was informed where she had been employed, he should have consulted her employers, and called them as witnesses to disprove her claims. Whether the alleged false testimony would support an original action for a new trial, under any circumstances, we do not decide; but we have no hesitation whatever in saying that there is in this record no sufficient showing of diligence to entitle the plaintiff herein to the relief demanded. There is another reason why the judgment of the trial court must be affirmed. It does not appear that the jury, in estimating the damages, did not have ample evidence of unexceptionable witnesses before them. There is nothing to indicate that, laying the testimony of Mrs. Post entirely out of view, the damages are ex-

cessive, or the judgment inequitable. The judgment of the district court is right, and is

AFFIRMED.

NORVAL, J., not sitting.

PACIFIC EXPRESS COMPANY V. JOHN F. CORNELL ET AL.

FILED DECEMBER 19, 1899. No. 10,416.

1. **Injunction Against Officers:** VOID STATUTES. Where it is alleged that a public body is proceeding to interfere with the rights of a person or corporation in a manner which will cause damage, for which there is no adequate remedy at law, or which may cause a multiplicity of suits, and it is further alleged that the law under which the proceedings are in progress is unconstitutional, the petition presents cause for equitable relief by injunction to prevent further action.

2. **Executive Officers:** DUTIES: CONSTITUTIONAL LAW. Under the provisions of the present constitution, the state officers of the executive department, as named therein, are charged with the performance of all duties executive in their nature, which are by law required of them. NORVAL, J., dissenting.

3. **State Board of Transportation:** STATE OFFICERS: DUTIES. The law creating the board of transportation, by which certain designated state officers of the executive department are charged with prescribed duties in regard to railroads, does not cast such duties upon the individuals, as distinguished from the offices or officers, but it is the latter upon whom is put the burden of further acts executive in their nature.

4. **Executive Officers:** DUTIES: BOARDS: CONSTITUTIONAL LAW. There is nothing in the constitution which prohibits the requirement of the performance by any, either or all the executive officers of the state, of additional duties executive in their nature, nor to inhibit action by two or three in the doing thereof by conclusions announced by them collectively or as a board. NORVAL, J., dissenting.

5. ———: SECRETARIES OF BOARD OF TRANSPORTATION. The secretaries, whose appointment is provided for by the law, are not executive state officers. They are, in the nature of mere deputies, to act for their principals in matters which precede and lead to a final order or decision, which must be by the principals.

6. **Board of Transportation:** STATUTES: AMENDMENTS. The act of 1897 (Session Laws, p. 303, ch. 56) placed certain companies or persons, owners or in control of telegraph, telephone or express line or lines, under the control of the board of transportation, and for the jurisdiction and powers of the board adopted such as were conferred by a prior act. It was not amendatory of the act of 1887, by which there was created the board of transportation.

7. **Carriers:** VOID MAXIMUM RATE LAW: ENFORCEMENT OF STATUTE CREATING BOARD OF TRANSPORTATION. The law of 1893, known as the maximum rate law, or the portion thereof which contained the schedule of rates, was declared unconstitutional, under the then existent conditions, by the supreme court of the United States. This carried with it section 6 of the act, which could have no operation except in connection with the rates as fixed in the schedule. Such law is now as if non-existent, and does not interfere with the enforcement of the law of 1887, to which we have referred, by the board and in the method provided in the law of 1887, to which we have hereinbefore alluded.

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

The opinion contains a statement of the case.

W. W. Morsman and *A. R. Talbot*, for appellant:

The act of 1887 (Session Laws, ch. 60), creating the board of transportation and defining its powers, is in conflict with section 26 of article 5 of the constitution, prohibiting the legislature from creating any other executive state office than those defined in the constitution, and is in conflict with section 2 of article 5, which provides that none of the officers of the executive department shall be eligible to any other state office. See *State v. Liedtke*, 9 Nebr., 464; *State v. Fremont, E. & M. V. R. Co.*, 22 Nebr., 313; *Nebraska Telephone Co. v. State*, 55 Nebr., 627.

At the time of the passage of the act of 1897 (Session Laws, ch. 56), whatever power the board of transportation previously had, under the act of 1887, to regulate rates, had been repealed by the act of 1893, known as

the Maximum Rate Law, and, therefore, chapter 56 of the Laws of 1897 was ineffectual to confer upon the board the power to regulate the rates to be charged by appellant. See *State v. Fremont, E. & M. V. R. Co.*, 22 Nebr., 313.

The act of 1897 (Session Laws, ch. 56) is an amendatory act, and does not "contain" the section or sections so amended, nor does it "repeal" such section or sections, and is, therefore, unconstitutional and void. See *People v. McCallum*, 1 Nebr., 182; *Smails v. White*, 4 Nebr., 353; *Sovereign v. State*, 7 Nebr., 409; *State v. Corner*, 22 Nebr., 265; *In re House Roll 284*, 31 Nebr., 505; *Stricklett v. State*, 31 Nebr., 674; *Trumble v. Trumble*, 37 Nebr., 340; *State v. County Commissioners*, 47 Nebr., 428; *Morgan v. State*, 48 Nebr., 798; *State v. Moore*, 48 Nebr., 872; *Sheasley v. Keens*, 48 Nebr., 57; *Lancaster County v. Hoagland*, 8 Nebr., 37; *City of South Omaha v. Taxpayers' League*, 42 Nebr., 678; *German-American Fire Ins. Co. v. City of Minden*, 51 Nebr., 870; *Board of Education v. Moses*, 51 Nebr., 288; *State v. Tibbets*, 52 Nebr., 228.

References as to inadequacy of a remedy at law: *Boyce v. Grundy*, 3 Pet. [U. S.], 210; *Sullivan v. Portland & K. R. Co.*, 94 U. S., 806; *Wylie v. Coxe*, 15 How. [U. S.], 415; *Tyler v. Savage*, 143 U. S., 79; *Richardson Drug Co. v. Meyer*, 54 Nebr., 319; *Miller v. Drane*, 75 N. W. Rep. [Wis.], 413; *Kilbourn v. Sunderland*, 130 U. S., 505; *Board of Liquidation v. McComb*, 92 U. S., 531; *Davis v. Grey*, 16 Wall. [U. S.], 203; *Osborn v. United States Bank*, 9 Wheat. [U. S.], 738; *Pennoyer v. McConnaughy*, 140 U. S., 1; *Morris v. Merrill*, 44 Nebr., 428; *City of Omaha v. Megeath*, 46 Nebr., 511.

C. J. Smyth, Attorney General, contra:

That part of section 26 of article 5 of the constitution which provides that "no other executive state office shall be continued or created" does not prohibit the legislature from creating a board of transportation and authorizing

the governor to appoint the members thereof from electors outside of the executive state officers named in section 1 of the same article. See *In re Railroad Commissioners*, 15 Nebr., 679; *State v. Weston*, 4 Nebr., 234; *State v. Smith*, 35 Nebr., 25.

The creation of a board of transportation out of state officers is not the creation of an office distinct from the several offices of the officers composing the board. See *State v. Judges*, 21 O. St., 1.

The law providing for secretaries of the board of transportation is not unconstitutional. See *State v. Fremont, E. & M. V. R. Co.*, 22 Nebr., 313, 23 Nebr., 117; *State v. Missouri P. R. Co.*, 29 Nebr., 550.

The act of 1897 (Session Laws, ch. 56), by its express terms, does not limit the power to regulate charges of telephone companies for messages sent.

The act of 1897 is not an amendatory act; and hence the argument by counsel, that the act is, for that reason, unconstitutional, must fail. See *Campbell v. Board of Pharmacy*, 45 N. J. Law, 245; *State v. Hibernia R. Co.*, 47 N. J. Law, 43; *People v. Banks*, 67 N. Y., 575; *Curtin v. Barton*, 139 N. Y., 514; *Davis v. State*, 51 Nebr., 301.

The act of 1897 is complete in itself, and as such is a valid exercise of the legislative powers. See *Van Horn v. State*, 46 Nebr., 79; *State v. Whittemore*, 12 Nebr., 252; *State v. Ream*, 16 Nebr., 681; *Stricklett v. State*, 31 Nebr., 674; *Smails v. White*, 4 Nebr., 353; *Sovereign v. State*, 7 Nebr., 409.

HARRISON, C. J.

In this action, commenced in the district court of Lancaster county, the company alleged its corporate organization and existence under the laws of the state, and that the defendants were acting and asserting the right to do certain things as the state board of transportation and its secretaries; that a complaint against the plaintiff company had been filed with the defendants, in which it

was charged it had been demanding and receiving unjust and exorbitant rates and sums for its services as a common carrier; that plaintiff had been notified to appear before the defendants, and answer said complaint; that defendants claimed to have the power and jurisdiction to entertain, hear and determine the matters of said complaint, and to fix and establish the rates of charges to be made and collected by the company for any and all services it might, in the course of its business, perform. It was further pleaded that the body, known as the board of transportation, was an unconstitutional one, the act under which it was asserting power to regulate the business affairs of the company in regard to rates being unconstitutional; that, "under color of their pretended offices, and under color of the said several acts of the legislature, the said defendants are now about to proceed against your petitioner for the purpose of fixing, establishing and reducing your petitioner's rates of charges for the services it performs for the public. The said defendants now threaten, and are about to proceed, to execute the said several acts of the legislature of the state of Nebraska, and enforce the provisions of the same against your petitioner, and will proceed unless restrained; against all of which your petitioner is without adequate remedy at law." The prayer was that the defendants be enjoined from proceeding further in the matter before them.

A temporary injunction was allowed. On hearing, a general demurrer to the petition was sustained, the injunction dissolved, and the action dismissed. The plaintiff has perfected an appeal to this court.

In the case of *Nebraska Telephone Co. v. Cornell*, 58 Nebr., 823, the same questions were raised in the district court, and in like manner—*i. e.*, by general demurrer to the petition. One point in that case was in regard to right of equitable relief. The point is also urged in this case, and a brief filed in support of a motion for a rehearing in the former case is presented in this case in reply

to the argument in behalf of the appellees. It is now contended that the former opinion was radically wrong, and that in it there was a failure to recognize the doctrine of this court as announced in the decision in the case of *Stahlhut v. Bauer*, 51 Nebr., 64. We have examined this question again generally, and particularly with a view to the applicability and governable strength properly to be given or accorded herein to the rule therein stated. We were satisfied with the conclusion in that case, and the reasons for the decision, and are at present of the same mind in regard to them, and adhere to them, and will say further that, with the existent conditions of the present case, the facts sufficiently pleaded, admitted by the demurrer, the case is clearly and unmistakably within the doctrine of the *Stahlhut-Bauer* decision, and that there is no ground for a distinction between them. In *Nebraska Telephone Co. v. Cornell* we viewed the petition as pleading at most a projected hearing, the preliminary notices for which had been served, and that the true sense of the allegations was of a possible outcome or determination adverse to the company; but we are now satisfied that we were wrong. Fairly read and construed, there were pleaded in the petition in that case—and this applies to the case at bar—a total want or lack of power or jurisdiction in the trial body, the proceedings begun and being prosecuted, and a direct result which would be of damage to the complainant, and for which the remedy at law would not afford adequate relief, or not to the extent relief could be afforded in the equitable action, and the latter was proper.

One of the points of argument is relative to the constitutionality of what is denominated "the State Board of Transportation"; the main point made here being that, under the provisions of our constitution, no such board could be created or have an existence. The sections of the constitution to which attention is directed in the line of argument pursued are as follows: "The powers of the government of this state are divided into three

distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." See Constitution, art. 2, sec. 1. "The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney general, and commissioner of public lands and buildings, who shall each hold his office for the term of two years from the first Thursday and [after] the first Tuesday in January next after his election, and until his successor is elected and qualified; Provided, however, that the first election of said officers shall be held on the Tuesday succeeding the first Monday in November, 1876, and each succeeding election shall be held at the same relative time in each even year thereafter. The governor, secretary of state, auditor of public accounts, and treasurer, shall reside at the seat of government during their terms of office, and keep the public records, books and papers there, and shall perform such duties as may be required by law." See Constitution, art. 5, sec. 1. "No other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this constitution shall be performed by the officers herein created." See Constitution, art. 5, sec. 26.

In the year 1883 the house of representatives of the legislature requested of the judges of this court an opinion by which answers would be given to the following questions:

"This was a matter coming before the court by the following document:

" 'WHEREAS, The constitutionality of the railway commissioner system has been questioned, and there are differences of opinion among the members of this legislature as to the construction of section 26 of article 5 of the constitution of the state of Nebraska, which provides that

"no other executive state office shall be continued or created,"

"'*Therefore be it Resolved,* That the members of the supreme court of this state be, and hereby are, respectfully requested to answer the following questions:

"'1st. Would railway commissioners be state executive officers, or would the office of railway commissioner of the state be a state executive office if created by the legislature?

"'2d. Would such an office, if created by the legislature, come within the inhibition of the constitution?

"'3d. Would a law regulating the management of railroads in Nebraska under the commissioner system be obnoxious to any provision or provisions of the constitution of this state?

"'4th. In your opinion could such a railroad commissioner law be framed that would be capable of enforcement?

"'You are most respectfully requested to answer the above and foregoing questions in full at your earliest possible convenience.

"'I certify the above to be a correct copy of the resolution adopted by the house of representatives on January 22, 1883.

"'BRAD D. SLAUGHTER, *Chief Clerk.*

"'Lincoln, January 23, 1883.'" See 15 Nebr., 679.

It was then stated as the opinion of the judges (Hon. Geo. B. Lake, then chief justice, and Hon. Amasa Cobb and Hon. Samuel Maxwell, judges): "The legislature has no power under the constitution to create railroad commissioners. The supervision of railroads by a commission would be proper, but the power must be conferred on executive officers already existing." See 15 Nebr., 679. "In answering the former questions, we have seen that all executive power must be enforced by the officers provided for by article 5, as constituting the executive department, and that the powers imposed upon railroad commissioners by the statute of the state of Iowa (and

we presume the same to be of other states which have resorted to similar legislation) are executive, we know of no constitutional inhibition to the imposition of additional executive power, as such, upon any or either of the officers constituting the executive department, and we do think it within the scope of legislative wisdom to frame a law for the regulation of the management of railroads under the commissioner system, with the above limitation as to the *personnel* of the commissioners, and within the limits of the constitutional powers of government over private or corporate rights, which would be capable of enforcement." See 15 Nebr., 683.

The attorney for the company and the attorney general, who appears for the state, call attention to the fact that the opinion to which we have referred was not announced in any pending cause, but in response to queries, and is not entitled to the weight and consideration to be accorded a decision in an actual matter of litigation; and they agree in the belief that the opinion is unsound and erroneous, but on different points and for diverse reasons. The latter vigorously and ably assails the portion of the decision which effectually negatived the proposition by which was disclosed the possible or contemplated creation of railroad commissioners as officers, and urges that the constitution does not prohibit the creation by the legislature of a board of transportation, and the authorization of their selection from the body of electors and persons other than those executive state officers named in section 1 of article 5 of the constitution. A somewhat fascinating question for study is outlined and presented in this brief; but we must decline to enter upon it or to indulge in it, for reasons which we deem sufficiently strong, the main one of which is that it is not of the matters of litigation in this case, and we have not time, inclination, nor would it be of any avail, to pass upon this point here, as what we might say, being upon a subject not involved, would not be decisive.

It is contended for the company that "The act of 1887,

by which was created the board of transportation and its powers defined, is in conflict with section 26 of article 5 of the constitution, which prohibits the creation of any state office other than those named in the constitution; and is also in conflict with section 2 of article 5, which provides that none of the officers of the executive department shall be eligible to any other state office." The act of 1887 provided as follows: "The attorney general, secretary of state, auditor of public accounts, state treasurer, and commissioner of public lands and buildings shall constitute a board of transportation, which board shall have power by a four-fifths vote to appoint three (3) secretaries to assist in the performance of the duties of said board, and they shall each be paid a salary of two thousand ($2,000) dollars per annum. Not more than two of the secretaries shall be appointed from the same political party. The secretaries of the board shall take the oath of office prescribed for state officers, and shall enter into bonds, to be approved by the governor, in the sum of ten thousand ($10,000) dollars, conditioned for the faithful performance of their duties. No persons in the employ of any railroad corporation, or holding stock in any railroad corporation, shall be employed as secretary." See Session Laws, 1887, ch. 60, sec. 11; Compiled Statutes, 1899, ch. 72, art. 8, sec. 11. And section 22, article 8, chapter 72, of Compiled Statutes, 1899, is as follows: "To carry out the provisions of this act without undue burden to the state officers who compose the board of transportation, their secretaries are hereby empowered, in all matters of examination or investigation, to perform the duties prescribed for the board themselves; *Provided*, That all final decisions shall be made by the board themselves."

It is asserted that the creation of the board and the provision for its secretaries are violations of the sections of the fundamental law of the state, to which we have just referred, or are evasions of them so violent as to be, in effect, violations. The attorney general says that they may be evasions in fact, but are not so in law, which may

be sound, but is, it would seem, somewhat dangerous and shaky ground to venture upon—a little unsafe, probably, as governmental doctrine, to say the least.

It is insisted for the company that the parties who occupy the offices designated by the law of 1887 are made members of the board of transportation as individuals, and not as officers; that they are not required or empowered to act as officers, but as an organized board; that the secretaries are charged with the performance of all the duties, and are in fact the members of the board, and in reality state officers. It is further argued that the duties are such as can not be said to naturally fall to any one of the officers named, and are wholly foreign to the matters which we recognize as distinctively to be given attention by some certain officers to the exclusion of all others. It is true that there are duties connected with the transaction of the government of a state which, by their very inherent qualities or elements, are for an attorney general to perform, and others which as certainly pass to the auditor for adjustment; and so with the other offices and officers. But there are others, of which it may truly be said that they do not, by nature or characteristics, classify, define or assign themselves. They are *blends*, if I may use the term in this connection, having some distinguishing elements which would apparently place them within the proper province of one office or officer, and some traits which would send them to another or three or more others, but the duties to be performed all executive or administrative in their characters. The duties assigned by the law of 1887 are clearly executive or administrative; so much of the former that it is no violence to any principle of right or true government that their doing be cast upon the corresponding, the executive department.

We are unable to agree that the law of 1887 makes the individuals members of the board. Its fair construction is of the officers, as distinguished from the individuals, and the duties cast upon them as officers; nor do we deem

it material that the law denominates the officers, collectively considered, a board, and speaks of actions as by the board as a body. The matters of performance are no less the acts of each single officer, a member of the board, than they are of the aggregate or whole body. We do not deem it fatal to the law that secretaries are provided for by it. They may as well have been called deputies. It was entirely necessary and proper that some method be pointed out and the means of relief of the principals from some of the burdens cast upon them be furnished. If the duties could be required of the officers designated, there was nothing incorrect or unconstitutional in giving them secretaries, if considered necessary, to perform such of the duties as might be legally done by assistants of the character stated.

We will now turn to what we consider are apparent matters of support of the action of the legislature; also to some matters which have given the law recognition as a valid exercise or expression of the legislative will. It is unquestionable that the constitution prohibits the creation of any state office other than those specially designated in that instrument; and an indication was given of what must be done in regard to the duties which were then being performed by officers who were not of the ones named in the constitution when it was stated that they must be assumed by the officers created by the constitution. See sec. 26, art. 5, *supra*. In section 1, article 5, wherein the executive department is defined and its officers named, it was provided that such duties should be performed by the officers as required by law. Strictly speaking, it may probably be said that, in express terms, in the section this is made applicable to but four of the officers; but the true sense of the section is that each and all of the state officers shall perform such duties as may be required by law, confined, of course, to duties properly assignable to the executive department. The constitution makers sealed the doorway to any more executive state offices, and must have done so, knowing and contem-

plating the future growth and development of the state and the consequent birth and existence of further duties; and their manner of disposition of them was that the constitutional officers should attend to them. In the decision, *In re Railroad Commissioners, supra,* the right of the legislature to do what afterward was done in the law under discussion was recognized, and one of the judges who concurred in that opinion was a member of the constitutional convention, and must have known what was the import of the constitution, as he listened to, and participated in, the debates and considerations of its different sections, and gathered information of reasons underlying, and the meaning embodied, in them, which doubtless was remembered more or less distinctly at the time of the opinion. In three cases in which decisions of this court have been rendered the authority and power of this board to act have been sustained. See *State v. Fremont, E. & M. V. R. Co.,* 22 Nebr., 313; *State v. Fremont, E. & M. V. R. Co.,* 23 Nebr., 117; *State v. Missouri P. R. Co.,* 29 Nebr., 550.

The validity or constitutionality of the law of the creation of the board was not discussed. It was necessarily involved, as, if the law was invalid, there would exist no authority by it to act. We are satisfied that the law is not invalid for being, in the particulars noticed in the attack herein made upon it, repugnant to the provisions of the constitution, to which attention has been challenged, and that in the cases cited it has been, in effect, declared not invalid.

In 1897 there was passed an act, in section 1 of which it was provided: "That from and after the passage of this act, all persons or companies owning, controlling or operating, or that may hereafter own, control or operate a line or lines of express, telephone or telegraph, whose line or lines is or are, in whole or in part, in this state, shall be under the control of the board of transportation of this state, who shall have the same power to regulate the prices to be charged by any company or person or per-

sons owning, controlling or operating any line or lines of express, telephone and telegraph, for any services performed by such company, person, or persons as they may have over railroad companies and other public carriers; and all the powers given to said board of transportation over railroads in this state by law are hereby declared to be of force against corporations, companies, or a person, or persons owning, controlling or operating a line or lines of express, telephone and telegraph, doing business in this state, whose line or lines is or are, wholly or in part, in this state, so far as the provisions of said act can be made applicable to any corporation, company, person or persons owning, controlling or operating a line or lines of express, telephone and telegraph." See Session Laws, 1897, p. 303, ch. 56, sec. 1; Compiled Statutes, art. 8, ch. 72, sec. 24. It was argued that this act was unconstitutional, for that it was amendatory of the former, especially that of 1887, and did not contain any section or sections amended, nor repeal such section or sections; hence was inimical to section 11 of article 3 of the fundamental law of the state. The last mentioned section reads, in part: "No law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." We have examined the citations for the company on this point, and do not deem them entirely applicable. The majority, if not all, of them sustain the proposition that a law which materially adds to or takes from a pre-existing law is amendatory in its character; but, as we view the enactment under discussion, it did neither. It but placed the companies, to which it was made applicable, under the supervision of certain officers, cast further duties upon the latter, and for the extent of their jurisdiction or power, and the manner of procedure in its exercise, refers to another law of prior existence. This was not fatally objectionable legislation. There was passed by the legislature in 1893 (Session Laws, 1893, p. 164, ch. 24; Compiled Statutes, 1899, ch. 72, art. 12) what was

known as the Maximum Rate Law, the object of which was to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon railroads in this state, and to provide penalties for the violation of the act. The act contained and established a schedule of rates. In section 6 of the act it was provided: "That the board of transportation is hereby empowered and directed to reduce the rates on any class or commodity in the schedule of rates fixed in this act whenever it shall seem just and reasonable to a majority of said board so to reduce any rate; and said board of transportation is hereby empowered and directed to revise said classification of freight as hereinbefore in this act established whenever it shall appear to a majority of said board just and reasonable to revise said classification; *Provided,* That said board of transportation shall never change the classification in this act established, so that by such change of classification the rates on any freight will become higher or greater than in this act fixed. When any reduction of rates or revision of classification shall be made by said board, it shall be the duty of said board to cause notice thereof to be published two successive weeks in some public newspaper published in the city of Lincoln, in this state, which notice shall state the date of the taking of effect of such change of rate or classification, and said change of rate or classification so made by the said board and published in said notice, shall take effect at the time so stated in said notice." See Session Laws, 1893, p. 346, ch. 24, sec. 6. It is asserted this operated as an amendment of the law of 1887 in regard to the powers of the board of transportation, and that after the passage of the later act, that of 1893, the board could not act in respect to rates except as provided in the section just quoted, and, this being true, it had no authority to do anything more than to reduce the rates as provided in schedule of the act of 1893, and possessed only such powers when the act of 1897 was passed which purported to

place under the control of the board the appellant and other similar corporations; that the power to reduce the rates as fixed by the schedule of 1893, could in nowise effect or be operative upon the appellant, or the rates charged by it for services, and consequently the board was without authority to act in relation to appellant's rates. The attorney general says to this that the act of 1893, as to the rates fixed by it, was declared unconstitutional by the supreme court of the United States, in the decision of the case of *Smith v. Ames*, 18 Sup. Ct. Rep., 424, known as the Maximum Freight Rate Case. Counsel for appellants answer that the law, to the extent that it established rates, was declared inoperative for the time being, and the act was not adjudged invalid. To say the least, the law was left in a condition which may be not inaptly described by the use of the somewhat current term "innocuous desuetude." It was announced that the rates fixed by the law, under the existent material business conditions in Nebraska, were so low as to be unreasonable, and the law, in the portions which affected rates, was declared, for the reason stated, unconstitutional and inoperative, and so it has been since and is to-day. The passage of the schedule of rates was unquestionably the main inducement for, and object of, the passage of the law; and, moreover, the section, No. 6, without operation in regard to the rates of the law in which it appeared, was without meaning or force, and passed out of effectual existence with the rates portion of the law with which it was inseparably connected. The maximum rate law, to the extent it was submitted to the decision of the supreme court of the United States, is now unconstitutional, and its condition can not interfere with, or modify, the laws of 1887 or 1897, if it be conceded they might have had such effect, which we do not decide. It follows, from the conclusions herein reached, that the judgment of the district court was right, and it is

AFFIRMED.

NORVAL, J., dissenting.

I dissent from the propositions stated in the second and fourth paragraphs of the syllabus of the opinion of the chief justice in this case. The law herein assailed (Compiled Statutes, 1899, ch. 72, art. 8) has constituted the attorney general, secretary of state, auditor of public accounts, state treasurer and commissioner of public lands and buildings a board of transportation. In my view, this legislation is unconstitutional, at least to the extent that the attorney general and commissioner of public lands and buildings are included as members of said board, and I will briefly state the reasons for this conclusion. By section 1, article 5, of the constitution eight executive state offices were created, consisting of the governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney general and commissioner of public lands and buildings. This section closes with the significant provision that "The governor, secretary of state, auditor of public accounts, and treasurer shall reside at the seat of government during their terms of office, and keep the public records, books, and papers there, and shall perform such duties as may be required by law." Thus the framers of the constitution, and the people in adopting it, have said that four of the eight officers of the executive department shall not only reside at the capital of the state, but shall discharge such duties as the law may require them to perform—that is, duties outside of, and not pertaining to, their respective offices. As to the four other executive state officers, namely, the lieutenant governor, attorney general, superintendent of public instruction and commissioner of public lands and buildings, the constitution does not require that they, or either of them, shall reside at any particular place in the state. Manifestly they are at liberty to choose their own place of abode. Nor does the fundamental law declare that they "shall perform such duties as may be re-

quired by law," as is specified concerning the governor, secretary of state, auditor of public accounts and treasurer. If each and all of the eight executive state officers may be required to perform any duty imposed by statute, then the wording of said section is meaningless, and the framers thereof did a useless thing in inserting the same in the constitution. It is just as logical to say that section 1 requires all executive state officers to reside at the capital as to hold that each and all of them shall discharge the duties which the legislature may see fit to impose upon them. The naming the four executive officers who should "perform such duties as may be required by law" was a limitation upon the powers of the legislature, and prevented that department of the state government from enacting laws requiring either the lieutenant governor, attorney general, superintendent of public instruction or commissioner of public lands and buildings to perform any official duties not within the scope of his respective office. Any other interpretation or rendering of the constitutional provision would do violence to its grammatical construction, and would involve the proposition that the legislature could make the lieutenant governor a member of the board of transportation, and, by duties devolving upon him by statute, require the giving of his entire time and services to the state for twice the compensation of a senator, or $600 for the period of two years. Likewise, the legislature might pass a law requiring the superintendent of public instruction to act as a member of said board or to devote the principal part of his time in the discharge of duties not belonging to, or in any manner connected with, his constitutional office, to the detriment of the educational interests of the state. So by legislation there may be required of the attorney general that he shall discharge various additional duties outside and not within the scope of his office, and thereby interfere with the performance of the duties imposed by the constitution, and to the material detriment of the legal interests of the state. The framers of the consti-

tution never so contemplated, but rather that the lieutenant governor, attorney general, superintendent of public instruction and commissioner of public lands and buildings should only be required to perform such duties as pertain to, or are within the scope of, their respective offices. In my view, therefore, the act creating the board of transportation violates section 1, article 5, of the constitution, by including the attorney general and commissioner of public lands and buildings as members of said board.

H. H. MAUCK, APPELLEE, v. E. D. BROWN, APPELLANT.

FILED DECEMBER 19, 1899. No. 10,717.

1. **Bill of Exceptions:** PRESERVATION AND AUTHENTICATION OF BALLOTS. Ballots cast at an election, and which were introduced in evidence and counted during the trial of a contest between two of the candidates for office at said election, were, at the close of the trial, placed in the proper receptacles, which were then closed, securely fastened, sealed and delivered to the officer of the county in whose custody they were by law required to be. A bill of exceptions was prepared which did not contain the ballots nor have attached to it the packages in which they had been placed, and, after the usual legal formalities, was presented to the trial judge for settlement and allowance. Both parties were represented by counsel, and the judge, in the certificate of allowance of the bill, stated that the ballots were intended to be included therein, and, on *ex parte* application of the appellant, ordered the custodian to then deliver them to the clerk of the trial court, he to attach them to the bill of exceptions. The order was obeyed, and the bill of exceptions was delivered by the clerk of the district court to the sheriff of the county in which the trial occurred, who delivered it to the clerk of this court. *Held*, As thus settled and allowed and transferred to this court, the bill, in the absence of any attack upon it as other than the true one, is complete, the ballots sufficiently identified, made of it and authenticated.

2. **Appeal and Error:** SUFFICIENCY OF EVIDENCE. The questions presented determined not to be those for the presentment of which a petition in error is the exclusive remedy, but of the weight and sufficiency of evidence to sustain findings of the trial court and proper in an appeal.

3. Elections: JUDGES: ENDORSEMENTS ON BALLOTS: CONSTRUCTION OF STATUTE. The provisions of the Australian Ballot Law (Compiled Statutes, 1897, ch. 26), in regard to the endorsement of the names of the two judges on the back of ballots, are mandatory; and that it be done is made of the essentials of a valid election, and if it is not done, the ballots will not be counted. See *Orr v. Bailey*, 59 Nebr., 128.

4. ———: ———: ———. It is not sufficient that the name of one judge of the election appears on the back of the ballots. See *Orr v. Bailey*, 59 Nebr., 128.

5. ———: MARKING BALLOTS. That the cross be in the circle or square is not of the essentials of a valid ballot or vote. If the proper mark is made either on the right or left of, and opposite to, the name of a candidate, it may indicate the choice of an elector. And on a straight party ticket, if the cross is placed within the space which contains the circle, although not within or touching the latter, it may suffice to indicate the intention of the voter.

6. ———: ———: CONSTRUCTION OF STATUTE. That an elector shall place no mark upon his ballot by which it may afterwards be identified as the one voted by him, and that he shall not make any mark on the ballot except as directed in the law, are mandatory provisions, and a violation of either will invalidate the ballot as to which it occurs.

7. ———: CONTESTS: APPEAL. The provisions of said law in reference to a contest, inclusive of appeals from judgments therein, are complete within themselves, and the word "appeal" is therein used in its technical or distinctive sense, not generally, and indicates an appeal and not a proceeding in error.

APPEAL from the district court of Nuckolls county. Heard below before HASTINGS, J. *Reversed.*

See opinion for statement of the case.

W. F. Buck and *S. A. Searle*, for appellant:

Ballots on which the name of one judge only was indorsed should be counted. A voter who complies with the law, and marks his ballot correctly should not be disfranchised for errors, fraud or negligence of election officers. See *Horning v. Burgess*, 77 N. W. Rep. [Mich.], 446; *People v. Wood*, 148 N. Y., 142; *People v. Bates*, 11 Mich., 362; *Lindstorm v. Board of Canvassers*, 94 Mich., 467; *Bragdon v. Navarre*, 102 Mich., 259; *People v. Avery*,

102 Mich., 572; *Moyer v. Van De Vanter*, 41 Pac. Rep. [Wash.], 60; *State v. Fransham*, 48 Pac. Rep. [Mont.], 1; *Cook v. Fisher*, 69 N. W. Rep. [Ia.], 264; *Parvin v. Wimberg*, 30 N. E. Rep. [Ind.], 790; *Gass v. State*, 34 Ind., 425; *Dobyns v. Weadon*, 50 Ind., 298; *Mustard v. Hoppess*, 69 Ind., 324; *Duncan v. Shenk*, 109 Ind., 26; *Storm v. Stevens*, 104 Ind., 46; *Stout v. Board of Commissioners*, 107 Ind., 343; *May v. Hoover*, 112 Ind., 455; *Martin v. Pifer*, 96 Ind., 245; *Middleton v. Greeson*, 106 Ind., 18; *In re Douglas*, 58 Barb. [N. Y.], 174; *Anderson v. Likens*, 47 S. W. Rep. [Ky.], 867.

Spoiled ballots, with identification marks, erasures and other unnecessary marks, are illegal and void, and, when intentionally so marked by the voter, should not be counted. See *Spurgin v. Thompson*, 37 Nebr., 45; *Taylor v. Bleakley*, 39 Pac. Rep. [Kan.], 1045; *People v. Parkhurst*, 53 N. Y. Supp., 598; *Church v. Walker*, 72 N. W. Rep. [S. Dak.], 101.

The statutory directions for marking ballots are mandatory, and ballots marked in violation of the statute should not be counted. See *Martin v. Miles*, 46 Nebr., 772; *Sego v. Stoddard*, 36 N. E. Rep. [Ind.], 204; *Sanner v. Patton*, 40 N. E. Rep. [Ill.], 290; *In re Vote Marks*, 17 R. I., 812; *Curran v. Clayton*, 86 Me., 42; *Vallier v. Brakke*, 64 N. W. Rep. [S. Dak.], 180; *McMahon v. Polk*, 73 N. W. Rep. [S. Dak.], 77; *McKittrick v. Pardee*, 65 N. W. Rep. [S. Dak.], 23; *Parmlee v. Healy*, 64 N. W. Rep. [S. Dak.], 186; *Zeis v. Passwater*, 41 N. E. Rep. [Ind.], 796; *Pennington v. Hare*, 62 N. W. Rep. [Minn.], 116; *Christopherson v. Common Council*, 75 N. W. Rep. [Mich.], 445; *Attorney General v. Glaser*, 102 Mich., 405; *Curran v. Clayton*, 29 Atl. Rep. [Me.], 930; *Tebbe v. Smith*, 41 Pac. Rep. [Cal.], 454; *Parker v. Orr*, 41 N. E. Rep. [Ill.], 1002; *People v. Board of Canvassers*, 156 N. Y., 36; *Hope v. Flentge*, 140 Mo., 390; *Ellis v. May*, 58 N. W. Rep. [Mich.], 483; *Attorney General v. McQuade*, 94 Mich., 439; *People v. Board of Canvassers*, 129 N. Y., 395; *State v. Walsh*, 25 Atl. Rep. [Conn.], 1; *Baxter v. Ellis*, 15 S. E. Rep. [N.

Car.], 939; *Bechtel v. Albin*, 33 N. E. Rep. [Ind.], 967; *Van Winkle v. Crabtree*, 55 Pac. Rep. [Ore.], 831; *Whittam v. Zahorik*, 59 N. W. Rep. [Ia.], 62.

Robert Ryan, also for appellant.

G. W. Stubbs, W. D. Oldham and *Frank Irvine, contra:*

Rulings below as to validity of ballots can only be reviewed in a proceeding in error. See *Scroggin v. National Lumber Co.*, 41 Nebr., 195; *Ainsworth v. Taylor*, 53 Nebr., 484; *Troup v. Horbach*, 57 Nebr., 644; *Te Poel v. Shutt*, 57 Nebr., 592; *Estep v. Schlesinger*, 58 Nebr., 62; *Brotherton v. Brotherton*, 12 Nebr., 72; *State v. Lancaster County*, 13 Nebr., 223; *Morse v. Engle*, 26 Nebr., 247; *Prentice Brownstone Co. v. King*, 39 Nebr., 816; *Campbell v. Farmers & Merchants Bank*, 49 Nebr., 143; *Dixon Nat. Bank v. Omaha Nat. Bank*, 54 Nebr., 796; *Lowe v. Riley*, 57 Nebr., 252; *Hayden v. Hale*, 57 Nebr., 349; *Holmberg v. Hauck*, 16 Nebr., 337; *Weigel v. City of Hastings*, 29 Nebr., 379; *State v. Tibbets*, 52 Nebr., 229.

References as to correctness of rulings relating to ballots: *State v. Russell*, 34 Nebr., 121; *People v. Holden*, 28 Cal., 136; *Wyman v. Lemon*, 51 Cal., 273.

HARRISON, C. J.

The two parties to this action were candidates for the office of county attorney of Nuckolls county at the general election held November 8, 1898, and as a result of a canvass of the votes cast the appellant was declared elected, and the certificate of election was issued to him. It was determined that he had received 1,285 votes, and the appellee 1,284. The appellee, who had been for nearly two years prior to, and was at the time of, the election county attorney, refused to surrender the office, and instituted in the county court this action—a contest of the election. The contestant was successful in the county court, and the defeated party appealed to the district court, where the cause was tried, and judgment

rendered for the contestant, H. H. Mauck, and the contestee, E. D. Brown, has perfected an appeal to this court.

The ballots cast at the election were obtained and counted by the county court, and it was decided that the appellee had received 1,277 votes and the appellant 1,273, or that for the former there was a majority of four. In the district court the ballots were examined, and as the result of another count it was settled that for the appellee there were 1,277 legal votes and for the appellant 1,272—a difference of five in favor of the former, who was adjudged entitled to the office. In the trial courts the ballots were produced, identified and received in evidence, there being no further evidence introduced or offered.

It is urged for appellee that there can be no examination of the questions of litigation, for the reason that the evidence is not in the bill of exceptions. In the preparation of that document the counsel for appellant had attached thereto copies of the ballots, or exhibits, to which they desired to direct the attention of this court; but these, at the time of the settlement of the bill, were stricken out of it; hence are not here for any purpose. After the ballots had been counted in the district court, as to the disposition made of them, there appears the following statement: "The Court: All of said ballots have been admitted in evidence and examined by the court, resealed carefully in the presence of the court, and returned and redelivered to the custody of the county clerk of Nuckolls county, Nebraska, from whom they were obtained, and are numbered from 1 to 18 in the order in which they appear in the tally and result of their count, which has been kept by the court." The certificate of settlement and allowance of the bill of exceptions is as follows: "April 6, 1899. Both parties appear by attorney for the settlement of the proposed bill of exceptions in this cause. I, W. G. Hastings, judge of the seventh judicial district, and presiding at the trial of the above

entitled cause, do hereby certify that this proposed bill of exceptions, as corrected by amendments allowed, contains all the testimony introduced and offered on said trial, except the original ballots, together with all objections made thereto, and the exceptions taken thereon; and I approve, settle and sign the same as the bill of exceptions in this case, and order that the same be made a part of the record in said cause in said court. The original ballots, marked in packages exhibits 1 to 18 inclusive, were at the trial carefully sealed and redelivered to the clerk of Nuckolls county, and are intended to be included in this bill of exceptions, and, when added, constitute all the evidence adduced in this cause, together with this bill. W. G. Hastings, Judge." This discloses that both parties were represented when the bill was settled and that therein was "intended to be included" the ballots in the packages in which they were placed at the close of the trial. April 10, or four days later, on application on behalf of the appellant, the trial judge ordered the county clerk of Nuckolls county to deliver the packages of ballots to the clerk of the district court and he to attach them to the bill of exceptions, and the order apparently was obeyed, the packages of ballots were, with the bill of exceptions, delivered by the clerk of the district court to the sheriff of the county, to be transmitted to the clerk of the supreme court, and the duty with which the sheriff was charged, it appears, has been performed. It might probably have been better practice to have obtained an order for the presence of the ballots at the time and place of the settlement of the bill; but, in the absence of any claim of anything wrong about the exhibits as attached, we will overrule the objections to the consideration of the bill.

It is argued for appellee that the matters of which appellant asks consideration are of alleged errors committed by the trial court, and will not be reviewed in an appeal. As we view the questions presented, they are rather of the sufficiency of the evidence received and

weighed to sustain the findings and judgment, proper inquiries in an appeal proceeding.

There were discovered during the count of the ballots nine with the name of but one judge of election on the back of each. Seven of these were favorable to the election of appellant and two to that of appellee. They were not counted, and that they were not is of the complaints of appellant. In the decision of the case of *Orr v. Bailey*, 59 Nebr., 128, similar questions were presented and examined, and it was determined that the provisions of the ballot law, that the signatures of two judges of the election should be written on the back of the ballot before given to the voter, and if not, the ballot should not be deposited in the ballot-box, and if it was, should not be counted, were mandatory, and ballots not so identified, or on the back of which there appeared the signature of but one judge of the election, should not be counted. A re-examination of the question at this time does not change our views of the matter; hence this objection must be overruled.

It will probably be best to here insert a statement of some of the principal prescriptions of the statute relative to the official ballots, the forms, the manner of marking by the voters, etc., to which it will be necessary to hereinafter refer in the discussions of the objections to particular ballots and the manner of marking ballots in specific instances. We will also call attention generally to some decisions of this court on questions which have arisen and been presented under the various provisions of what is designated the "Australian Ballot Law" enacted by our legislature and in force in 1898. The ballots must be of a good quality of "news printing paper," white in color, and for the printing black ink shall be used. The names of candidates for each office to be arranged according to parties under the party name and emblem and in separate columns. Each column which contains a list of the candidates of a party is to be separated by a distinct and heavy line, and within the column

at the top shall be printed the party appellation or title. At the top of each party column or ticket, under the emblem, shall be made a circle one-half inch in diameter, in which a person who desires to vote a straight party ticket may make a cross, which will signify a vote for every candidate whose name appears on said party ticket. Above the circle on each ticket of the ballot shall appear in print the words "For a straight ticket mark within this circle." Immediately to the right of the name of each candidate, and following or on the line with the name, there is to be printed a square, each side of which is to be not less than one-fourth of an inch, the square to be detached from the heavy line separating the columns. At the end of the list of candidates for each office to be filled at the election there is to be a blank space with lines and a small square to the right, and on each line space lines and squares for as many written names of candidates as there are candidates on any and all tickets for said office. See Compiled Statutes, 1897, ch. 26, sec. 140. In section 155 it is stated: "No elector shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him." In regard to counting, section 151 contains the following: "Any ballots or parts of a ballot from which it is impossible to determine the elector's choice shall be void and shall not be counted, *Provided*, that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, that it shall be the duty of the judges of election to count such part." Of the instructions to voters are the following: "The ballots are prepared as follows: If you wish to vote a straight ticket, make a mark in the circle at the top of the ticket, and your ballot will then be counted for every candidate on the ticket under the circle. If you wish to vote otherwise than the straight ticket, you place a cross with an indelible pencil, in the square on the right margin of the ballot opposite the name of each person for whom you wish to vote; if you wish to vote a straight ticket with the exception of certain offices, place a cross

in the circle at the head of the ticket you wish to vote in the main, and then place a cross opposite the names of the candidates you wish to vote for on other tickets. * * * Do not make any mark on the ballot save as above directed, or the ballot will not be counted." See Compiled Statutes, 1897, ch. 26, schedule "B." In regard to the manner of voting, and more particularly the subject of marking the ticket, it is said in section 146 of the chapter 26, that it shall be by a cross placed in the circle to signify a party vote, and in a square to evidence a vote for one specific candidate. In the case of *State v. Russell*, 34 Nebr., 118, some of the provisions of the Australian Ballot Law being under consideration, it was said: "In the construction of statutes of this character it is important to keep in mind two recognized principles: First—That the legislative will is the supreme law, and the legislature may prescribe the forms to be observed in the conducting of elections and provide that such method shall be exclusive of all others. Second—Since the first consideration of the state is to give effect to the expressed will of the majority, it is directly interested in having each voter cast a ballot in accordance with the dictates of his individual judgment. Recognizing the principle first stated the courts have uniformly held that when the statute expressly or by fair implication declares any act to be essential to a valid election, or that an act shall be performed in a given manner and no other, such provisions are mandatory and exclusive. By an application of the second principle the courts, in order to give effect to the will of the majority and to prevent the disfranchising of legal voters, have quite as uniformly held those provisions to be formal and directory merely, which are not essential to a fair election, unless such provisions are declared to be essential by the statute itself." It was further observed that not every marking from which a ballot might afterwards be distinguished would render it illegal. And in the opinion in *Spurgin v. Thompson*, 37 Nebr., 39, it was

held: "While the statute requires that the cross which signifies the preference of the elector shall, in ink, be placed in a space designated for that purpose, a ballot upon which such preference is indicated by a cross made with a lead pencil, outside the space designated, but opposite the name of the choice of the elector, should be counted according to such manifest intention." And further: "The indorsement of the name 'Eagleham,' he not being one of the election judges, upon a ballot, was within the inhibition of the statute forbidding the marking of his ballot by an elector, and vitiates said ballot." In *Martin v. Miles*, 46 Nebr., 772, it was announced: "The provision of section 20, act of 1891 ('Australian Ballot Law'), for the expressing of the voter's intention by a mark opposite the name of the candidate of his choice, is mandatory, and the manner thus prescribed is exclusive of all others, and such is the rule, whether the names of candidates be printed on the ballot or written thereon by the voter."

In the consideration of the objections to ballots which are drawn into question in the arguments, we will refer to the precinct in which they were voted. There was a ballot cast in Beaver precinct upon which, near to the left hand of the name of each candidate of the republican party, except for the office of county attorney, there appeared the cross. None of them were to the right of the candidate's name in the space provided and in which to vote properly, or, to speak more accurately, to vote strictly in the manner prescribed by the law, the cross should have been placed. On the "people's independent" portion of a ballot cast in Beaver precinct, and in reference to the office of county attorney, appeared this: × H. H. Mauck. □ To the left hand of this were like spaces on the republican ticket, and in the larger was the name of the appellant as candidate for county attorney, but between the two was the distinct and heavy line which it is prescribed by the law shall separate upon the ballot the different party lists of offices and

names of candidates therefor. It seems clear, from the correspondence of this cross in place relative to the candidate's name with all the others made by the voter on the ballot, that it was his intention to vote for H. H. Mauck for the office for which he was a candidate, and this view is strengthened by the fact that the cross was on the people's independent ticket as separated from the republican ticket by the distinct and heavy line. We are satisfied that this vote was properly counted as one for Mauck.

There is a further question argued of this vote, that it is not an expression in the manner authorized by law of the voter's choice of any one for the office of county attorney. Within the rule announced by this court in the consideration of a like contention in the case of *Spurgin v. Thompson*, 37 Nebr., 39, this was an indication of the voter's preference of Mauck for the office for which he was striving.

A ballot was cast in Spring Creek precinct which had a cross marked not in the circle but near it, and in the space wherein was placed the circle at the head or top of the column entitled "people's independent." This was counted for Mauck, and the contention for appellant is that the mark of the cross in the place in which it appeared was not a marking such as is required by law, but was an identifying mark. It is true the manner of marking the ballot might serve to identify it; but with the policy of the law as declared in the section, wherein it is stated that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention it shall be counted, and the construction given to the law by this court in *State v. Russell, supra*, and *Spurgin v. Thompson, supra*, there was an indication here of the voter's intention which was entitled to recognition, and it was proper to count the vote.

In Beaver precinct there was a ballot cast upon which there had been made with a pencil, evidently by a voter, a circle within the circle which appeared on the official

ballot and about half as large, and also a cross which was partly in and on the inner pencil circle and the ends of which extended into the larger and true circle of the ballot. There was also in the vote of Spring Creek precinct a ballot marked similarly to the one we have just noticed, with the addition of a horizontal line marked through and on the inner circle and almost immediately through or over the point of junction of the lines of the cross within the inner circle. There was also a ballot cast in Sherman precinct marked in a manner very similar to the first one of these three, the only difference being that one line of the cross was shorter than the other. Among the ballots cast in Hammond precinct was one which had the cross made within the circle at the head of a party ticket and also a cross in the proper place relative to each candidate on the ticket, except one immediately underneath the name of the one candidate as to whom there was no cross mark there appeared written with a pencil, "Anybody but him." A ballot was cast in Beaver precinct with a cross in the circle at the top of a people's independent ticket and the word "against" written in the blank space under the name on the ballot of the republican candidate for congress, and "for" written in the blank space underneath the name on the ballot of the candidate for congress of the "people's independent party." The words were evidently written with an indelible pencil. Among the ballots of Beaver precinct was one which was marked in the circle at the top of the party ticket with five or six straight lines, each extending beyond the lines of the circle and crossing some of them near the centre of the circle, the others crossing not at nor so near the centre. This altogether formed a somewhat star-shaped figure. In the same precinct there was cast a ballot which had no cross upon it, but had a letter "H" in the circle at the head of the party ticket. A ballot cast in Victor precinct was marked in a circle at the top of ticket with three lines so placed as to form a star. The law prescribes, as we have seen, that the mark

by the voter be a cross. The voter is charged with a knowledge of the law and, moreover, has a card of instructions before him to inform him of the manner of voting, for there must be a printed card of instructions in each voting compartment or booth. See Compiled Statutes, ch. 26, sec. 150. It does not seem probable that he will or need to mistake the manner of marking the ballot, or to mark it improperly, unless he is entirely heedless, or he desires or intends a marking different than directed. It has been decided that the mark must be a cross—that it is required by law and the requirement is exclusive. See *Martin v. Miles, supra.* As we have seen, the voter shall not place any mark upon the ballot by which it may be known as the one which he voted, and the legislature, in the enactment of the form and substance of the card of instructions, gave a construction to the law in this respect, and announced the rule to be followed when it stated what we have hereinbefore quoted: "Do not make any mark on the ballot save as above directed, or the ballot will not be counted." This was to say that, if a ballot has other marks than those prescribed, it is invalid. All the ballots with peculiar markings to which we have just directed the attention, more or less in detail, were violative of the letter and spirit of the law, and should not have been counted.

The appellee accepts the count as made by the court. It gave him 1,277 and the appellant 1,272—a majority of five for the former. Of the count as attacked by the appellant eight votes were invalid and should not have been counted for appellee. Subtracting these from the total as counted for him by the trial court, 1,277, leaves him but 1,269, and the appellant has 1,272—a majority of three.

There are other matters of objections to ballots as counted argued for the appellant; but as the foregoing will dispose of the entire litigation, we need not discuss the question in regard to other ballots.

This matter has been presented to this court by an

appeal, and for the appellee there was filed and submitted a motion to dismiss, on the ground that it was not an action in equity and not appealable, which motion was denied. The question raised by the motion has been again urged in the arguments upon the merits of the action. As we have before herein indicated, the contest was of inception in the county court, thence removed by appeal, after judgment, to the district court, and from its judgment an appeal perfected to this court. The general right to an appeal provided for in the Code of Civil Procedure has been restricted to "actions in equity" (Code of Civil Procedure, sec. 675); and a review of a strictly law action can only be obtained in an error proceeding, and an appeal will not lie. See *Dixon Nat. Bank v. Omaha Nat. Bank*, 54 Nebr., 796. The statute herein in question is clearly one complete within itself (with possibly a slight exception, which we will notice hereafter, and which, as we shall see, does not materially affect the present question) on the subject of the action of contest, inclusive of the manner of its review, in an appellate court. The language used is all of an appeal in its distinctive sense; and it was fully within the power of the legislature to provide for the review in a proceeding by appeal. At the time of the passage of the act, in which there were the provisions in regard to contests of elections, appeals, in the particular and not general sense of the term, were proper to obtain reviews in equity cases. See Code of Civil Procedure, sec. 675. The one given by the law in question was not an appeal in an action in equity—an appeal given by the Code of Civil Procedure —but provision for review of a specific proceeding, of which all the matters and methods entering into it to render it as a proceeding complete were embraced in the act by which it was created, and there exists no reason, in the nature of the action of contest or the methods to be pursued in it, for holding that the intention of the legislature was other than expressed in the law clearly, that there should be an appeal as distinguished from a

proceeding in error. In one portion of the law (sec. 86) it is stated in reference to the contest that "The proceedings shall be assimilated to those in an action, so far as practicable." This does not make the law objectionable for appropriating methods of procedure in vogue by virtue of other sections of the statute. That the procedure is thus made to conform to that in existence in other cases does not make the law invalid, nor any the less complete within itself. See *Davis v. State*, 51 Nebr., 301; *Campbell v. Board of Pharmacy*, 45 N. J. Law, 245; *Curtin v. Barton*, 139 N. Y., 514. For like legislation see chapter 20, Compiled Statutes, "Probate (County) Court Act," wherein it is provided that the provisions of the Code of Civil Procedure relative to justices of the peace shall, where no special provision is made, apply to the proceedings in all civil actions in the county court, and also that in certain cases the rules of practice concerning pleadings and processes in the district court shall be applicable, so far as may be, to pleadings in the county court. In the section of the election law on the subject of appeal in action of contest there is the following language: "The party against whom judgment is rendered in cases tried in the county and district court may appeal to the district or supreme court." See Compiled Statutes, ch. 26, sec. 98. It is argued that this is vague and indefinite; that it apparently provides that there may be an appeal from the county court direct to the supreme court. We do not so read it. The meaning is clear. That the appeal from the county court first mentioned of the courts of trial may be to the district court first named of the appellate courts; and with like effect on the meaning are the relative positions in the sentence of the district as a trial court and the supreme as an appellate. It has been assumed by both litigants and the courts, without being the subject of litigation or decision, that the word "appeal" in the election law in relation to an action of contest was used in its distinctive or technical, and not in a general, sense, and we are satisfied that the import

which has been given it is the correct one. The judgment of the district court must be reversed, and judgment entered in this court for the contestee.

JUDGMENT ACCORDINGLY.

JOSEPH A. MCGRAW V. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

FILED DECEMBER 19, 1899. No. 9,068.

1. **Negligence:** DEFINITION. The following definition, "Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do," *held* not incorrect. See *Kearney Electric Co. v. Laughlin*, 45 Nebr., 404.

2. **Review Without Bill of Exceptions:** EVIDENCE. If the bill of exceptions in a cause has been quashed, questions, the decisions of which necessarily call for an examination of the evidence, can not be considered.

3. ———: INSTRUCTIONS. If instructions contain statements which may have been correct and applicable to possible conditions of the proof in the case, in the absence of a bill of exceptions, they must be presumed to be free from error.

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

Lamb & Adams, for plaintiff in error.

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

HARRISON, C. J.

In this action, commenced in the district court of Lancaster county, the plaintiff sought a recovery of damages alleged to have been caused by the negligent operation and running of an engine and train by defendant upon and over a line of railroad track, whereby and by reason

of which, the plaintiff, who was, at the time specified, crossing the said track, was struck by the locomotive or engine, and severely, seriously and permanently injured. The answer of the company denied generally or specifically the main material allegations of the petition, pleaded affirmatively that the plaintiff was, at the time he alleged he received the injuries, a trespasser upon the track upon which it was running its engine, and the injuries of plaintiff, if any suffered, resulted from his own carelessness and negligence. The reply was a general denial. There was a trial of the issues, and a verdict and judgment for defendant. The plaintiff presents the case to this court for review. Since the removal of the cause to this court, a motion to quash the bill of exceptions has been sustained.

One of the assignments of error noticed in the argument is of the giving by the court on its own motion instruction numbered 2. In a portion of this instruction the jury was informed that negligence was the "gist," the groundwork, or basis, of the action, and it was a question for them to determine from the evidence, under the rules embodied in the instructions. This introductory, if it may be so termed, or general part of this instruction, was probably not as definite as it might have been written; but there was nothing in it, or in that it was given, which could in the least work any prejudice to the complainant. The further portion of the instruction was a definition of "negligence," which it is asserted was incorrect. The definition given in the instruction was quoted with approval by this court in *Foxworthy v. City of Hastings*, 23 Nebr., 772; also in *Kearney Electric Co. v. Laughlin*, 45 Nebr., 404, and in the last approved as substantially correct. Probably as good or a better definition is "the absence of care according to circumstances." See 1 Thompson, Negligence, 135. But the one given by the trial court was not open to the objections urged against it.

It is contended that instruction numbered 3, given by

the court on its own motion, was erroneous. This placed upon the plaintiff the burden of proving the negligence of the defendant as the cause of the injuries to plaintiff. It is complained that, having given this, the court should also have instructed the jury relative to the burden of proof on the issue of alleged contributory negligence of the plaintiff. Whether it was proper to read the one given, and to charge no further than was done, on the issue of plaintiff's alleged contributory negligence, depends, to a great extent, if not wholly, upon the condition of the evidence, and this is not before us for examination; hence this assignment is unavailing.

It is asserted that instruction 4 should not have been given. The main argument here was directed against the use of the word "respectfully" in the instruction applicable to the running of the train by defendant. In an addition to the transcript filed during the pendency of the cause in this court it is disclosed that the term was "rightfully" and not "respectfully," and, thus corrected, the determination of the objections urged against this instruction would necessitate an examination of the evidence, and depend upon the circumstances shown. The evidence is not before us, and in its absence the instruction must be presumed to be without error.

Neither the third nor fourth instructions contained statements which could not be correct and applicable to some possible conditions of the proof; and they must be presumed to be correct, there being no bill of exceptions. See *Home Fire Ins. Co. v. Weed*, 55 Nebr., 146, 75 N. W. Rep., 539.

There were no other assignments of error urged in argument, and it follows, from what has been determined, that the judgment must be

AFFIRMED.