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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

September Term, 1901—January Term, 1902.

VOLUME LXIII.

LEE HERDMAN,

OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

85353

SUPREME COURT OF NEBRASKA

DURING THE

PERIOD AND PREPARATION OF THIS REPORT.

CHIEF JUSTICES AND JUDGES.

T. L. NORVAL,* } CHIEF JUSTICES.
J. J. SULLIVAN,†

J. J. SULLIVAN,‡
SILAS A. HOLCOMB, } JUDGES.
SAMUEL H. SEDGWICK,§

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GEORGE A. DAY, } DEPARTMENT No. 1.
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HUGH G. PATTON,
HENRY M. LEAVITT, } BAILIFFS.

* Until January 9, 1902.
† After January 9, 1902.
‡ Until January 9, 1902.
§ After January 9, 1902.
‖ Until January 7, 1902.
¶ After January 9, 1902.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

First District—

CHARLES B. LETTON.....Fairbury
JOHN STULL.....Auburn

Second District—

PAUL JESSEN.....Nebraska City

Third District—

ALBERT J. CORNISH.....Lincoln
LINCOLN FROST.....Lincoln
EDWARD P. HOLMES.....Lincoln

Fourth District—

IRVING F. BAXTER.....Omaha
GEORGE A. DAY*.....Omaha
CHARLES T. DICKINSON.....Tekamah
LEE ESTELLE.....Omaha
JACOB FAWCETT.....Omaha
WILLIAM W. KEYSOR†.....Omaha
GUY R. C. READ.....Omaha
WILLARD W. SLABAUGH.....Omaha

Fifth District—

BENJAMIN F. GOOD.....Wahoo
SAMUEL H. SORNBORGER.....Wahoo

Sixth District—

JAMES GRIMISON.....Schuyler
CONRAD HOLLENBECK.....Fremont

Seventh District—

GEORGE W. STUBBS.....Superior

Eighth District—

GUY T. GRAVES.....Pender

---

*Appointed by Governor Savage September 8, to take effect September 28, 1902; took oath of office October 21; and was elected to fill unexpired term November 4 following.

†Resigned September 8, 1902, to take effect twenty days thereafter. —REPORTER.

Ninth District—

JAMES F. BOYD.....Neligh

Tenth District—

ED L. ADAMS.....Minden

Eleventh District—

JAMES N. PAUL.....St. Paul

JOHN R. THOMPSON.....Grand Island

Twelfth District—

HOMER M. SULLIVAN.....Broken Bow

Thirteenth District—

HANSON M. GRIMES.....North Platte

Fourteenth District—

GEORGE W. NORRIS.....McCook

Fifteenth District—

JAMES J. HARRINGTON.....O'Neill

WILLIAM H. WESTOVER.....Rushville

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOL. LXII.

BOESCHE, HERMAN G.
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BURNETT, LAFE.
BUTTON, W. F.
CASE, REED.
CHAMBERS, WILL H.
CLARKE, E. D.
CLELAND, JESSE P.
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JOHNSON, ALBERT P.
KING, H. C.
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RAYMOND, L. L.
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WILLIAMS, FRANK D.

REPORTER'S NOTES.

☞ If any subsequent edition of these reports is ever issued, as, doubtless, there will be, the future editor's attention is hereby called to errors in the 61st volume which escaped notice: On page xvii, In Memoriam—Samuel Maxwell, remarks of Wilbur F. Bryant, fifth line from bottom of page, tenth word of line, put "eleven" in place of "seven," and strike out words "rehearing allowed" in margin of page 454.

A table of statutes and constitutional provisions cited and construed can be found on pages lxxvii to lxxxiii.

Attention is called to foot-notes in this volume. Thanks are due Prof. Walter Wheeler Cook, of the State University, for valuable suggestions. Joseph E. Cobbey, the learned and distinguished legal writer, first suggested to the editor the idea of foot-notes. With the help of his assistant, the editor prepared the note in the 59th volume. The seeming approval of the bar has encouraged him to continue the work.

In regard to the digest of cases overruled, modified and compared, which list will be found on pages liii to lxxvi, some explanations are here offered. The former editor, William B. Rose, at the suggestion of the court, prepared a list of cases, which, in his judgment, had been overruled. This list commences with the 37th volume. No one can vie with the present writer in appreciation of the magnitude and importance of the task. At a suggestion coming from the court, a classification of these cases was begun. In the preparation of this classification, the digest suggested itself. The classification or digest first appears in the 62d volume. In the criticism of this work, it should not escape the attention of the critic that *facta* and not *dicta* —what the court does and not what it says in the doing—determines whether or not a former opinion has been overruled by the present case. The best definition of *obiter dicta*, which is at hand, may be found in note 1 on page 198 of volume I of Life and Writings of Benjamin Robbins Curtis:

"The expression, by judges, of opinions that are not called for by the record, or which can not be expressed consistently with the views that they take of the technical attitude of the case before them, in respect to some principal question."

The *Dred Scott Case* and the *Insular Cases* are distinguished examples of *obiter dicta*. *Scott v. Sandford*, 19 How. [U. S.], 393; *De Lima v. Bidwell*, 182 U. S., 1; *Downes v. Bidwell*, 182 U. S., 244. These decisions have been discussed in a spirit of partisan bias oftener than with an eye single to the discovery of the truth. In the first case

cited, Taney, C. J., who was supposed to have delivered the majority opinion, although but one of his associates fully agreed with him, reasoned that Scott, because of his race and pedigree, could not be a citizen. If this were true, the court below had no jurisdiction. But the learned chief justice ignored the jurisdictional question and passed upon the merits. This opinion upon the merits could not be "expressed consistently with the views" of a majority of the court—including the chief justice—on the question of jurisdiction. Hence the opinion is *dicta sine cera.* In the *Insular Cases*, seven of the nine judges agreed that the Bill of Rights—the first ten amendments to the constitution of the United States—went into the insular possessions *proprio vigore.* But, as this opinion was "not called for by the record," these expressions of the judges are pure *dicta.* Illustrations have been chosen from outside the reports of our own court, because such discussion by an editor is *ultra provinciam.* No court can do justice to itself without uttering much that must pass for *obiter dicta.* As long as human minds are differently constituted, no two logicians will arrive at the same goal by the same route. One learned in the law, in conversation with the present writer, pointed to the *edicta* of the Roman prætors as models of conciseness and contrasted them with the opinions of modern courts to the disparagement of the latter. But the critic had forgotten that the ancient prætor's *edictum* has, in its nature, no more resemblance to the opinion of a modern judge than a mathematical definition has to the solution of a problem. The *edictum* was a rule of court, by which the prætor announced that he would be governed during the term of his office. The task of a modern judge may be stated as follows: Given, a certain state of facts + certain ascertained principles of law = the decision rendered. The buttressing of this decision as a precedent against a different state of facts often requires *dicta.* The citing of these *dicta* as overruling *facta* or *dicta* in another case, is manifest injustice. What has been heretofore announced is here repeated: Cases containing *dicta* in apparent conflict, where the *facta* are not antagonistic, will not be placed in the family of overruled cases. If the court has distinguished them, they will be placed, after this volume, in the list of distinguished cases; otherwise they will be placed in the list to be compared. *Obiter dicta* are not peculiar to courts. The historic Hayne-Webster debate of 1830 grew out of the Foote resolution with reference to the sale of public lands and the discontinuance of the office of surveyor general.

The arrangement of the alphabetical order indexes and tables is not appreciated by those unfamiliar with the work. Some uniform rule is mandatory. Hence it has been decided, with this report, to adopt the method of the Century Dictionary of Names, viz.: A compound term, as Farmers and Merchants' Bank of Bloomfield, is to be treated as one word for the purposes of indexing and tabulation. To make this plain, several words and compound terms from the

Century Dictionary here follow in the order in which they appear in the first column of page 130 of that valuable work: Battle, Battle above the Clouds, Battle at Sea, Battle Bridge, Battle Creek, Battle Hill, Battle Monument, Battle of Alcazar, Battle of Amazons, Battle of Dorking, Battle of the Baltic, Battle of the Books, Battle of the Frogs and Mice, Battle of the Giants. But the Century Dictionary does not always follow its own rule.

Every first-class publisher expects the editor of a book to adopt some uniformity of spelling and punctuation. The reason for this rule needs no explanation. Except as otherwise announced, Goold Brown's Grammar of Grammars is the standard for punctuation; the Standard Dictionary for spelling.

The explanation of other matters will be reserved for a subsequent volume.

ERRATUM.—At page 730, end of line 9, for 14 read 15.

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NOTE.—The insertion in the following list of a case from another state would necessitate a change in the foregoing title; hence this note. An act of the legislature of Ohio, adopted in 1835, provided "That if any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison, or causing the same to be done, kill another; every such person shall be deemed guilty of murder, in the first degree," etc. In 1857 the supreme court of the state construed that statute, holding the adverb "purposely," as a modifier of the verb "kill," to apply to every intervening clause; opinion by Bartley, C. J., *Robbins v. State*, 8 Ohio St., 175. The effect was to make intent a necessary ingredient of murder in both degrees. In 1875 the Ohio law became ours by adoption. Criminal Code, sec. 3; amended in 1893. In 1897 our supreme court held that our legislature, in adopting the Ohio law, did not adopt the construction of her court, but that such decision stood—on a par with any decision of our own court—subject to revision; and they then and there overruled it; opinion by POST, C. J., *Morgan v. State*, 51 Nebr., 672, overruling *Franklin v. Kelly*, 2 Nebr., 79, 104, paragraph 3 in *Hallenbeck v. Hahn*, 2 Nebr., 377, *O'Dea v. Washington County*, 3 Nebr., 118, *Bohanan v. State*, 18 Nebr., 57, 73, 74, *Parks v. State*, 20 Nebr., 515, 518, *Coffield v. State*, 44 Nebr., 417, 423, and *Forrester v. Kearney Nat. Bank*, 49 Nebr., 655, 663,* and it is a mistake to say, as has been said, that these decisions are modified by *Nebraska Building & Loan Ass'n v. Marshall*, 51 Nebr., 534, 538. *Morgan v. State* is upheld in *Rhea v. State*, 63 Nebr., 461, 477, opinion by HOLCOMB, J. The Ohio decision is mentioned with disapproval in a dictum by the Oregon supreme court; opinion by Kelly, C. J., *State v. Brown*, 7 Ore., 186, 197.—REPORTER.

*The principle of these cases is recognized tacitly by NORVAL, C. J., in *State v. Poynter*, 59 Nebr., 417, 430

EXPRESSLY PARTIALLY OVERRULED.

Adams v. Nebraska City Nat. Bank, 4 Nebr., 370.

Chattel mortgage. Title to property passes to mortgagees.

Musser v. King, 40 Nebr., 892.

Latter case upheld in Randall v. Persons, 42 Nebr., 607; Sharp v. Johnson, 44 Nebr., 165; Camp v. Pollock, 45 Nebr., 771.

Murray v. Loushman, 47 Nebr., 256.

Strahle v. First Nat. Bank of Stanton, 47 Nebr., 319.

Title to property remains in mortgagor.

Alter v. Bank of Stockham, 51 Nebr., 797.

Alter v. Bank of Stockham, 53 Nebr., 223.

Fraud. Conversion.

Aultman v. Obermeyer, 6 Nebr., 260.

Lipscomb v. Lyon, 19 Nebr., 511.

Woodruff v. White, 25 Nebr., 745.

Stevens v. Carson, 30 Nebr., 544, 551.

Good faith of transaction between husband and wife.

Bankers' Life Ins. Co. v. Robbins, 53 Nebr., 44.

Section 8, chapter 16, Compiled Statutes, does not apply to domestic insurance companies.

Bankers' Life Ins. Co. v. Robbins, 55 Nebr., 117.

Section 8, chapter 16, does apply to domestic insurance companies.

Bollman v. Lucas, 22 Nebr., 796.

Sunday Creek Coal Co. v. Burnham, 52 Nebr., 364.

Fraudulent conveyance. Guilty knowledge of purchaser.

Brooks v. Dutcher, 22 Nebr., 644.

City of Omaha v. Richards, 49 Nebr., 244.

A general and a specific exception to instructions.

Carkins v. Anderson, 21 Nebr., 364.

Anderson v. Carkins, 135 U. S., 483.

Robinson v. Jones, 31 Nebr., 20.

Homestead. Prior contract to convey after having acquired title. Estoppel.

Cheney v. Harding, 21 Nebr., 68.

Rowe v. Griffiths, 57 Nebr., 488.

Failure to file affidavit before service by publication.

Courcamp v. Weber, 39 Nebr., 533.

Dorsey v. Conrad, 49 Nebr., 443.

Alteration of instruments. Presumption.

Crook v. Vandevoort, 13 Nebr., 505.
Mattis v. Boggs, 19 Nebr., 698.
Latter case reaffirmed in Kirk v. Bowling, 20 Nebr., 260.
Johnson v. Hardy, 43 Nebr., 368.
Ejectment by tenant in common.

Curten v. Atkinson, 29 Nebr., 612.
Curtin v. Atkinson, 36 Nebr., 110.
Parties to error proceeding in supreme court.

Darst v. Levy, 40 Nebr., 593.
McCord v. Bowen, 51 Nebr., 247, 251.
Attachment. Chattel mortgage. Rights of mortgagor.

Drexel v. Richards, 48 Nebr., 732.
Drexel v. Richards, 50 Nebr., 509.
Mechanic's lien. Description of real estate.

First Nat. Bank of Chadron v. Engelbercht, 57 Nebr., 270.
First Nat. Bank of Chadron v. Engelbercht, 58 Nebr., 639, 640.
Mortgage foreclosure.

First Nat. Bank of Omaha v. Goodman, 55 Nebr., 409.
First Nat. Bank of Omaha v. Goodman, 55 Nebr., 418.
Liability of wife as surety for husband.

Gee Wo v. State, 36 Nebr., 241.
O'Connor v. State, 46 Nebr., 157, 158.
Negative averment in criminal information.

Geisler v. Brown, 6 Nebr., 254.
World Publishing Co. v. Mullen, 43 Nebr., 126.
Language libelous per se.

Henry v. Vliet, 33 Nebr., 130.
Henry v. Vliet, 36 Nebr., 138.
Precedent debt as consideration for chattel mortgage.

Hoadley v. Stephens, 4 Nebr., 431.
Omaha Real Estate & Trust Co. v. Kragscow, 47 Nebr., 592.
Acknowledgment of a deed in another state before a commissioner for this state.

Hollenbeck v. Tarkington, 14 Nebr., 430.
(Phenix Ins. Co. v. Swantkowski, 31 Nebr., 245.)
Sharp v. Brown, 34 Nebr., 406.
Limitation of proceeding in error.

Johnson v. First Nat. Bank of Plum Creek, 28 Nebr., 792.
Dorsey v. Conrad, 49 Nebr., 443, 444.
Alteration of negotiable instrument.

Kittle v. De Lamater, 3 Nebr., 325, 332.
Smith v. Columbus State Bank, 9 Nebr., 31.
Promissory note. Illegal consideration. Innocent purchaser.

La Flume v. Jones, 5 Nebr., 256.
Burkett v. Clark, 46 Nebr., 466, 468, 475.
Judicial sale. Redemption. Deposit.

Lancaster County Bank v. Horn, 34 Nebr., 742.
Sager v. Summers, 49 Nebr., 459.
Voluntary assignment.

..ee v. Hastings, 13 Nebr., 508.
Sureties on replevin bond are not liable in a case in which a return of the property can be had.
Ulrich v. McConaughey, 63 Nebr., 10, 13.
"We think, in the light of the opinion in that case [*Shelby v. McQuillan*, 59 Nebr., 158], *Lee v. Hastings* should not be followed."

Lewis v. Mills, 47 Nebr., 910.
Barker v. Wheeler, 60 Nebr., 470, 471.
Res adjudicata. Judgment upon officer's bond.

McCord v. Krause, 36 Nebr., 764.
McCord v. Bowen, 51 Nebr., 247, 251.
Attachment. Chattel mortgage.

McCord v. Weil, 29 Nebr., 682.
McCord v. Weil, 33 Nebr., 868, 869.
Latter case reaffirmed in Seeds Dry-Plate Co. v. Heyn Photo-Supply Co., 57 Nebr., 214, 217.
Review of order appointing receiver in advance of main case.

Magneau v. City of Fremont, 30 Nebr., 844.
State v. Boyd, 63 Nebr., 829.
Rosenbloom v. State, 64 Nebr., 342.
See Templeton v. City of Tekamah, *infra*.

Manly v. Downing, 15 Nebr., 637.
Green v. Sanford, 34 Nebr., 363.
Limitation of foreclosure of mechanic's lien.

Marvin v. Weider, 31 Nebr., 774.
Perry v. Baker, 61 Nebr., 841, 845.
Law of the case as a rule in district court.

O'Dea v. Washington County, 3 Nebr., 118.
See note at the head of this digest of cases.

Omaha Consolidated Vinegar Co. v. Burns, 44 Nebr., 21.
Omaha Consolidated Vinegar Co. v. Burns, 49 Nebr., 229.
Mechanic's lien for sinking well.

Omaha & R. V. R. Co. v. Wright, 47 Nebr., 886.
Omaha & R. V. R. Co. v. Wright, 49 Nebr., 456, 457.
Pleading negligence.

Osborne v. Canfield, 33 Nebr., 330.
Moline v. Curtis, 38 Nebr., 520, 534.
Bill of exceptions on review of attachment proceeding in county court.

Pacific Express Co. v. Cornell, 59 Nebr., 364.
Nebraska Telephone Co. v. Cornell, 59 Nebr., 737.
Maximum rate law.

Richards v. State, 22 Nebr., 145.
Horbach v. City of Omaha, 49 Nebr., 851.
Latter case reaffirmed in Mathews v. Mulford, 53 Nebr., 252, 253.
Extension of time for filing bill of exceptions.

Richardson v. Campbell, 34 Nebr., 181.
Havemeyer v. Paul, 45 Nebr., 373, 374.
Latter decision reaffirmed in Omaha Loan & Trust Co. v. Hanson, 46 Nebr., 870, and in Connecticut Mutual Life Ins. Co. v. Westerhoff, 58 Nebr., 379, 383.
Contract rate of interest after maturity.

Russel v. Rosenbaum, 24 Nebr., 769.
Aultman v. Martin, 49 Nebr., 103.
Separate assignments of error in the giving of instructions.

Schields v. Horbach, 40 Nebr., 103.
State v. Scott, 53 Nebr., 571, 572.
Amendment of bill of exceptions. Time to present for allowance. Notice.

Scott v. Flowers, 60 Nebr., 675.
Scott v. Flowers, 61 Nebr., 620.
State industrial school. Constitutionality of statute. Constitutional portion stands notwithstanding the defect.

Search v. Miller, 9 Nebr., 26.

In the trial of an action in replevin, the jury should be instructed as to which party has possession of the property at the time of the trial. If a verdict is silent as to the right of property and the right of possession, and as to the value thereof, according to the finding, no judgment can be rendered for any amount whatever.

Ulrich v. McConaughey, 63 Nebr., 10.

If the nature of a defendant's interest is not in issue and his right of possession is equal in value to the ownership, the silence of the verdict as to these questions is not prejudicial error.

State v. Green, 27 Nebr., 64.

State v. Boyd, 63 Nebr., 829.

Rosenbloom v. State, 64 Nebr., 342.

See Templeton v. City of Tekamah, *infra.*

State v. Sioux City & P. R. Co., 7 Nebr., 357.

Foree v. Stubbs, 41 Nebr., 271.

Latter case reaffirmed in Hall v. Hooper, 47 Nebr., 111, 118.

Right to maintain action to quiet title defined.

Strader v. White, 2 Nebr., 348.

Gibson v. Smith, 31 Nebr., 354.

Waggoner v. First Nat. Bank of Creighton, 43 Nebr., 84, 94, 95.

Liability for partnership debts.

Stutzner v. Printz, 43 Nebr., 306.

Herman v. Hayes, 58 Nebr., 54.

Discharge of attachment after judgment.

Templeton v. City of Tekamah, 32 Nebr., 542.

A provision of a municipal ordinance, which imposes a license-tax as a condition precedent to entering upon a certain occupation, that punishes an offender against the provision with fine and imprisonment is unconstitutional and void.

State v. Boyd, 63 Nebr., 829.

Rosenbloom v. State, 64 Nebr., 342.

The provision of section 154 of the general revenue law authorizing fine and imprisonment as a means of enforcing a license-tax is constitutional and valid.

Thomas v. Markmann, 43 Nebr., 823.

Barker v. Wheeler, 60 Nebr., 470, 471.

Judgment of court having jurisdiction against an officer does not conclude his bondsmen, but is only prima-facie evidence.

Walker v. Turner, 27 Nebr., 103.

City of Omaha v. Richards, 49 Nebr., 244, 245.

Specific exceptions to instructions.

Weaver v. Cressman, 21 Nebr., 675.
Anheuser-Busch Brewing Ass'n v. Hier, 52 Nebr., 424.

Funds in hands of clerk of district court not subject to garnishment. Action in equity.

Westcott v. Archer, 12 Nebr., 345.
Grebe v. Jones, 15 Nebr., 312, 317.

Latter case reaffirmed in Darnell v. Mack, 46 Nebr., 740. Attachment. Levy. Jurisdiction.

White v. State, 28 Nebr., 341.
Coffield v. State, 44 Nebr., 417.

Filing information without preliminary hearing.

Whitman v. State, 42 Nebr., 841.
Metz v. State, 46 Nebr., 547, 556.

Burglary. Presumption. Possession of stolen property.

Wilson v. Macklin, 7 Nebr., 50.
Muller v. Plue, 45 Nebr., 701, 702.

Writ of replevin against officer holding goods under execution issued on void judgment.

Winslow v. State, 26 Nebr., 308, 312.
Leisenberg v. State, 60 Nebr., 628, 629.

Allegation of the particular hour of the night in an indictment for burglary.

Woodruff v. White, 25 Nebr., 745.
Stevens v. Carson, 30 Nebr., 544, 551.

Good faith of transaction between husband and wife.

PARTIALLY (NOT EXPRESSLY) OVERRULED.

Bohanan v. State, 18 Nebr., 57.

See note at the head of this digest of cases.

Chicago, B. & Q. R. Co. v. Cass County, 51 Nebr., 369.
James v. Higginbotham, 60 Nebr., 203.

Latter case reaffirmed in Gandy v. Cummins, 64 Nebr., 312, and Achenbach v. Pollock, 64 Nebr., ...

Assignment in petition in error that court erred in overruling motion for new trial.

Coffield v. State, 44 Nebr., 417, 419.

See note at the head of this digest of cases.

Crowell v. Johnson, 2 Nebr., 146.
Wescott v. Archer, 12 Nebr., 345.

Attachment. Jurisdiction.

Eiseman v. Gallagher, 24 Nebr., 79.

Brewster v. Bank of Ainsworth, 43 Nebr., 79.
[Eiseman v. Gallagher approved in a dictum in Frenzer v. Richards, 60 Nebr., 131.]

Usury. Defense. Affirmative relief. Rule of equity.

Franklin v. Kelley, 2 Nebr., 79.

Forrester v. Kearney Nat. Bank, 49 Nebr., 655.

See note at the head of this digest of cases.

Hallenbeck v. Hahn, 2 Nebr., 377.

Johnson v. Hahn, 4 Nebr., 139.

Enjoining the collection of taxes.

Morgan v. State, 51 Nebr., 672.

See note at the head of this digest of cases.

Hurley v. Estes, 6 Nebr., 386.

Hale v. Christy, 8 Nebr., 264.

Limitation of mortgage foreclosure.

Kane v. Union P. R. Co., 5 Nebr., 105.

Hurlburt v. Palmer, 39 Nebr., 158.

Anheuser-Busch Brewing Ass'n v. Peterson, 41 Nebr., 897.

Herbert v. Wortendyke, 49 Nebr., 182, 185.

Defective service. General appearance. Waiver of objection. Setting up want of personal jurisdiction in answer.

Kountze v. Scott, 49 Nebr., 258.

McCord v. Bowen, 51 Nebr., 247, 251.

Motion to dissolve attachment. Right of defendant who does not own property.

Kyger v. Ryley, 2 Nebr., 20.

Hale v. Christy, 8 Nebr., 264.

Limitation of mortgage foreclosure.

Mercer v. James, 6 Nebr., 406.

A verdict in replevin not in accord with statute in a case not involving the nature of defendant's interest, is error without prejudice.

Hooker v. Hammill, 7 Nebr., 231.

Verdict in replevin not in accord with statute in a case not involving the nature of defendant's interest, is prejudicial error.

Also

Hershiser v. Delone, 24 Nebr., 380.

Richardson Drug Co. v. Teasdall, 59 Nebr., 150.

Morrissey v. Schindler, 18 Nebr., 672.

Herron v. Cole Bros., 25 Nebr., 692.

The discrepancy in the two preceding cases pointed out and the latter held to overrule the former in Hanna v. Emerson, 45 Nebr., 708, 709.

Right to bring action in county where one of the defendants resides.

Parks v. State, 20 Nebr., 515, 518.

See note at the head of this digest of cases.

Peters v. Dunnells, 5 Nebr., 460.

Hale v. Christy, 8 Nebr., 264.

Limitation of mortgage foreclosure.

OVERRULED ON A POINT NOT DISCUSSED IN FORMER OPINION.

Shiverick v. Gunning, 58 Nebr., 29.

Shiverick v. Gunning, 59 Nebr., 73.

Instructions as to matters not in evidence.

MODIFIED.

Boyer v. Clark, 3 Nebr., 161.

Raymond Bros. v. Green, 12 Nebr., 215, 220.

Set-off. Unliquidated damages.

Hiatt v. Brooks, 17 Nebr., 33.

City of Hastings v. Foxworthy, 45 Nebr., 676, 682.

Law of the case.

Jefferson County v. Saxon, 10 Nebr., 14.

Schuyler v. Hanna, 28 Nebr., 601.

Practice. Appeal. Transcript.

Mathews v. Toogood, 23 Nebr., 536.

Mathews v. Toogood, 25 Nebr., 99.

Interest-bearing coupons. Aggregate interest of principal debt and coupons must not exceed ten per cent.

Miller v. Waite, 59 Nebr., 319.

Miller v. Waite, 60 Nebr., 431.

Voluntary assignment. Partnership property.

Plummer v. Rohman, 61 Nebr., 61.

Plummer v. Rohman, 62 Nebr., 145.

Plea of estoppel.

Real v. Hollister, 17 Nebr., 661.

Real v. Hollister, 20 Nebr., 112.

Eviction before action on covenant.

Romberg v. Hughes, 18 Nebr., 579.
Schrandt v. Young, 62 Nebr., 254, 263.
Ulrich v. McConaughey, 63 Nebr., 10, 15.
Damages in replevin.

Scott v. Flowers, 60 Nebr., 675.
Scott v. Flowers, 61 Nebr., 620.
State Industrial School.

Solt v. Anderson, 62 Nebr., 153.
An allegation of fact in a reply is taken as denied by the force of the Code.
Solt v. Anderson, 63 Nebr., 734.
Allegations of a reply are to be construed with the petition.

OVERRULED IN TOTO.

Allis v. Newman, 29 Nebr., 207.
Stull v. Cass County, 51 Nebr., 760.
Bill of exceptions. Mistake. Loss. Failure to file in time.

Arlington State Bank v. Paulsen, 57 Nebr., 717.
Arlington State Bank v. Paulsen, 59 Nebr., 94.
Review of questions not litigated below.

Banghart v. Lamb, 34 Nebr., 535.
Selby v. McQuillan, 45 Nebr., 512.
Judgment against sureties on appeal bond.

Barker v. Wheeler, 60 Nebr., 470.
Barker v. Wheeler, 62 Nebr., 150.
General denial. Proof of payment.

Bartlett v. Bartlett, 13 Nebr., 456.
Bartlett v. Bartlett, 15 Nebr., 593.
Husband and wife. Equitable title to real property.

Bennet v. Fooks, 1 Nebr., 465.
Galway v. Malchow, 7 Nebr., 285.
Mansfield v. Gregory, 8 Nebr., 432.
Harral v. Gray, 10 Nebr., 186.
Mansfield v. Gregory, 11 Nebr., 297.
Hubbart v. Walker, 19 Nebr., 94.
Galway v. Malchow reaffirmed in Sheasley v. Keens, 48 Nebr., 57, 59.
Purchaser at sheriff's sale. Prior lien.

Bonns v. Carter, 20 Nebr., 566, 22 Nebr., 495.
Jones v. Loree, 37 Nebr., 816.
Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Nebr., 863, 866.

Last two cases reaffirmed in Grand Island Banking Co. v. Costello, 45 Nebr., 119, 140, and Goldsmith v. Erickson, 48 Nebr., 48.

No presumption of fraud because the property transferred was all the vendor owned.

Bressler v. Wayne County, 25 Nebr., 468.
Wayne County v. Bressler, 32 Nebr., 818.

Taxation of national bank stock. Deduction of debts.

Burlington & M. R. R. Co. v. Shoemaker, 18 Nebr., 369.
Chicago, B. & Q. R. Co. v. Cox, 51 Nebr., 479.

Railroad company's liability for damages where line is not fenced.

Cass County v. Chicago, B. & Q. R. Co., 25 Nebr., 348.
Chicago, B. & Q. R. Co. v. Richardson County, 61 Nebr., 519.

Railroad bridge across navigable river assessable by state board.

Cedar County v. Jenal, 14 Nebr., 254.
State v. Hill, 47 Nebr., 456.
Bush v. Johnson County, 48 Nebr., 1.
In re State Treasurer's Settlement, 51 Nebr., 116.
Bartley v. State, 53 Nebr., 310, 337.

But see dictum in Thomssen v. Hall County, 63 Nebr., 777, 783.

Payment by county treasurer to his successor without manual delivery of legal tender, viz., with deposits in a bank.

Coy v. Jones, 30 Nebr., 798.
Globe Publishing Co. v. State Bank of Nebraska, 41 Nebr., 175, 176.

Deere v. Losey, 48 Nebr., 622.
Sager v. Summers, 49 Nebr., 459.

Voluntary assignment.

Edgington v. Cook, 32 Nebr., 551.
Graff v. Ackerman, 38 Nebr., 720.

Taxation of land purchased from the government before issuance of patent.

First Nat. Bank of Hastings v. McAllister, 33 Nebr., 646.
Capital Nat. Bank of Lincoln v. American Exchange Nat. Bank of Chicago, 51 Nebr., 707.

Negotiable paper. Legal holiday. Presentment and protest. Common law not abrogated by statute.

First Nat. Bank of South Bend v. Gandy, 11 Nebr., 431, 433.

McIntosh v. Johnson, 51 Nebr., 33, 34.

Public funds. Garnishment.

Fisher, ex parte.

This court will not inquire into the constitutionality of the law, under which the defendant was committed, in a habeas-corpus proceeding.

Sovereign v. State, 7 Nebr., 409.

Ex parte Thomason, 16 Nebr., 238.

The court *did* inquire into the constitutionality of the law under which the defendant was committed in a proceeding in habeas corpus.

Strange and unaccountable as it may seem, there is no allusion to the *Fisher Case* in either *Sovereign v. State* or *Ex parte Thomason.*

Godman v. Converse, 38 Nebr., 657.

Godman v. Converse, 43 Nebr., 463.

Administration of estates. Allowance to widow. Acceptance of conditional will.

Horn v. Miller, 20 Nebr., 98.

Bickel v. Dutcher, 35 Nebr., 761.

Latter case reaffirmed in Continental Building & Loan Ass'n v. Mills, 44 Nebr., 136, 142.

Taking appeal. Limitation of time.

Howell v. Roberts, 29 Nebr., 483.

Globe Publishing Co. v. State Bank of Nebr., 41 Nebr., 175, 176.

Liability of stockholder in corporation.

Landauer v. Mack, 39 Nebr., 8.

Landauer v. Mack, 43 Nebr., 430.

Attachment. Levy on mortgaged chattels. Burden of proof.

McDonald v. Bowman, 35 Nebr., 93.

McDonald v. Bowman, 40 Nebr., 269.

Chattel mortgage. Attachment. Replevin by mortgagee.

Mathis v. Pitman, 32 Nebr., 191.

Wallace v. Sheldon, 56 Nebr., 55, 59.

Taxing of costs and attorneys' fees, in a will contest, against the estate.

Merrill v. Wright, 41 Nebr., 351.

Neither a levy nor assessment of taxes, will be presumed from the mere introduction in evidence of a treasurer's tax receipt or certificate of sale.

Darr v. Wisner, 63 Nebr., 305.

In the foreclosure of a tax lien, the certificate of sale is evidence, *prima facie.*

Morehead v. Adams, 18 Nebr., 569.
Scott v. Overall, 50 Nebr., 144.
Construction of statutes relative to settling a bill of exceptions.

Morgan v. State, 48 Nebr., 798.
State v. Cornell, 50 Nebr., 526.
Compensation of stenographer.

Nebraska Telephone Co. v. Cornell, 58 Nebr., 823.
Pacific Express Co. v. Cornell, 59 Nebr., 364.
Construction of petition in injunction.

Nebraska Telephone Co. v. Jones, 59 Nebr., 510.
Nebraska Telephone Co. v. Jones, 60 Nebr., 396.
Contributory negligence. Directing verdict.

Nickolls v. Barnes, 32 Nebr., 195.
Nickolls v. Barnes, 39 Nebr., 103.
Landlord and tenant. Possession by tenant under written lease unilaterally executed, tantamount to occupying under oral lease.

Omaha & R. V. R. Co. v. Clark, 35 Nebr., 867.
Omaha & R. V. R. Co. v. Clarke, 39 Nebr., 65.
Question of fact.

Pickens v. Plattsmouth Land Co., 31 Nebr., 585.
Pickens v. Plattsmouth Investment Co., 37 Nebr., 272.
Mechanic's lien. Question of fact.

Phillips v. Bishop, 31 Nebr., 853.
Phillips v. Bishop, 35 Nebr., 487.
The latter case overruled the former, on a question of fact and not of law.

Rice v. Gibbs, 33 Nebr., 460.
Rice v. Gibbs, 40 Nebr., 264, 265.
Assignability of a contract of option for a sale of real estate.

Rittenhouse v. Bigelow, 38 Nebr., 543.
Rittenhouse v. Bigelow, 38 Nebr., 547.
Cities of the first class. Equalization of taxes by township.

St. Joseph & D. R. Co. v. Baldwin, 7 Nebr., 247.
Railroad Co. v. Baldwin, 103 U. S., 426.
Government grant of land to railroad company.
The latter case overruled the former on a question of fact and not of law.

Sandwich Mfg. Co. v. Feary, 34 Nebr., 411.
Sandwich Mfg. Co. v. Feary, 40 Nebr., 226.
Harvesting machine. Sale. Contract. Warranty.

Scott v. Overall, 50 Nebr., 144.

Williams v. Miles, 62 Nebr., 566.

Construction of statute relative to settling bill of exceptions. See Morehead v. Adams, *supra*.

Scott v. Waldeck, 11 Nebr., 525.

Jones v. Wolfe, 42 Nebr., 272.

City Nat. Bank of Hastings v. Thomas, 46 Nebr., 861.

State v. Ambrose, 47 Nebr., 235, 241.

Use of quashed bill of exceptions.

Shawang v. Love, 15 Nebr., 142.

Hurlburt v. Palmer, 39 Nebr., 158, 159.

Latter case reaffirmed in Mayer v. Nelson, 54 Nebr., 434.
Waiver of defects in process by appeal or error.

Shellenberger v. Ransom, 31 Nebr., 61.

Shellenberger v. Ransom, 41 Nebr., 631.

Descent in case of murder of ancestor by heir.

Shellenberger v. Ransom, 41 Nebr., 631.

Veeder v. McKinley-Lanning Loan Co., 61 Nebr., 892, 912.

Descent of real estate.

Smith v. Boyer, 29 Nebr., 76.

Smith v. Boyer, 35 Nebr., 46.

The latter case overruled the former by the established rule that where evidence is fairly conflicting the finding or verdict of the nisi-prius court will not be disturbed, the court applying this rule to an order discharging an attachment.

Sonnenschein v. Bartels, 37 Nebr., 592.

Sonnenschein v. Bartels, 41 Nebr., 703.

Fraudulent conveyance.

Stanwood v. City of Omaha, 38 Nebr., 552.

Stanwood v. City of Omaha, 42 Nebr., 303.

Rule as to conflicting evidence applied.

State v. Keim, 8 Nebr., 63.

Farmers & Merchants' Banking Co. v. City of Red Cloud, 62 Nebr., 442.

Garnisheeing public money.

State v. Missouri P. R. Co., 29 Nebr., 550.

Missouri P. R. Co. v. Nebraska, 164 U. S., 403, 17 Sup. Ct. Rep., 130.

Latter case reaffirmed in Chicago, B. & Q. R. Co. v. State, 50 Nebr., 399.

Grain elevator case. The taking by a state of the private property of a person or a corporation without the owner's consent for the use of another.

State v. Roper, 46 Nebr., 724.
State v. Roper, 47 Nebr., 417.
Relocation of county seat.

State v. Seavey, 22 Nebr., 454.
State v. Moores, 55 Nebr., 480.
Municipal corporation. Local self-government.

Stewart-Chute Lumber Co. v. Missouri P. R. Co., 28 Nebr., 39.
Stewart-Chute Lumber Co. v. Missouri P. R. Co., 33 Nebr., 29.
Railroad. Mechanic's lien. Material-man.

Svanson v. City of Omaha, 38 Nebr., 550.
Svanson v. City of Omaha, 42 Nebr., 303.
Sufficiency of evidence.

Thomas v. Edgerton, 36 Nebr., 254.
Thomas v. Edgerton, 40 Nebr., 25, 26.
Liability of officer for sufficiency of sureties on replevin bond.

United States Nat. Bank of Omaha v. Geer, 53 Nebr., 67.
United States Nat. Bank of Omaha v. Geer, 55 Nebr., 462.
Commercial paper. Restrictive indorsement.

TO BE COMPARED.

Atchison & N. R. Co. v. Baty, 6 Nebr., 37.
Graham v. Kibble, 9 Nebr., 182.

The former case held a part of a statute which gave double value in damages void. The latter case held the fifty-dollar penalty for illegal fees constitutional.

Becker v. Anderson, 11 Nebr., 493, 496.
Marsh v. Burley, 13 Nebr., 261, 264.
Housel v. Cremer, 13 Nebr., 298.
Lancaster County Bank v. Gillilan, 49 Nebr., 165, 180.

In the first of the foregoing cases, it was stated [dictum] that the filing and recording of a chattel mortgage was equivalent to a change of possession of the property. In the second case, the writer of the former opinion retracts the statement. In the first case, it was held that, where a chattel mortgage was void as to creditors, the mortgaged property was assets in the hands of the executor of the mortgagor. The third and fourth cases appear to be in almost direct conflict with this doctrine, and in the fourth case the opinion in the first, as to this point, is analytically criticised.

Berkley v. Lamb, 8 Nebr., 392.

Schribar v. Platt, 19 Nebr., 625.

Best v. Zutavern, 53 Nebr., 619.

Execution. Homestead. Confirmation of sale.

The last decision says that the second overruled the first.

Bradshaw v. City of Omaha, 1 Nebr., 16.

Turner v. Althaus, 6 Nebr., 54, 77.

Taxation of vacant and farm lands within city limits.

Bryant v. Estabrook, 16 Nebr., 217.

Schoenheit v. Nelson, 16 Nebr., 235, 238.

Holmes v. Andrews, 16 Nebr., 296.

Otoe County v. Brown, 16 Nebr., 394, 397.

McClure v. Warner, 16 Nebr., 447.

D'Gette v. Sheldon, 27 Nebr., 829.

Alexander v. Wilcox, 30 Nebr., 793.

Warren v. Demary, 33 Nebr., 327.

Fuller v. Colfax County, 33 Nebr., 716.

Black v. Leonard, 33 Nebr., 745.

Alexander v. Thacker, 43 Nebr., 494, 497.

Foreclosure of tax lien. When does the five-year limit begin to run?

In the opinion in the last case cited NORVAL, C. J., makes an exhaustive review of the decisions on this point.

Commercial Nat. Bank v. Nebraska State Bank, 33 Nebr., 292.

Lancaster County Bank v. Gillilan, 49 Nebr., 165, 178.

Assignment for benefit of creditors. Title of assignee.

The opinion in the latter case, by IRVINE, C., contains an exhaustive summary. The decisions which he cites are cited elsewhere in this table.

Dawson v. Merrille, 2 Nebr., 119.

Simmons v. Yurann, 11 Nebr., 516.

Carkins v. Anderson, 21 Nebr., 364, 368.

Carkins v. Anderson, 135 U. S., 483.

Public lands. Improvements.

Entry of land under United States laws. Agreement by entryman to convey after he shall have acquired title. Public policy.

The third case in the foregoing series states that the second overrules the first. But the fourth case in such series reverses the third.

Filley v. Duncan, 1 Nebr., 134.

Colt v. Du Bois, 7 Nebr., 391, 394.

In the opinion in the former case CROUNSE, J., says that the lien of a judgment does not attach to lands acquired after its rendition, so as to affect bona-fide purchasers, until levy of execution. In the latter opinion, GANTT, C. J., says that question was not before the court in the former case, and then proceeds to lay down the opposite rule.

German Nat. Bank v. First Nat. Bank, 55 Nebr., 86.

An insolvent corporation, merely because it is a corporation, is not prohibited from preferring particular creditors.

National Wall Paper Co. v. Columbia Nat. Bank, 63 Nebr., 234.

An insolvent corporation can not make a preference of a debt due from it on which the officers and directors are bound as sureties.

Grimes v. Farrington, 19 Nebr., 44.

Bonns v. Carter, 20 Nebr., 566.

Hershiser v. Higman, 31 Nebr., 531.

Hamilton v. Isaacs, 34 Nebr., 709, 713, 714, 716.

Jones v. Loree, 37 Nebr., 816.

Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Nebr., 863.

Assignment for the benefit of creditors.

The sixth opinion in the foregoing series contains a learned discussion by IRVINE, C.

Hagenbuck v. Reed, 3 Nebr., 17.

Washington County v. Fletcher, 12 Nebr., 356, 359.

Graff v. Ackerman, 38 Nebr., 720, 724.

Taxation of school lands where the state has not parted with the title.

Handy v. Broug, 4 Nebr., 60, 64.

Buckmaster v. McElroy, 20 Nebr., 557, 564.

In the former opinion GANTT, J., appears to lay down the rule that statutes in derogation of the common law are to be strictly construed. In the latter, COBB, J., lays down the opposite rule. The first section of the Code of Civil Procedure would appear to settle the question as to that Code.

Harmon v. City of Omaha, 53 Nebr., 164, 170.

Language seems to imply that laches may bar a proceeding by injunction to prevent the collection of a void tax.

Casey v. Burt County, 59 Nebr., 624.

Mere delay of party in proceeding against a void tax, will not constitute laches.

Hill v. Palmer, 32 Nebr., 632.

Reynolds v. Fisher, 43 Nebr., 172, 173.

Farmers' Loan & Trust Co. v. Memminger, 48 Nebr., 17.

Lien upon personal property for taxes.

Howell v. Hathaway, 28 Nebr., 807.

Rust-Owen Lumber Co. v. Holt, 60 Nebr., 80.

Mechanic's lien for material furnished to husband for improvements upon wife's property with her knowledge.

Insurance Co. of North America v. Bachler, 44 Nebr., 549.
Hartford Fire Ins. Co. v. Corey, 53 Nebr., 209, 213.
Recovery of attorney fees in action on insurance policy.

Johnson v. Jones, 2 Nebr., 126.
Holliday v. Brown, 33 Nebr., 657, 34 Nebr., 232.
Wilson v. Shipman, 34 Nebr., 573.
Campbell Printing Press & Mfg. Co. v. Marder, 50 Nebr., 283, 287.
Impeachment of officer's return.

McCord v. Krause, 36 Nebr., 764.
Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Nebr., 863.
Attachment. Chattel mortgage.

Merriam v. Goodlett, 36 Nebr., 384.
Brown v. Ulrich, 48 Nebr., 409, 413.
Specific performance. Default in payment. Essence of contract. Waiver.
The writer of the opinion in the latter case says that the point in question was not necessary to a decision of the former; yet he makes a conditional overruling *in hæc verba.*

Minneapolis Harvester Works v. Hedges, 11 Nebr., 46, 48.
O'Leary v. Iskey, 12 Nebr., 136, 137.
Creighton v. Keith, 50 Nebr., 810, 814.
Jenkins v. State, 60 Nebr., 205.
Effect of appeal as to vacating judgment.

Morse v. Engle, 28 Nebr., 534.
Holliday v. Brown, 34 Nebr., 232, 234.
Radzuweit v. Watkins, 53 Nebr., 412, 416.
Service of summons in the alternative manner.

Morse v. Steinrod, 29 Nebr., 108.
Brown v. Work, 30 Nebr., 800.
Thompson v. Richardson Drug Co., 33 Nebr., 714.
Lininger v. Raymond, 12 Nebr., 19.
Nelson v. Garey, 15 Nebr., 531.
Bierbower v. Polk, 17 Nebr., 268.
Grimes v. Farrington, 19 Nebr., 44, 48.
Costello v. Chamberlain, 36 Nebr., 45.
Kavanaugh v. Oberfelder, 37 Nebr., 647.
Farwell v. Wright, 38 Nebr., 445.
Sherwin v. Gaghagen, 39 Nebr., 238.
Hewitt v. Commercial Banking Co., 40 Nebr., 820.
Preferring a creditor. Fraudulent conveyance.

Patrick v. Leach, 8 Nebr., 530, 538.
Search v. Miller, 9 Nebr., 26, 27, 30.
Kopplekom v. Huffman, 12 Nebr., 95.
Altschuler v. Algaza, 16 Nebr., 631.
Dunbar v. Briggs, 18 Nebr., 94, 97.
Stevens v. Carson, 30 Nebr., 544, 550.
Wylie v. Charlton, 43 Nebr., 840.

Veeder v. McKinley-Lanning Loan & Trust Co., 61 Nebr., 892.

Doane v. Dunham, 64 Nebr., 135.

Preponderance of evidence.

In *Search v. Miller* MAXWELL, J., says: "The court also erred in instructing the jury that a 'clear preponderance of the evidence was required to impeach the consideration.' In a civil action a preponderance of evidence is all that is required to sustain the claim of a party to the action."

In *Doane v. Dunham* POUND, C., says: "Parol evidence to establish a resulting trust, must be clear, unequivocal and convincing."

Pearson v. Kansas Mfg. Co., 14 Nebr., 211.

Barry v. Wachosky, 57 Nebr., 534, 537.

The former decision held in effect that where an action was commenced in one county against several defendants, and summons was issued to another bailiwick, the court retained its jurisdiction notwithstanding it developed that the defendant, whose presence gave the court jurisdiction, was improperly joined. The writer of the latter opinion says that the former opinion "is no longer regarded as sound, but has in effect long been overruled."

Peckinbaugh v. Quillin, 12 Nebr., 586.

Burnham v. Doolittle, 14 Nebr., 214, 216.

Attachment. Garnishment. Equity of redemption.

Ray v. Mason, 6 Nebr., 101.
Credit Foncier v. Rogers, 8 Nebr., 34.
Aultman v. Howe, 10 Nebr., 8.
Oliver v. Sheeley, 11 Nebr., 521.
Walker v. Lutz, 14 Nebr., 274.
Searles v. Auerhoff, 28 Nebr., 668.

Nothing appearing to the contrary, it will be presumed that judicial proceedings are conducted with reference to sun time.

Iowa Loan & Trust Co. v. Estate of Devall, 63 Nebr., 827.

"That decision (*Searles v. Auerhoff*) was rendered in 1890, before standard time was generally adopted in this state, and may, therefore, be said to have had as its basis the experienced course of human conduct. Since then, however, the former method of measuring time has fallen into disuse to such an extent that the reason for the presumption has, almost, if not entirely, ceased to exist."

Sides v. Brendlinger, 14 Nebr., 491.
Kyle v. Chase, 14 Nebr., 528.
Republican V. R. Co. v. Boyse, 14 Nebr., 130, 132.
Donavan v. Sherwin, 16 Nebr., 129, 130.
Tessier v. Crowley, 16 Nebr., 369, 372.

Preserving affidavits in bill of exceptions. The last case repudiates what it claims was a dictum in the eighth opinion of this series.

Scott v. Waldeck, 11 Nebr., 525.
Donovan v. Sherwin, 16 Nebr., 129, 130.
City of Seward v. Klenk, 27 Nebr., 615, 30 Nebr., 775.
Jones v. Wolfe, 42 Nebr., 272.
City Nat. Bank of Hastings v. Thomas, 46 Nebr., 861, 863.

Use of bill of exceptions after the same has been quashed.

State v. Moore, 37 Nebr., 13.
Weis v. Ashley, 59 Nebr., 494.

The governor as part of the law-making power.

State v. Priebnow, 16 Nebr., 131.
Arnold v. State, 38 Nebr., 752.

An obiter-dictum in the first opinion disapproved in the second. Plea in bar. Jury trial.

State v. Sanford, 12 Nebr., 425.
State v. Krumpus, 13 Nebr., 321.
Mann v. Welton, 21 Nebr., 541.
Hamilton v. Fleming, 26 Nebr., 240.
State v. Wilson, 31 Nebr., 462, 464.
Johnson v. Bartek, 56 Nebr., 422, 424.

Attachment. Exempt property.

The doctrine in Nebraska now is that the judgment of a court sustaining an attachment does not settle the status of the property attached as to its exemption.

Walker v. Morse, 33 Nebr., 650.
Moline v. Curtis, 38 Nebr., 520, 528.

Motion to quash bill of exceptions.

Wescott v. Archer, 12 Nebr., 345.
Grebe v. Jones, 15 Nebr., 312, 317.

The opinion in each of these cases was written by MAXWELL, J. The latter opinion, at the most, hardly more than modifies the former. In the latter case there is a vigorous dissenting opinion by LAKE, C. J.

Woods v. Shields, 1 Nebr., 454.
Kyger v. Ryley, 2 Nebr., 20, 27.

Strict foreclosure. Effect of statute.

Wright v. People, 4 Nebr., 407.

The first sentence of the third paragraph of the syllabus, lays down the doctrine of moral insanity *sine cera*. The latter sentence of the same paragraph lays down the right-and-wrong rule. These two sentences seem to be in direct and irreconcilable conflict. It appears, from an examination of the original opinion on file, that the syllabus was *not* prepared by the court.

NEGATIVED BY CONSTITUTION OF 1875.

Burlington & M. R. R. Co. v. Lancaster County, 4 Nebr., 293.

Land road tax valid under constitution of 1867.

McCann v. Merriam, 11 Nebr., 241.

Land road tax invalid under constitution of 1875.

City of Tecumseh v. Phillips, 5 Nebr., 305.

License money collected by towns and villages belongs to county.

City of Hastings v. Thorne, 8 Nebr., 160.

License money collected by a city or village belongs to such municipality.

NEGATIVED BY STATUTE.

Armstrong v. Mayer, 60 Nebr., 423.

Chapter 82, Laws of 1883, which attempted to amend section 1030 of the Code by grafting into the original section the right of appeal, is inimical to section 11, article 3, of the constitution.

House Roll No. 8, introduced by Loomis, of Dodge (Session Laws 1901, p. 484, ch. 85), provided for an appeal in forcible entry and detainer.

Aultman, Miller & Co. v. Mallory, 5 Nebr., 178.

A sale and delivery of goods on condition that the property is not to vest until the purchase-money is paid or secured, does not pass the title to the vendee until the condition is performed.

The legislature of 1877 enacted (Session Laws, p. 170) "that no sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee, in actual possession, obtained in pursuance of such sale, contract or lease, without notice, unless the same be in writing, signed by the vendee or lessee, and a copy thereof filed in the office of the clerk of the county within which such lessee or vendee resides," etc.

Campbell Printing Press & Mfg. Co. v. Dyer, 46 Nebr., 830, 833, 835.

The statute of 1877 was in effect a legislative command that the decision in the *Aultman Case* should no longer be the law of this state so far as judgment and attaching creditors and purchasers without notice were concerned.

Brotherton v. Brotherton, 14 Nebr., 186.
Session Laws, 1883, p. 284, ch. 40.
Nygren v. Nygren, 42 Nebr., 408, 411.
Judgment for alimony as a lien on real estate.

Brunswick v. McClay, 7 Nebr., 137.
Session Laws, 1881, ch. 33.
Larabee v. Klosterman, 33 Nebr., 150, 156.
Assignment of error in motion for new trial.

Haller v. Blaco, 10 Nebr., 36.
Howard v. Lamaster, 11 Nebr., 582.
Thompson v. Merriam, 15 Nebr., 498.
Shelley v. Towle, 16 Nebr., 194.
General Statutes, 1873, p. 923, sec. 68.
Larson v. Dickey, 39 Nebr., 463.
Session Laws, 1879, p. 327, sec. 127.
Form of tax deed.

Hand v. Phillips, 18 Nebr., 593.
This was an action to foreclose a mortgage containing a stipulation for an attorney's fee. The mortgage was dated February 18, 1879. On February 24, 1879, the governor approved the act repealing the act of February 18, 1873, providing for stipulated attorney's fee. General Laws, 1873, p. 98. This repealing act took effect June 1, 1879.
Dow v. Updike, 11 Nebr., 95.
This was a suit on a note, providing for an attorney fee, dated June 20, 1879, twenty days after the repealing act went into effect. The opinion is to the effect that in the absence of a statute no recovery of a stipulated attorney's fee can be had.
Under the old law it was held that attorney fees must be taxed as costs and kept separate from the judgment. *Rich v. Stretch*, 4 Nebr., 186; *Hendrix v. Rieman*, 6 Nebr., 516; *Hand v. Bank*, 8 Nebr., 10; *Dow v. Updike*, 11 Nebr., 95.

Hardy v. Miller, 11 Nebr., 395. See Hand v. Phillips, *supra*.

Heard v. Dubuque County Bank, 8 Nebr., 10.
Session Laws, 1881, p. 212.
Larabee v. Klosterman, 33 Nebr., 150, 157.
Assignment of error in motion for new trial.

Hewerkle v. Gage County, 14 Nebr., 18.
Session Laws, 1885, ch. 106.
Liability of county for defendant's witness's fees where he is indicted for a felony.

Hoover v. Engles, 63 Nebr., 688.

Personal taxes can be collected in an action for debt.

Rosenbloom v. State, 64 Nebr., 342.

A tax is not a debt as the word is used in the constitution, and, consequently, the provision of section 154 of the general revenue law authorizing fine and imprisonment as a means of enforcing a license-tax does not trench upon the constitution.

Howard v. Lamaster, 11 Nebr., 582. See Haller v. Blaco, *supra*.

Johnson v. Hahn, 4 Nebr., 139.

Session Laws, 1877, p. 43.

Kittle v. Shervin, 11 Nebr., 65.

County treasurer's authority to sell real estate of taxpayer before exhausting personalty.

Kemerer v. State, 7 Nebr., 130.

Session Laws, 1879, p. 366, sec. 40.

State v. Baushausen, 49 Nebr., 558.

Power of county board to reconsider a claim.

McCormick v. Keith, 8 Nebr., 142. See Heard v. Dubuque County, *supra*.

Merriam v. Rauen, 23 Nebr., 217.

Alexander v. Thacker, 43 Nebr., 494.

Interest on tax-sale certificate.

Midland P. R. Co. v. McCartney, 1 Nebr., 398. See Brunswick v. McClay, *supra*.

Moore v. Kepner, 7 Nebr., 291.

General Statutes, 1873, p. 257.

Selby v. McQuillan, 45 Nebr., 512, 513, 514.

Appeal bond. Judgment against sureties.

Rich v. Stretch, 4 Nebr., 186.

Rosa v. Doggett, 8 Nebr., 48.

White v. Blum, 4 Nebr., 555, 558.

Seymour v. Street, 5 Nebr., 85.

Miller v. Hyers, 11 Nebr., 474.

Stay. Waiver of error proceeding.

Shelley v. Towle. See Haller v. Blaco, *supra*.

State v. Brodboll, 28 Nebr., 254.

Where portions of different school districts go to make up the territory included in a municipal corporation, license moneys collected for the school fund in such municipal corporation, is to be distributed equally among such school districts.

Session Laws, 1895, ch. 63.

In cities and villages where corporate limits form, in whole or in part, more than one school district all money derived from fines, penalties and licenses shall be apportioned to these several districts in proportion to the number of persons of school age residing in each district.

State v. White, 29 Nebr., 288. See State v. Brodboll, *supra*.

Thompson v. Merriam. See Haller v. Blaco, *supra*.

Woods v. Commissioners of Colfax County, 10 Nebr., 552.

County not liable for negligence in not repairing bridge.

Session Laws, 1889, ch. 7.

County made liable by legislative enactment.

Hollingsworth v. Saunders County, 36 Nebr., 141.

County held liable except in case of contributory negligence on the part of the person injured.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, A. D. 1901.

PRESENT:

HON. T. L. NORVAL, CHIEF JUSTICE.
HON. J. J. SULLIVAN, } JUDGES.
HON. SILAS A. HOLCOMB, }

DEPARTMENT NO. 1.
HON. WILLIAM G. HASTINGS,
HON. GEORGE A. DAY,
HON. JOHN S. KIRKPATRICK,

DEPARTMENT NO. 2.
HON. SAMUEL H. SEDGWICK,
HON. WILLIS D. OLDHAM,
HON. ROSCOE POUND,

DEPARTMENT NO. 3.
HON. EDWARD R. DUFFIE,
HON. JOHN H. AMES,
HON. I. L. ALBERT,

} COMMISSIONERS.

FRANK FIALA ET AL. V. JOHN V. AINSWORTH, RECEIVER.

FILED NOVEMBER 20, 1901. No. 10,464.

Commissioner's opinion, Department No. 2.

1. **Assistant Cashier:** CONDITION OF BOND. A condition in the bond of an assistant cashier of a bank that he will "honestly, faithfully and efficiently discharge the duties of such position" is a guaranty not only of the personal honesty of such officer, but also a guaranty of his competency, skill and diligence in the discharge of his duties.

2. **Assistant Controlled by Superior Only Within Scope of Authority.** Within the scope of the cashier's authority, and so long as he is apparently acting on behalf of the corporation, the cashier's directions may control the assistant cashier and the teller; and the latter may not be required to look beneath the surface of his superior's acts. But, when he is led to believe that the cashier is violating his own duty to the bank, and is taking the bank's funds for his own ends, irregularly, and without authority from the directors, the assistant cashier has no more right to aid in or connive at such misappropriation than if it were being perpetrated by a stranger.

3. **Acceptance and Retention of Bond Tantamount to Approval.** The fact that the bond of an assistant cashier of a bank was delivered to the cashier of such bank, who was one of the directors, and that the assistant cashier entered upon the duties of his office, under such bond, and that such bond was retained by the cashier of the bank, is sufficient to establish the acceptance of the bond, though no acceptance or approval of such bond is shown by the minutes of the board of directors.

4. **Negligence:** RECOVERY. To authorize a recovery for negligence the damage complained of must be the natural and proximate result of the negligence and not a remote and conjectural one.

ERROR from the district court for Fillmore county. Tried below before HASTINGS, J. *Reversed.*

John W. Barsby, Frank Dolezal and *Cook & Cook,* for plaintiffs in error.

Fayette I. Foss, J. D. Pope, C. H. Sloan, B. V. Kohout and *R. D. Brown, contra.*

OLDHAM, C.

This is a suit brought by the receiver of the State Bank of Milligan against the assistant cashier of said bank and the sureties on his bond.

The material allegations of the petition are: That on the 28th day of February, 1894, Frank Fiala, a minor, was appointed assistant cashier of the State Bank of Milligan and that he executed and delivered to the said bank a bond, in the penal sum of $5,000, containing the following condition: "Whereas, On the 1st day of February, 1894, the aforesaid Frank Fiala was appointed assistant cashier of the State Bank of Milligan, at Milligan, Nebraska, and

by virtue thereof is authorized to do and perform the duties generally appertaining to the office and position of assistant cashier in such a bank as well also as to do and perform any other clerical work and other business pertaining to the running, management, and conduct of the business of said bank which by the directions of the officers of the said bank may have heretofore been or may hereafter be entrusted to him, the said Frank Fiala, now, therefore, the condition of this obligation is such that if the said Frank Fiala honestly, faithfully, and efficiently discharge the duties of such position under its present or subsequent appointment thereto, and true, just and accurate account make of for all moneys, property, papers, or assets of any kind or description which may come into his hands, possession, control, or discharge as such as long as he may be connected with the said bank, then and in such event this obligation to be null and void, otherwise to be and remain in full force and effect"; that said bond was accepted by said bank, and that said Fiala commenced the duties of said assistant cashier of said bank. The petition then alleges that at the time that said Fiala was assistant cashier of the said bank one W. J. Zirhut was the cashier of said bank; and that said Zirhut on October 25, 1894, took $1,000 of the money of said bank, and on November 8, $1,000, and on November 13, $2,000, and on November 20, $1,000, and on the — day of January, 1895, $3,000, and appropriated the same to his own use with the full knowledge of the said Frank Fiala, and by an agreement with the said Fiala, that the said Fiala would keep quiet and say nothing about the transaction. The petition also alleges that the said Zirhut, cashier of the said bank, placed in the said bank certain fraudulent and forged notes, all in the sum of $6,915.65, and that certain moneys were withdrawn from the bank by the said Zirhut by discounting these forged and fictitious notes to the said bank, and that the said Frank Fiala assisted the said Zirhut in concealing and covering up such fraudulent transactions, to the damage of the bank. To this petition the defend-

ants' sureties answered separately, admitting that they had signed the bond sued on, but denying that said bond had ever been delivered to, or accepted or approved by, the State Bank of Milligan; denying that the conditions of the said bond had ever been broken by the said Frank Fiala, or that, under the conditions of his bond, he was in any manner liable for the conduct of W. J. Zirhut, cashier of said bank. The answer also charged that the loss to said bank, complained of in the petition, was caused by the gross negligence of the president and the board of directors of said bank in their dealings with the affairs of the said bank, and that they had full knowledge of the peculations and embezzlements of the cashier, W. J. Zirhut, long prior to the time that he absconded; and that, notwithstanding such knowledge, they negligently permitted him to remain in full charge of said bank. The defendant, Frank Fiala, filed a separate answer specifically denying any knowledge of the misconduct of W. J. Zirhut, except such as was communicated to the directors of the said bank, and alleging substantially the same defenses as those contained in the answer of defendant's sureties. Plaintiff replied, denying the allegations in each of these answers. The jury found a verdict for the plaintiff against all the defendants in the sum of $4,700, on which judgment was rendered, and defendants bring error to this court.

In the petition filed in this court by the defendants error is alleged against the sufficiency of the petition to sustain the judgment and against the sufficiency of the evidence to sustain the judgment, and against the action of the trial court in giving and refusing instructions. In determining the question of the sufficiency of the petition against the sureties on the bond, we must first examine the conditions of the bond on which the breach is alleged and ascertain what their liabilities are under these conditions. The conditions, briefly stated, are that the said Frank Fiala shall honestly, faithfully and efficiently discharge the duties of his position as assistant cashier in said bank. A condition

of this kind in the bond of a cashier or an assistant cashier of a bank has been held not only to guarantee the personal honesty of such officer, but also to guarantee his competency, efficiency and diligence in the discharge of his duties. *American Bank v. Adams,* 12 Pick. [Mass.], 303; *Minor v. Mechanics' Bank of Alexandria,* 1 Pet. [U. S.], 46.

The next question to be determined is, What duty the assistant cashier owed to the directors of the bank with reference to furnishing them information of the misconduct of his superior officer, the cashier? Under the allegations of the petition, the assistant cashier performed the duties in the bank which generally appertain to the office of bookkeeper and teller; and, consequently, the question as to his liability for the fraudulent acts of his superior officer depends on whether he owes any duty to the bank beyond the ordinary duty of obeying the cashier. In the case of *Hobart v. Dovell,* 38 N. J. Eq., 553, 566, this question was before the court in a case in which the teller of the bank was sought to be held civilly liable for the embezzlements of the cashier. Dixon, J., in rendering the opinion, says: "For knowingly assisting in such an abstraction, the teller would be as responsible to the bank as if he had spent the money himself. He was an officer of the bank, having certain prescribed duties, for the faithful performance of which he was bound directly to the corporation. No orders of the cashier could exculpate him in the breach of those obligations. Within the scope of the cashier's authority, and so long as he was apparently acting on behalf of the corporation, the cashier's directions might control the teller, and the latter might not to be required to look beneath the surface of his superior's acts. But when he was led to believe that the cashier was violating his own duty to the bank, and was taking the bank's funds for his own ends, irregularly, and without authority from the directors, the teller had no more right to aid in or connive at such misappropriation than if it were being perpetrated by a stranger. The same prin-

ciple would hold if the embezzler were a director or the president. Such misconduct on the part of Dovell we think the evidence tends to establish in more than one instance; and so far as it helped to effect a loss to the bank, he is answerable." We believe that the opinion just quoted from properly declares the law, and as the petition in the case at bar alleges that the assistant cashier assisted and aided in concealing fraudulent practices of the cashier, we think that it charges a good cause of action on the bond against these defendants.

The next question urged is that there was no delivery of the bond, nor any acceptance of it by the directors of the bank. The undisputed facts with reference to the delivery of the bond are that after the bond was prepared and signed, Fiala, the assistant cashier, delivered it to Zirhut, the cashier of the bank, and that Zirhut kept the bond and the bank officers found it among his papers after he had absconded. We think that the fact that the bond was delivered to the cashier of the bank, who was one of the directors, and that Fiala entered upon the duties of his office under such bond, and that such bond was retained by one of the directors of the bank, is sufficient to establish the acceptance of the bond, though no acceptance is shown by the minutes of the board. *Pryse v. Farmers' Bank,* 33 S. W. Rep. [Ky.], 532; *Bank of United States v. Danbridge,* 12 Wheat. [U. S.], 64; *Dedham Bank v. Chickering,* 3 Pick. [Mass.], 335.

The evidence with reference to the taking of the $1,000 from the bank by Zirhut on October 25, 1894, is that this money was procured by a draft signed by Zirhut as cashier of the bank and drawn on Tootle, Lemon & Co., of St. Joseph, Mo., in favor of McLain Bros., of Chicago, Illinois. The evidence shows that Fiala had no notice whatever at the time of the drawing of this draft; that the draft stub was marked "spoiled" by Zirhut; and that the first intimation that Fiala received of this draft was when the monthly statement was sent to the bank by Tootle, Lemon & Co. As soon as this statement came, Fiala immediately noti-

fied the cashier, Zirhut, that the statement was not correct, and the cashier told him that he would make it all right, and marked the draft with a cross and laid it to one side. This was all the evidence of any wrong-doing, with reference to this transaction, that is charged against the assistant cashier, and we think that this is not sufficient to entail a liability, either on him or his bondsmen, for this transaction. Now, the only theory on which plaintiff seeks to fasten the liability for this draft on the assistant cashier, is that he, Fiala, should have gone to the board of directors and notified them of this mistake. The evidence shows that this board of directors had never held a meeting while Fiala was assistant cashier, and that none of them lived at Milligan, or were present there, except Zirhut, the cashier. The case of *Second Nat. Bank v. Burt,* 93 N. Y. App., 233, 240, was an action against the cashier of a bank for discounting drafts without submitting them to the advisory committee of the bank, as provided by a by-law of that institution. The facts show that this committee had been entirely neglecting their duty with reference to the business of the bank, and had been disregarding the by-law for the violation of which the cashier was sought to be held. Ruger, C. J., in delivering the opinion, says: "The undisputed evidence in the case shows that these by-laws were from the first uniformly disregarded in the practical management of this bank, with the knowledge and acquiescence of its officers. Such laws were equally as obligatory on the president and various committees therein referred to as upon the cashier, and impliedly required them either to attend at the bank at stated periods to perform the duties enjoined upon them, or at least to keep themselves accessible to the cashier and in a position to be conveniently consulted by him according to the requirements of the business. To impose on the cashier the duty of carrying on the business of a bank and yet hold him responsible for a neglect of duty in not consulting officers and committees who apparently held no meetings and systematically absented themselves

from the performance of their duties is an imposition which the law will not tolerate. It would be quite impracticable for the managing officer of a bank required to keep it open daily to leave his place of business as each transaction requiring attention occurred to look up persons engaged in other employments and consult them in regard to such transactions."

The evidence with reference to the charge against the defendant for the $1,000 taken by the cashier on November 8, the $2,000 on November 13, and $1,000 on November 20, all in 1894, shows that the drafts, like the one just considered, were drawn by the cashier in favor of McLain Bros. on Tootle, Lemon & Co. and that the stubs of these drafts were marked "spoiled," and that Fiala had no notice of the drawing of them by the cashier. The evidence also shows that before the statement of charges for the drafts from Tootle, Lemon & Co. had been sent to the bank and before Fiala had any knowledge that any such drafts had been drawn, Zirhut, the cashier of the bank, himself, notified the president and directors of the bank that he had been speculating on the Board of Trade in Chicago, and that he had lost $5,000. Two directors of the bank denied that he had told them that he had lost the bank's money, but admitted that he said that he had lost $5,000. Zirhut, his wife and Fiala all testified that these directors were informed that he, Zirhut, had lost the bank's money. They all admit that after this notice the directors, Zirhut, and Fiala went down to Milligan and examined the condition of the bank. It also appears that Zirhut and wife gave a deed to the bank for some property that they owned in Milligan to secure his indebtedness, and that this deed was at the bank on December 1, 1894, the day that this examination was made. It also appears that after this examination the board of directors permitted Zirhut to remain in charge of the bank as cashier. We think, in view of this notice, the officers of the bank are not in shape to complain of the alleged default of Fiala in not notifying them further of the shortcomings of their cashier.

The next item for which they seek to recover is $3,000 taken from the bank about the 18th day of January, 1895. The evidence shows that this money was procured by the cashier, Zirhut, as a loan for the bank,—$1,000 of it from the First National Bank of Tobias and $2,000 from the Harbine Bank of Fairbury, the correspondent of Tootle, Lemon & Co., of St. Joseph. The evidence is that this money was procured by telegrams sent to these banks by Zirhut; that Fiala knew nothing of the transaction whatever; that, when the money came to the express office, Zirhut took it out of the express office, and that he then went to the post-office and got the statement of the accounts sent by the banks and destroyed them, put the money in his satchel, and absconded. There is no claim that Fiala had any knowledge of, or any connection whatever with, this transaction, and the only theory on which plaintiff claims that the defendants should be held for this loss is that if Fiala had notified the directors of the bank of all the other misconduct of their cashier they would have discharged him before he had an opportunity to steal this amount of money from the bank. It is an elementary principle that to recover for negligence the damage must be the natural and proximate result of the negligence complained of and not a remote and conjectural one. It would be going far into the realms of speculation to determine just how much more notice of Zirhut's shortcomings than that which the president and board of directors of the bank must have had at their meeting on the first day of December, 1894, would have induced that board to discharge him, and we don't believe that any vague theorizing on this question should be indulged in at the expense of Fiala's bondsmen. We therefore conclude that it was error for the trial court to submit this item of alleged damage to the jury.

On the charge for alleged damages to the bank by obtaining money from it by forged and fictitious notes, we think there is some evidence offered by the plaintiff tending to show the liability of the assistant cashier for knowingly

aiding the cashier in concealing these transactions from the directors; but the court, in its instructions, gave all the alleged items of damage in charge to the jury and it is impossible to tell which item or items their verdict was based upon.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded.

SEDGWICK and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

VALENTINE ULRICH v. A. J. MCCONAUGHEY.*

FILED NOVEMBER 20, 1901. No. 9,994.

Commissioner's opinion, Department No. 2.

1. **Replevin:** WHERE ANSWER IS GENERAL DENIAL AND PROPERTY HAS BEEN DELIVERED, PRAYER UNNECESSARY. Where property has been delivered to the plaintiff in replevin and defendant's answer is a general denial, it is not necessary that such answer contain a prayer for return in order to sustain a judgment for return of the property or its value.

2. ———: JUDGMENT NOT ALTERNATIVE: ERROR WITHOUT PREJUDICE. A plaintiff in replevin who, by his own admission in open court, has disposed of the property delivered to him and is not able to return it, will not be heard to complain that a judgment rendered against him is for the value of the property only, and not alternative, as prescribed by section 191*a*, Code of Civil Procedure.

3. ———: FORM OF VERDICT. The fact that plaintiff may have disposed of the property delivered to him under the writ, so that a return will not be possible, does not change the nature of the action so as to obviate the requirements of section 191, Code of Civil Procedure, as to the form of the verdict.

4. ———: VERDICT SHOULD CONFORM TO SECTION 191 OF CODE. Such requirements should be complied with in every case, and

*Rehearing allowed.

failure to do so is ground of reversal wherever the findings required would be of benefit to any party in the cause or where the nature or amount of the interest of the prevailing party is in issue.

5. ———: ERROR WITHOUT PREJUDICE. But if the nature of a defendant's interest is not in issue and his right of possession is equal in value to the ownership, the value of the property having been found, omission to find whether defendant was owner or had the right of possession only, is error without prejudice. *Search v. Miller*, 9 Nebr., 26, disapproved to this extent. NORVAL, C. J., dissenting.

6. **Partnership:** DISPOSITION OF PROPERTY BY PARTNER. A partner can not apply partnership property to the payment of his individual liability without the consent of his copartner.

7. **Deposition May Be Used by Opposite Party.** A deposition regularly taken and filed in a cause, not used by the party taking it, may be offered and read by the other party, whether he participated in taking it or not.

ERROR to the district court for Hamilton county. Tried below before BATES, J. *Reversed.*

W. H. Thompson, for plaintiff in error.

Hainer & Smith, contra.

Argued orally by *Thompson,* for plaintiff in error; by *Hainer, contra.*

POUND, C.

This proceeding is brought to review a judgment for the defendant in an action of replevin. The facts, so far as material to the questions of law involved, may be stated best in connection with the several assignments of error to which they relate.

The first point urged is that since the answer is a general denial and the usual prayer for the alternative judgment for return of the property or for its value is omitted, no judgment could be rendered in favor of the defendant further than one for his costs. At first sight this position seems warranted by the authorities. Thus, a recent work says, in accordance with the text-books generally: "The

weight of authority requires the defendant in his answer to make a special claim of property and a demand for its return; otherwise there will not be a judgment for the return of the property to the defendant." 18 Ency. Pl. & Pr., 558, citing: *Pico v. Pico,* 56 Cal., 453; *Chandler v. Lincoln,* 52 Ill., 74; *Bartlett v. Brickett,* 98 Mass., 521; *Hinchman v. Doak,* 48 Mich., 168; *Young v. Glascock,* 79 Mo., 574; *Capital Lumbering Co. v. Hall,* 10 Ore., 202; *Gallagher v. Bishop,* 15 Wis., 303. Examination of these authorities, however, and of the statutes or adjudications determining the practice in replevin in the several jurisdictions referred to, readily demonstrates that they have no application in this state. In some of these jurisdictions the common law pleading obtains, under which system plea of *non cepit* or of *non detinet* does not entitle a defendant to return of the property. *Chandler v. Lincoln, supra;* Shinn, Replevin, secs. 671, 672. In others the defendant is required to elect whether to claim a return or judgment for the value. *Tuckwood v. Hanthorn,* 67 Wis., 326; *Wooldridge v. Quinn,* 70 Mo., 370; Shinn, Replevin, sec. 682. In the remainder there are express statutory requirements rendering prayer for or claim of return necessary. California Code of Civil Procedure, secs. 627, 667; Oregon Code of Civil Procedure, sec. 259. The section last quoted expressly provides that the alternative judgment shall be rendered, "if the property has been delivered to the plaintiff, and the defendant claim a return thereof," and *Capital Lumbering Co. v. Hall, supra,* is decided upon that section. In *Pico v. Pico, supra,* the court, speaking of the California statute, says that "it is arbitrarily made the duty of defendant to assert his formal claim for a return as a prerequisite to a judgment for the return of the property or its value." No such requirement is to be found in our statutes. Nor do the common-law rules of pleading in replevin apply here. With us it is well settled that the defendant may prove anything that makes against plaintiff's claim under a general denial, whereas *non cepit* and *non detinet* at common law admit property in the

plaintiff. Shinn, Replevin, secs. 671, 672. The provisions of our Code are clear and express to the effect that the alternative judgment is to be rendered "in all cases" where the property has been delivered to the plaintiff and there is a verdict for defendant. Code of Civil Procedure, secs. 191, 191*a*. In view of this express provision and the obvious distinction to be noted as to the cases which would at first indicate a contrary conclusion, we think that no claim or prayer is necessary, over and above a general denial, to entitle a successful defendant, from whom property has been taken and delivered to a plaintiff, to a judgment for return or value of the property or of his interest therein. A like conclusion was reached in *Lavelle v. Lowry,* 5 Mont., 498, 6 Pac. Rep., 337.

Exception is taken to the judgment because it is not in the alternative form prescribed by section 191*a*, Code of Civil Procedure, but is a money judgment for the value of the property only. It appears by the bill of exceptions that during the trial the parties stipulated in open court that "the property since being replevied in this case has been disposed of by the plaintiff and can not be returned." In *Lee v. Hastings,* 13 Nebr., 508, it seems to have been held that an alternative judgment must be rendered as directed by the statute, notwithstanding a stipulation that a return can not be had. But this whole subject, which had been far from clear under the previous decisions of this court, was gone over exhaustively in *Selby v. McQuillan,* 59 Nebr., 158, and we think, in the light of the opinion in that case, *Lee v. Hastings* should not be followed. It is true, in *Selby v. McQuillan* the judgment itself showed that the property could not be returned, while in this case, as in *Lee v. Hastings,* such fact appears only from the stipulation of the parties. Nevertheless the reason and principle of *Selby v. McQuillan* clearly apply. As SULLIVAN, J., aptly says in that case: "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." This is true whether the facts which operate to make the alternative judgment nugatory appear in the judgment itself or elsewhere in the record. A plaintiff in replevin who, by his own admission in open court, has disposed of the property delivered to him, and is not able to return it, ought not to be heard to complain that the judgment does not allow him to make a return which he has admitted to be beyond his power.

Error is also assigned with respect to the form of the verdict and the instruction of the court by which it was prescribed. The instruction was as follows: "If you find from the evidence for the defendant, it is admitted that the value of the corn in controversy is $591.36, interest $254.58, total, $845.94, and you should return a verdict for the defendant for said sum of $845.94." The verdict, following the instruction, was in this form: "We, the jury in the above entitled cause, do find for the defendant and assess the amount of his recovery at the sum of $845.94." Both the instruction and the verdict were excepted to, and they are manifestly contrary to section 191, Code of Civil Procedure, which requires that in all cases where the property has been delivered to the plaintiff and the jury find for the defendant, the jury also find whether at the commencement of the action the defendant had the right of property or the right of possession only and assess his damages. The stipulation of the parties, referred to in the instruction quoted, fixes the value of the property at $591.36, and the interest thereon, computed by the court and directed to be found as a part of the value, would, in strictness, be the damages for withholding the property. The attention of the trial court was called to these errors in the form of verdict it was prescribing at the time. But the view seems to have been taken that, by reason of the stipulation that the property could not be returned, the action had become, in effect, an action of trover and that

the verdict should be framed accordingly. This position finds some support in *Romburg v. Hughes,* 18 Nebr., 579, and in those jurisdictions where the defendant must elect whether to claim return or to take judgment for the value of the property. But we have had occasion to review this subject in *Schrandt v. Young,* 62 Nebr., 254, recently decided, and have held that, under the provisions of the statutes of this state, the nature of the action is not changed by inability of plaintiff to make a return. The cases cited by defendant in the case at bar are all of a different nature. Where the plaintiff fails to give the required undertaking, the Code provides that the action shall proceed as for damages, and in such case, by express statutory provision, the action is, in effect, one in trover.

The instruction quoted and the verdict pursuant thereto were clearly erroneous. But the question still remains whether such errors require a reversal of the judgment. It is fundamental that errors, as such, are not, of necessity, ground for reversal unless prejudicial to the party complaining. In the analogous case of the alternative judgment required by section 191*a* of the Code, after first holding that such requirement must be complied with absolutely in all cases, this court has come to the view that a party who is in no way prejudiced by failure to enter the prescribed form of judgment can not complain thereof. *Selby v. McQuillan,* 59 Nebr., 158. We see no difference either in the requirements themselves or in the language of the Code with respect to them which constrains us to hold that the one may be departed from with impunity, if no prejudice results, while the other must be adhered to absolutely in every case under pain of reversal of the judgment. Although the case most in point is to the contrary, the course of decision in this court, when considered in connection with the rulings as to the form of judgment in such cases, supports this conclusion. *Search v. Miller,* 9 Nebr., 26, was in many respects like the case at bar. There the defendant was agent of the owner, and plaintiff claimed as mortgagee, while here the defendant

held under a writ of replevin sued out by one whose interest, if any, was that of owner. Hence in each case the defendant's right of possession was equivalent in value to ownership. In *Search v. Miller* the jury found the right of possession in the defendant and found the value of the property, but did not find the value of the right of possession. The court held that no judgment could be rendered on such a verdict. But at that time it was held that the provision requiring an alternative judgment was mandatory. *Hooker v. Hammill,* 7 Nebr., 231. On the other hand, in *Mercer v. James,* 6 Nebr., 406, a verdict not in accord with the statute was held error without prejudice where there was no issue as to the nature of defendant's interest, and in *Hershiser v. Delone,* 24 Nebr., 380, a verdict for plaintiff which did not find the right of possession, was held to be error without prejudice where the evidence showed plaintiff to be owner and there was no evidence of a right of possession in any one else. *Search v. Miller* excepted, the cases where judgments have been reversed for failure to comply with the provisions of the Code as to the contents of the verdict are cases in which there was an issue as to the nature of the defendant's right. Moreover, in *Richardson Drug Co. v. Teasdall,* 59 Nebr., 150, this court treated the provisions as to form of the verdict and those as to form of the judgment as upon the same basis in this regard. In other jurisdictions in which there are similar statutes, the courts have differed, some holding that the verdict must in every case conform to the statute (*Fulkerson v. Dinkins,* 28 Mo. App., 160; *Washburn v. Huntington,* 78 Cal., 573, 21 Pac. Rep., 305; *Yick Kee v. Dunbar,* 20 Ore., 419, 26 Pac. Rep., 275), others holding that the error is fatal to the judgment only when it affects some one prejudicially (Shinn, Replevin, sec. 619; *Brannin v. Bremen,* 2 N. M., 40; *Gregory v. Morris,* 1 Wyo., 213). In most cases, however, which appear to lay down that the verdict must absolutely conform to the statute in every event, it will be found that the nature of the interest of the prevailing party was a substantial issue and that the

error was prejudicial. We do not wish to be understood as holding that the requirements of the section in question are nugatory and are not to be adhered to. As was said in *Singer Mfg. Co. v. Dunham,* 33 Nebr., 686, referring to said section, "Such is the letter of the statute, and there is sufficient reason why it should be enforced." Whenever the findings required by the Code can or may be of practical worth to any party in the cause, whenever the interest of the prevailing party is an issue, the findings there prescribed must be made. But where there is no such issue and the finding when made would be of no substantial utility to any one in the cause, we do not think that said section or anything in the Code constrains us to reverse a judgment, otherwise right, at suit of one who is in no way prejudiced by the informality. We regard *Selby v. McQuillan,* 59 Nebr., 158, as governing this point no less than the one immediately involved therein.

To obtain a proper understanding of the errors assigned upon the instructions of the court, a brief review of the evidence will be necessary. S. S. Brown and H. S. Brown were partners engaged in various lines of business, among others the purchase and sale of land. They held a bond for a deed to certain lands, the legal title to which was in the plaintiff, and were in possession of them. Although it seems to have been partnership property, the bond ran to H. S. Brown. The latter had rented the lands prior to 1891, but, as he had gone out of the state, S. S. Brown rented them for that year and took leases running to himself. He claims to have assigned these to his wife, Elizabeth H. Brown, on May 16, 1891. During the spring of the same year negotiations began between the two Browns and the plaintiff looking to the surrender of the bond and of possession of the lands and the adjustment of a considerable indebtedness which they owed him. The plaintiff claims that the bond was surrendered May 20. However this may be, a written agreement, whereby the bond was canceled, the debts adjusted, and the rents turned over to the plaintiff, was duly executed by the latter and H. S.

Brown, the nominal holder of the bond, in September. Orders on the tenants to pay the rent to plaintiff were given pursuant thereto. Some correspondence between S. S. Brown and plaintiff is in evidence which indicates that the former acquiesced in the arrangement and understood that it involved turning the rents over to the plaintiff. H. S. Brown claims that prior to this agreement he also made an assignment of his interest in the rents to Elizabeth H. Brown; but he did not deliver this assignment till some time after its execution, and apparently did not at first intend to deliver it. The plaintiff claimed the property in controversy, which is the landlord's share of the corn raised on said lands, by virtue of the assignment to him from H. S. Brown, acquiesced in and assented to by S. S. Brown. The defendant claimed under Elizabeth H. Brown as assignee of S. S. Brown and H. S. Brown.

We are not entirely satisfied with the manner in which the issues and the law applicable to them were presented in the charge. As we view the case, the questions to be decided were these: (1) Were the respective assignments relied upon valid and complete? (2) if so, when did they become complete respectively, and what were their respective priorities? and (3) was the assignment to Elizabeth H. Brown a genuine transaction or was it colorable merely and intended to defeat the rights of the plaintiff? But we need not discuss the charge as a whole, because we think at least one of the specific instructions complained of is prejudicially erroneous. In this instruction the jury were told that if S. S. Brown and H. S. Brown were partners, any contract made by either in the line of the partnership business would bind the partnership, and hence that the first assignment of the rent share made by either would hold. We need not consider this as an abstract proposition, because the testimony does not show that S. S. Brown made the assignment to his wife in the course of the partnership business. He claims to have made it in payment of moneys he had borrowed of her years before,

evidenced by his personal note. He claims to have used these moneys in the partnership business. But granting this, he borrowed the money and he gave the note. He, not the partnership, owed Mrs. Brown. The partnership owed him, not her. Even if he could have assigned partnership property to her to pay a partnership debt, he could not have assigned such property to pay his own debt without the consent of his partner. *Cady v. South Omaha Nat. Bank,* 46 Nebr., 756, 763. Mrs. Brown is not in the position of one dealing with the apparent owner of the leases without notice of the rights of the other partner. There is no testimony that she did not know of the latter's interest, and it is in evidence that her husband set about it at once to get her an assignment from H. S. Brown. Moreover, if only because the transaction was between husband and wife, the burden would be on her to show that she took without such notice. For these reasons, we think the assignment to Elizabeth H. Brown was not complete till H. S. Brown had in some way consented thereto or assigned his interest, and that the instruction in question has no foundation in the evidence and was prejudicial error.

With one exception, the other errors assigned do not present questions likely to arise upon a new trial, and need not be taken up. The one question which may come before the district court again relates to a ruling permitting the defendant to use a deposition taken by the plaintiff, but not offered by him. It seems that the deposition of this witness had been taken three times, twice by the plaintiff and once by defendant. Plaintiff introduced a part of one of those taken by him, whereupon defendant, besides reading the one he had taken, read also, over objection, the other deposition taken by plaintiff. It would seem that a considerable part of these several depositions went over the same ground and objection might possibly have been made for that reason. But the objections made at the trial went solely to the right of one party to use depositions of his adversary, in the taking of which he did

not participate, where the party who took them did not read them. We think that question is settled by section 383, Code of Civil Procedure. The same section in all respects exists in the Code of Kansas, and is construed to make depositions available to all parties in the cause. *Rucker v. Reid,* 36 Kan., 468. While there are authorities to the contrary, the prevailing, and, as we think, the sounder view is that either party may use depositions regularly taken and filed in the cause. *Hale v. Gibbs,* 43 Ia., 380; *Woodruff v. Garner,* 39 Ind., 246; *McClintock v. Curd,* 32 Mo., 411; *O'Connor v. American Iron Mountain Co.,* 56 Pa. St., 234; *Hazelton v. Union Bank,* 32 Wis., 34. The common law originally was very strict in confining each party to his own means of proof, and, as it has been expressed, regarded a trial as a cock-fight, wherein he won whose advocate was the gamest bird with the longest spurs. But we have come to take a more liberal view and have done away with most of those features of trials which gave rise to that reproach. In *Echols v. Staunton,* 3 W. Va., 574, the court said: "It is as competent for one party to read on his own behalf a deposition regularly taken and filed by the other party as it would be to introduce a witness summoned on behalf of such other party." That is evidently the view which the framers of our Code took when they drew the section cited. We are satisfied that the purpose of that section was to adopt the rule that either party might use depositions properly taken in the cause, and to prevent the rule contended for by plaintiff in this case, and maintained by some authorities, from obtaining in this jurisdiction. We see nothing in what was said in *Converse v. Meyer,* 14 Nebr., 190, to require a different conclusion or to constrain us to limit the right of using depositions to parties who have participated in taking them.

It is recommended that the judgment be reversed and the cause remanded for a new trial.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

EZEKIEL JOHNSTON V. PHELPS COUNTY FARMERS' MUTUAL INSURANCE COMPANY.

FILED NOVEMBER 20, 1901. No. 10,401.

Commissioner's opinion, Department No. 2.

1. **Mutual Insurance:** WAIVER OF FORFEITURE. A provision in the policy of a mutual fire insurance company that, if the member holding the policy "fails to pay any assessment * * * at the time specified in the notice sent him by the secretary," it shall become void, is within the purview of the rules as to waiver of forfeitures and will be waived by acts of the company inconsistent with an intention to rely thereon.

2. ———: ———: RECEIPT OF DELINQUENT ASSESSMENT. A further provision that, if the policy-holder afterward pay the amount due from him, the policy "shall be holding from the date of the receipt of said amount," will prevent receipt of the amount of a delinquent assessment from operating as a waiver of forfeiture under the prior provision, if at the time of the receipt of such assessment any of the insured property remains in existence to which the revived insurance may attach.

3. **Quaere.** Whether, if the delinquent assessment was levied prior to loss and to meet losses accruing prior thereto, receipt of the amount thereof subsequently with knowledge of the loss will constitute a waiver of the forfeiture, *quære.*

4. **Waiver:** RECEIPT OF SUBSEQUENT ASSESSMENT AFTER TOTAL LOSS. But where all the property covered by the policy is destroyed by fire while the policy-holder is delinquent, so that nothing remains to which renewal of the insurance might attach, receipt of the amount of subsequent assessments levied after the loss, in addition to the assessment levied prior to and delinquent at the time of the loss, with knowledge of the facts, is inconsistent with reliance upon the forfeiture and is a waiver thereof. *National Masonic Accident Ass'n v. Burr*, 44 Nebr., 256, distinguished.

ERROR from the district court for Phelps county. Tried below before BEALL, J. *Reversed.*

Rhea Bros. & Manatt and *J. A. Gardner*, for plaintiff in error.

Stewart & Munger, contra.

Argued orally by *Rhea,* for plaintiff in error; by *Stewart, contra.*

POUND, C.

The plaintiff became a member of the defendant, a mutual fire insurance company, and received a policy covering his barn and granary, and the wagons, buggies, harness, farm implements and machinery, hay and grain therein. In December, 1896, all of this property was destroyed by fire. At that time he was delinquent in payment of an assessment levied long prior for the purpose of meeting prior losses. The policy contained these provisions: "If the member who holds this policy fails to pay any assessment * * * at the time specified in the notice sent him by the secretary, this policy shall become null and void, but if he afterward pay the amount due from him this policy shall be holding from the date of the receipt of said amount then due. The company, however, will not be held liable during the time that this policy was made void by such delinquency." In order to avoid said provisions of the policy, which were pleaded and relied upon by defendant, the plaintiff pleaded and testified that after the loss, and with knowledge thereof, the defendant received the amount of said delinquent assessment, and also two subsequent assessments levied after the loss. He pleaded further and now insists that the delinquent assessment was irregular and of no validity and that proper notice thereof was not given. The lower court directed a verdict for the defendant and error is prosecuted from such ruling.

We need not consider the validity of the assessment nor

the sufficiency of the notice thereof, in view of the opinion which we entertain as to the claim of waiver. It is true that the provisions of the policy quoted do not stipulate for a complete forfeiture of the policy-holder's membership in case of delinquency, but only for a suspension of the right of indemnity during the period of such delinquency. Nevertheless, such suspension is a penalty attached to failure to pay any assessment at the time specified in the notice sent out by the secretary, and would seem to be within the purview of the well established rules as to waiver of forfeitures. A like stipulation in the policy of a stock company was considered in *Phenix Ins. Co. v. Bachelder,* 32 Nebr., 490, and it was there held that such stipulation might be waived. The same conclusion has been reached elsewhere as to mutual companies. *Farmers' Mut. Ins. Co. v. Bowen,* 40 Mich., 147, 149; *Marshall Farmers' Home Fire Ins. Co. v. Liggett,* 16 Ind. App., 598, 45 N. E. Rep., 1062. Hence we have next to consider whether the acts of the company pleaded and testified to by plaintiff amount to waiver of said provisions of the policy. The general principle with respect to which such questions must be determined is that acts inconsistent with an intention to rely upon the forfeiture or recognition of the continued validity of the policy notwithstanding and with knowledge of facts entailing the forfeiture will be held a waiver; neither a new agreement nor the elements of an estoppel are required. *Home Fire Ins. Co. v. Kuhlman,* 58 Nebr., 488; *Modern Woodmen of America v. Lane,* 62 Nebr., 89. Applying this principle, a solution in entire harmony with the cases cited by counsel for the respective parties may be reached readily. It is claimed by counsel for the defendant that receipt of the amount of the delinquent and subsequent assessments did not operate as a waiver, but merely reinstated plaintiff in his membership and revived his insurance from the date of payment. In view of the provision already quoted from the policy to the effect that if the policy-holder afterward pay the amount due from him the policy "shall be holding

from the date of the receipt of said amount," this position would be well taken if any of the insured property remained in existence at such date to which the revived insurance might attach. In such case, receipt of the delinquent assessment and of subsequent assessments by the company would be consistent with an intention to give insured the benefit of such provision as to reattachment of the insurance, and would be inconsistent in no way with intention to rely on the provision as to suspension of the insurance during delinquency. Under such circumstances there would be no waiver. *National Masonic Accident Ass'n v. Burr,* 44 Nebr., 256; *Beeman v. Farmers' Pioneer Mut. Ins. Ass'n,* 104 Ia., 83, 73 N. W. Rep., 597. It may be true, also, that where the delinquent assessment was levied prior to the loss and to meet losses accruing prior thereto, receipt of the amount thereof subsequently with knowledge of the facts would not constitute a waiver of the forfeiture. The assessment was made at a time when the member was in full standing, to meet losses incurred at a time when he was fully protected, and hence may be said fairly to have been earned prior to the forfeiture. Hence receipt of the amount thereof, is not necessarily inconsistent with an intention to rely upon the forfeiture. *Farmers' Mut. Fire Ins. Co. v. Hull,* 77 Md., 498, 27 Atl. Rep., 169. But see *Phœnix Ins. Co. v. Lansing,* 15 Nebr., 494; *Farmers' Mut. Ins. Co. v. Bowen,* 40 Mich., 149. The case at bar is to be distinguished from both of the classes of cases just considered. In the first place, according to the plaintiff's testimony, the property, the subject of insurance, was entirely destroyed, and nothing remained to which a renewal of the insurance from the date of payment might attach. In consequence, when the company accepted payment of the several assessments, with knowledge of the loss, after forfeiture, it could not claim to do so in the understanding that the policy was to reattach and continue in force. This condition of fact at once differentiates the case at bar from *National Masonic Accident Ass'n v. Burr, supra,* and the many cases of ac-

cident and mutual benefit insurance cited by counsel. When a man has suffered an accident pending forfeiture, he is not thereby cut off from the danger of other accidents and there is still a subject of insurance. But in fire insurance, a risk could only reattach in case something were left after the first fire upon which the insurance could operate. In such case, collection of subsequent assessments is clearly inconsistent with reliance upon the forfeiture, and could only be construed as a recognition of the continued validity of the insurance. *Marshall Farmers' Home Fire Ins. Co. v. Liggett,* 16 Ind. App., 598, 45 N. E. Rep., 1062; *Farmers' Mutual Ins. Co. v. Bowen,* 40 Mich., 149. We do not think the case of *Crawford County Mutual Ins. Co. v. Cochran,* 88 Pa. St., 230, makes for a contrary conclusion. In that case there was no payment of subsequent assessments nor other circumstance that might be held a waiver, and the court passed only upon the general effect of the provision in question. Further, it must be noted, the case at bar differs from those in which the assessment received was one levied prior to loss to meet losses incurred prior thereto, in that the defendant took also the amount of two subsequent assessments. The forfeiture is conditioned upon failure to pay assessments due at and prior to the loss, not every assessment that may be levied during the term of the policy. After loss, the relation between insurer and insured becomes one of debtor and creditor, not subject to this forfeiture clause in the policy; and, in consequence, no forfeiture arises from non-payment of an assessment falling due after loss. *Seyk v. Millers' National Ins. Co.,* 74 Wis., 67, 41 N. W. Rep., 443. As plaintiff was not bound to pay these assessments in case his insurance was forfeited, and as they could not have been paid for the purpose of causing the insurance to reattach to the property nor have been received with that understanding, all having been destroyed, receipt of such subsequent assessments is obviously inconsistent with reliance upon the forfeiture and must be held a waiver.

It follows that the court erred in directing a verdict for defendant, and we therefore recommend that the judgment be reversed and the cause remanded for a new trial.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

ROBERT A. BATTY ET AL., APPELLEES, V. CITY OF HASTINGS ET AL., APPELLANTS.

FILED NOVEMBER 20, 1901. No. 11,671.

Commissioner's opinion, Department No. 2.

1. **Action Quia Timet Not Barred by Statute of Limitations.** A cloud upon the title of an owner of real property in possession thereof constitutes a continuing cause of action, not accruing once for all at the creation of the cloud, but available as a cause of action at all times during its existence. Hence an action to remove such cloud is not barred by lapse of the statutory period of limitation of equitable actions after the date of its creation.

2. **Subsequent Purchaser:** SPECIAL ASSESSMENT: RIGHT OF ACTION. A subsequent purchaser of property against which a special assessment has been levied, may sue to establish the invalidity of such assessment.

3. **The Phrase "Subject to Incumbrances" in a Conveyance Means Valid Incumbrances.** Where property is conveyed "subject to incumbrances" generally, no specific incumbrances being named, it will be presumed that valid and subsisting incumbrances are referred to, and the grantee will not be estopped by the mere words of the conveyance from asserting the invalidity of an apparent lien existing at the date of the transfer.

4. **Petitioner for Improvement Not Estopped to Assert Invalidity of Assessment.** No estoppel to assert the invalidity of such an assessment arises from the mere fact that the plaintiff was one of the petitioners for the improvement in question.

5. **Laches:** VOID SPECIAL ASSESSMENT: DELAY. Delay in proceeding against a void special assessment does not, of itself, amount to laches.

6. ——: ——: ——. Where acts of a municipality, alleged to have been in reliance upon a petition for a public improvement, were done before the assessment in question was levied, at a time when irregularities and deficiencies in the petition might have been remedied, and the municipality had the power to perform such acts without assessment against property benefited, delay on the part of the owners of assessed property in investigating and attacking the assessment will not bar their action to establish its invalidity.

7. **Statute Must Be Followed Strictly.** It is the settled construction of the statutes of this state relating to municipal corporations that the several steps required to be taken in assessing the cost of public improvements against property benefited must be pursued strictly.

8. **Special Assessments:** SIGNATURES TO PETITION MUST BIND OWNERS. Property owners whose property will be charged by the establishment of a paving district are entitled to insist that the several petitioners therefor sign in such a way as to be fully and legally bound, and no signatures which do not so bind the owners of the property purported to be affected thereby may be counted in passing upon the validity of such a petition.

9. **Former Opinions Adhered To.** *Leavitt v. Bell*, 55 Nebr., 57, and *Von Steen v. Beatrice*, 36 Nebr., 421, reexamined and adhered to.

APPEAL from the district court for Adams county. Heard below before ADAMS, J. *Affirmed.*

L. J. Capps, for appellants.

J. B. Cessna and *Batty & Dungan, contra.*

W. C. Lambert and *James H. Adams, amici curiæ.*

Argued orally by *Capps* for appellants; by *Cessna, contra.*

POUND, C.

In 1892 the city council of Hastings, pursuant to a petition purporting to be signed by the owners of a majority in front-feet of the property abutting upon certain streets, created a paving district and, after a proposition had been duly submitted and voted upon and bonds issued for paving the intersections, proceeded in November, 1894, to as-

sess the cost of paving said district upon the property abutting on the several streets therein. This suit was brought by some thirty-eight property owners in said district to have such assessment declared invalid, to enjoin collection of the same and to remove the clouds upon their several titles by reason thereof. A decree was rendered as prayed for, from which this appeal has been taken.

Most of the questions raised have been passed on heretofore in the many cases of this character which have been brought to this court, and we have only to apply the principles therein settled to the circumstances of this particular controversy. The one point not previously passed on in this connection, or requiring independent consideration, arises upon defendants' plea of the statute of limitations. The assessment was levied on November 9, 1894, and, under the terms of the statute became, if valid, a lien from and after that date. Suit was begun on November 14, 1898. It is argued that plaintiffs' cause of action accrued when the assessment was levied and the cloud created, and that, as the four years limited by the Code for commencing actions not otherwise provided for had elapsed, the action is not maintainable. In *Eayers v. Nason,* 54 Nebr., 143, the application of the statute of limitations to suits to quiet title was considered, and the court said: "If a defendant is in the adverse possession of a plaintiff's real estate, claiming title thereto, plaintiff's cause of action accrues when such adverse possession begins. If the defendant be out of possession, asserting title or claim to the real estate, the cause of action accrues when such claim or title is asserted. If the conveyance, instrument, or thing on which the assertion of title is based is of record, perhaps the cause of action accrues when such conveyance, instrument or thing is placed of record." If such be a complete statement of the rule, it may well be argued that plaintiff's cause of action to remove the cloud accrued when the assessment was levied, became of record and appeared and was asserted as a lien upon the property in the district. But it is not clear that the language

quoted was intended to lay down a complete rule. The cloud sought to be removed was an unrecorded deed and the court merely pointed out that in any event the cause of action would not accrue till the deed was recorded or title was asserted thereunder. *Pleasants v. Blodgett,* 39 Nebr., 741, 744. Where a plaintiff out of possession brings the statutory action to quiet title, it is undoubtedly true that the statute begins to run from the time when defendant's possession became adverse. But, while a cause of action clearly accrues to the owner of real property in possession thereof whenever a cloud upon his title is created or an adverse title asserted, we do not think it necessarily follows that such cause of action accrues then once for all, so as to start the statute of limitations from that date. A cloud upon a title must always continue to operate as such during the period of its existence, and, as its effect upon the title is continuing, the cause of action resting on the right of the owner to have it removed would seem to be continuing also, and to be available at all times while the cloud remains. *Miner v. Beekman,* 50 N. Y., 337. "The cause of action is not the creation of the cloud, but its existence, its effect upon the title of the owner, and his right to have it removed." *Schoener v. Lissauer,* 107 N. Y., 111, 117. Hence there would seem good ground for holding that lapse of time after the creation of a cloud upon a title will not bar an action by an owner in possession to have it removed. *Quinn v. Kellogg,* 4 Colo. App., 157, 35 Pac. Rep., 49; *American Emigrant Co. v. Fuller,* 83 Ia., 599, 50 N. W. Rep., 48; *Hendrickson v. Boreing,* 32 S. W. Rep. [Ky.], 278; *Wagner v. Law,* 3 Wash. St., 500, 28 Pac. Rep., 1109. The contrary view has been taken in Indiana (*Eve v. Louis,* 91 Ind., 457), and perhaps by other courts, but we prefer to follow the rule established in New York, and to hold that where the plaintiff is in possession, he may sue to remove the cloud at any time during its existence.

The contention of defendants that several of the plaintiffs are in no position to maintain this action because

they owned no property in the district at the time the assessment was levied, but subsequently purchased the tracts in respect of which they now sue, is settled adversely by the case of *Lasbury v. McCague,* 56 Nebr., 220. Nor do we see how it matters that several of these purchasers took "subject to incumbrances." Had they taken subject to this particular lien, there would be ground for asserting an estoppel. But "incumbrances" meant valid incumbrances, and the covenants and recitals in their deeds did not preclude them from insisting that the assessment in question had no legal standing as a charge upon the property. An estoppel is also claimed by reason of the fact that a number of the plaintiffs signed the petition for the establishment of the district. This of itself is not enough. Those who signed the petition had a right to presume that the city would act legally. It can not say that it relied on the signatures of plaintiffs to an invalid petition when plaintiffs intended to sign, and had every reason to suppose they were signing, a valid petition, which would not be acted upon unless it received the requisite number of signatures; and had no intention of binding themselves in any other event. They asked the city to proceed lawfully. Such request does not estop them from objecting when the city has proceeded without warrant of law. The same observation may be made with reference to the further pleas of estoppel by reason of acts alleged to have been done by the city in reliance upon the petition and of laches by reason of delay in bringing this action. It might, perhaps, be inferred from *Harmon v. City of Omaha,* 53 Nebr., 164, and authorities there cited, that mere delay would sometimes bar an action of this nature. But the question was squarely presented in *Casey v. County of Burt,* 59 Nebr., 624, and it was held that where the assessment is void there is no duty imposed upon property owners to act promptly; so that in such case delay, of itself, does not constitute laches. In the case at bar no circumstance appears beyond lapse of time. The acts alleged to have been done by the city in reliance upon the petition, namely, the

submission of a proposition for paving the intersections and the issuance of bonds to pay the cost of such paving, were done before the levy of the assessment in controversy, and at a time when irregularities and deficiencies in the petition might still have been remedied. Prior to levy of the assessment, plaintiffs were not in a position to interfere. Nor was the pendency of the work any notice to them that the expense had been or would be unlawfully charged against their property. The city had a right to pave without charging the cost upon abutting owners, and nothing occurred to impose any duty of investigating or objecting upon such owners while the work was in progress. *Hutchinson v. City of Omaha,* 52 Nebr., 345; *Harmon v. City of Omaha,* 53 Nebr., 164, 169. As was said in the latter case, "there must be both the opportunity and the duty to speak." In the case at bar, several of the plaintiffs acquired their titles but a short time before this suit was begun. The others testify that they had no notice or knowledge of the facts as to the petition, and, to quote once more from *Harmon v. City of Omaha,* "they were warranted in assuming, in the absence of actual information that the officers would act and were acting and proceeding legally in all respects as required by statute and to rest their rights on such assumption, and in so doing they were not guilty of laches." Moreover, it appears that the original petition was kept very carelessly and was lost or mislaid for some time; so that, even if the fact that the petition and assessment proceedings were public records could be said to have cast a duty of investigation and inquiry upon the property owners affected, we think the finding of the court below that plaintiffs were not guilty of laches is justified. Counsel has argued with no little force and ability that others have paid their assessments in full and that the statute of limitations will prevent such persons from recovering the amounts so paid. We fully appreciate this and the other unfortunate results which he has urged. But the primary fault is with the city. The special authority conferred upon it to make as-

sessments of this nature involves responsibility and should not be exercised loosely or carelessly. Reasonable pains to investigate the petition and the relation of those who signed to the property purported to be affected would have enabled the city to make a legal assessment by correcting the petition or would have shown clearly to the city authorities that they had no power to proceed. We are not disposed to take this responsibility from the city and put it upon the owners of the abutting property.

There can be no doubt that the assessment was invalid. It is the settled construction of the statutes of this state relating to municipal corporations that the several steps required to be taken in assessing the cost of public improvements against property benefited must be pursued strictly. *Casey v. County of Burt,* 59 Nebr., 624; *Leavitt v. Bell,* 55 Nebr., 57; *Horbach v. City of Omaha,* 54 Nebr., 83; *Von Steen v. City of Beatrice,* 36 Nebr., 421. Several grave defects and omissions in the proceedings leading up to the assessment here in question are charged. But we need not consider them, for the reason that the petition is manifestly insufficient. Property owners whose property will be charged by the establishment of a paving district are entitled to insist that the several petitioners therefor sign in such way as to be fully and legally bound, and no signatures which do not so bind the owners of the property purported to be affected thereby may be counted in passing upon the validity of such a petition. *Von Steen v. City of Beatrice, supra.* The petition in question was signed by the mayor representing abutting property owned by the city; by the administrator of an estate on its behalf without any authority other than such as might arise from his office; by several husbands representing property owned by their wives; by several individual tenants in common on behalf of the whole tracts so held, without authority from or signatures of the other coowners; and in one case by an owner purporting to bind more property than he held. These several cases fall clearly within the rules announced in *Von Steen v. City of*

Beatrice, and without going into detail we may say that careful review of the record shows that the insufficient signatures are more than enough to vitiate the entire petition, and hence the assessment.

While this cause has been under advisement, briefs have been submitted to us by counsel representing other municipalities, asking us to review and overrule *Leavitt v. Bell,* 55 Nebr., 57, and *Von Steen v. Beatrice,* 36 Nebr., 421, and to hold that no petition was necessary. Notwithstanding the full consideration of this question in *Leavitt v. Bell,* we have withheld our opinion for some time in order to examine those briefs and re-examine the questions they present. Having done so, we feel satisfied of the correctness of the former rulings of this court. The whole tendency of recent legislation in this state has been to give those who are to be assessed with the cost of paving a voice in the determination of how, when and where the improvement shall be made. The earlier statutory provisions gave plenary powers in that regard to city councils. But more recently the advisability of reposing such powers in bodies of that character has been doubted. In *Von Steen v. Beatrice* the court held that the several provisions of the section of chapter 12*a,* Compiled Statutes, with respect to paving, were to be construed together, and that, so construed, they required a petition. IRVINE, C., in his dissenting opinion in *Leavitt v. Bell,* concedes that if these provisions are construed as if drawn as an entirety and at one time, such must be the result. The restatement and amendment took the usual unfortunate form of tacking on a new provision without endeavoring to reconcile it to the original section. But the whole was reenacted as one section, and the latter part, as the last expression of the legislative will, must prevail. We think the course of subsequent legislation has shown that this was the result intended, and that the legislative policy is to leave this matter to the property owners affected. Section 97, article 1, chapter 13, Compiled Statutes, provides that no paving shall be done except on petition of abutting

owners. Section 110, chapter 12*a*, Compiled Statutes, 1899, provides that no paving shall be done if a majority of the abutting owners protest, and that there shall be no repaving except upon petition therefor. These provisions are later than the one involved in the case at bar, which now stands as section 55, article 3, chapter 13, Compiled Statutes, 1901; but they suggest what the final formulation of that section and the added provision as to a petition were meant to accomplish and indicate the legislative policy of this state.

We therefore recommend that the former rulings of this court be adhered to and that the judgment be affirmed.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, the judgment of the district court is

AFFIRMED.

RICHARD S. HORTON, TRUSTEE, V. STATE OF NEBRASKA, EX REL. WILLIAM HAYDEN ET AL.

FILED NOVEMBER 20, 1901. No. 12,157.

Commissioner's opinion, Department No. 2.

1. **Mandate.** When the judgment of a district court is reversed, a mandate is the proper and legal mode of communicating the judgment and directions of the supreme court to such district court.

2. **Jurisdiction of Supreme Court to Alter or Modify Its Own Judgments.** The jurisdiction of the supreme court to alter or modify its judgments continues during the whole of the term at which its final judgment is rendered, unless its mandate is acted upon in the district court. But when the mandate of the supreme court is acted upon and carried into effect by the district court, the power of the supreme court over its judgment is at an end.

3. **District Court Should Await Mandate:** WAIVER. In order to prevent conflict, a district court whose judgment has been reversed should defer action until the mandate of the supreme court is before it, although, where both parties proceed without objec-

tion, the irregularity in so doing without a mandate on file may not be taken advantage of thereafter.

4. **Order Unadvised or Irregular.** When it is manifest on the face of the record that the court has acted irregularly and unadvisedly, it may, and should, so long as its jurisdiction over its own order continues, undo it as soon as the facts come to its notice.

5. **Rule in Case of Dismissal.** The rule that the court has full power and control over its judgments and orders during the term at which they are rendered applies to an order of dismissal entered at the instance of a plaintiff.

6. **Right of Plaintiff to Dismiss Not Absolute:** POWER OF COURT. The right of a plaintiff to dismiss his action is not absolute in the sense that the court has no power over or discretion with respect to its exercise. Whenever justice to the court or its officers or to any of the parties requires imposition of terms or retention of the cause upon the docket, the court, in its discretion, may impose such terms or refuse to permit dismissal.

7. **Discretion to Protect Rights Not Formally Asserted in Record.** Such discretion depends upon the existence of rights which would be jeoparded by dismissal, not upon the manner in which the court may become cognizant of them, and is not conditioned upon some formal claim or assertion of them in the record.

8. **Restitution:** SUMMARY PROCEEDINGS. Where a party to a cause has obtained money or property under or by virtue of a judgment which is afterwards reversed, the court has power to compel restitution by summary proceedings in that cause.

9. **Restitution Matter of Right.** Such restitution is a matter of right and does not depend upon the merits of the controversy between the parties.

10. **Record:** EVIDENCE ALIUNDE: ORDER TO SHOW CAUSE. Where the record shows that money has been collected or obtained under and by virtue of the judgment afterwards reversed, restitution should be awarded as of course. Where such fact does not clearly appear upon the record, but is made to appear *aliunde*, the proper procedure is by order to show cause why restitution should not be made.

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

James W. Hamilton and *Richard S. Horton*, for plaintiff in error.

George E. Pritchett and *Smyth & Smith, contra.*

Argued orally by *Hamilton*, for plaintiff in error; by *Smyth, contra.*

POUND, C.

This proceeding was brought to obtain a writ of mandamus commanding certain officers of the Greater-America Exposition to draw, issue and deliver to relators an unconditional warrant upon the treasurer of said corporation for the payment to them of the sum of $10,000. The district court allowed the writ. Error was taken to this court, which held that the proceedings below were unwarranted and the writ improvidently allowed, reversed the judgment and remanded the cause. *Horton v. State,* 60 Nebr., 701. A motion for rehearing having been filed on behalf of relators, which was not disposed of until the opening of the January, 1901, term of this court, a mandate issued on January 28. This mandate was not filed or docketed in the district court until March 23. Two days before, on March 21, the relators appeared in that court and procured an order of dismissal. When the mandate was filed, this order was set aside *ex parte* at the instance of defendant, on the ground that it had been rendered prematurely, and on the same day, March 23, on motion of the defendant Horton, supported by an affidavit showing that $10,000 of the moneys of the corporation had been paid to, and obtained by, relators under and by virtue of said writ of mandamus, an order issued requiring relators to show cause on or before March 30 why restitution of said moneys and interest thereon should not be awarded. The relators, having been served with said order, appeared specially and objected to the jurisdiction of the court. At the hearing, the district court held that it had jurisdiction to render the order of dismissal on March 21, that it had no jurisdiction to set such order aside on March 23 nor to enter the order to show cause on the same date and sustained the objections. Error is prosecuted from this ruling.

The argument made on behalf of relators is that as soon as the cause was determined in this court and a mandate issued, the district court was reinvested with jurisdiction and might properly act without having the mandate before it; that the right of a plaintiff to dismiss, in the absence of some pleading, showing or claim of the adverse party on file entitling the latter to relief, is absolute, and that the order of March 21 was made with full jurisdiction, giving effect to this absolute right of dismissal; that even if such order was prematurely made, and the court had the power to set it aside, in the absence of some application by the defendants for relief, on file at the time, it should not have done so and hence, in any event, the final action of the court was right. We are unable to agree to these propositions under the circumstances disclosed by the record. While it is true that the Code of Civil Procedure provides in express terms only for a special mandate, which is to issue where a judgment is reversed and a new judgment entered in the supreme court, it does not follow that mandates are abolished or rendered unnecessary in all other cases. Under various names, mandate, remittitur, or *procedendo,* such process from the appellate court to the lower tribunal is in general use in all common-law jurisdictions. Where a judgment is affirmed, indeed, the mandate has no office to perform and may be dispensed with. *State v. Sheldon,* 26 Nebr., 151. But where a judgment is reversed, a mandate is the usual, and it seems to us, the only legal method of communicating the ruling of the one court to the other with authority. It is the judgment of this court which the lower court is to look to, not its opinion, and it must be obvious that some authentic and official notification of the judgment affords the only sure basis for further proceedings. This is furnished by the mandate, which is "the official mode of communicating the judgment of the appellate court to the lower court." 13 Ency. Pl. & Pr., 837. Such, moreover, is the settled and recognized practice in this state. *State v. Sheldon, supra; State v. Omaha Nat. Bank,* 60 Nebr.,

232. As between the opinion and such official statement of the judgment in a mandate, the district court must be guided by the latter. *Merriam v. Gordon,* 20 Nebr., 405, 408. Hence we are not able to assent to the proposition advanced by counsel that, in the absence of an express statutory requirement of a mandate, "any way in which the court can be satisfied of the action of the supreme court will answer the purpose." It has been held that where no mandate is issued, the lower court will not act on a certified copy of the judgment of the appellate court. *Oregon R. & N. Co. v. Hertzberg,* 26 Ore., 216, 37 Pac. Rep., 1019. The statute recognizes a mandate as the proper legal mode of communication, and, assuming this, provides for a special mandate in certain special cases. The very use of the term "special mandate" implies that for ordinary cases there is to be a general mandate. The cases which have been cited as leading to a contrary conclusion are not inconsistent with this view, as we shall show in another connection.

The jurisdiction of the supreme court over its own judgments and orders is, in general, the same as that of any other court of record, and hence it may alter or modify such judgments or orders and correct its mandates accordingly at any time during the term at which they are rendered, unless its mandate has been filed and acted upon in the lower court prior to the end of the term. *Bronson v. Schulten,* 104 U. S., 410, 415; *People v. Nelliston,* 79 N. Y., 638; *Trowbridge v. Sickler,* 48 Wis., 424, 428. Obviously there must be some point of time at which the jurisdiction of the one court ceases and that of the other court attaches, and, while the subject is not free from judicial conflict, we think the sounder rule draws the line at the time when the mandate is acted upon and carried into effect. *Merriam v. Gordon, supra; People v. Nelliston, supra.* But it may be observed that the weight of authority fixes the transfer of jurisdiction at the time when the mandate has been filed in the court below. *Leese v. Clark,* 20 Cal., 387; *Zorn v. Lamar,* 71 Ga., 85; *King v.*

Ruckman, 22 N. J. Eq., 551; *Whaley v. Bank of Charleston,* 5 Rich. (S. C.), 262; *Ward v. Springfield Fire & Marine Ins. Co.,* 12 Wash., 631, 42 Pac. Rep., 119. And such rule would be equally consistent with the view we take of this case. Counsel in contending that the issuance of a mandate terminates the jurisdiction of the appellate court and gives jurisdiction to the lower court, point out that the practice in altering or modifying a judgment is to recall the mandate. But we think the object of this is to stay action thereon while the appellate court is considering what modification shall be made, and that the acknowledged power to recall the mandate before it is carried into effect argues jurisdiction in the appellate court. For these reasons, and in order to prevent unseemly conflict of authority, we think that a district court whose judgment has been reversed should defer action until the mandate of the supreme court is before it. 13 Ency. Pl. & Pr., 837; *Trowbridge v. Sickler,* 48 Wis., 424; *Wright v. King,* 107 Mich., 660, 65 N. W. Rep., 556; *Barnwell v. Marion,* 56 S. C., 54, 33 S. E. Rep., 719; *Lafferty v. Rutherford,* 10 Ark., 453; *Oregon R. & N. Co. v. Hertzberg,* 26 Ore., 216, 37 Pac. Rep., 1019; *McAlpin v. Bennet,* 21 Tex., 535. If, however, both parties proceed without objection in the absence of a mandate, if the provisions of the judgment of reversal are carried out, and trial had, we do not doubt that the irregularity is not to be taken advantage of by either party in appellate proceedings. It is fundamental that no error is available in such proceedings unless prejudicial, and such an irregularity would be technical only and without serious results. Many cases of that character have been cited to us, and we fail to perceive that they militate against our conclusion in any way. As the district court entered its first order at a time when the mandate was not before it, and in the absence of any authentic record of what had been done in the supreme court, we think it did right in treating such order as it would any other unadvised and improvident action and setting it aside at once. All judg-

ments and orders of the court are under its control during the term at which they are rendered. In ordinary cases the proper, and perhaps even the necessary, course is by motion and notice. But, when it is manifest on the face of the record that the court has acted irregularly and unadvisedly, it may and should, so long as its power over the act in question continues, undo it as soon as the facts come to its notice. *Alspaugh v. Ionia Circuit Judge,* 85 N. W. Rep. [Mich.], 244. And it may do this regardless of the form in which application for such action is made. *Bradley v. Slater,* 58 Nebr., 554.

We think the general rule that the court has full power and control over its judgments and orders during the term at which they are rendered applies to an order of dismissal entered at the instance of a plaintiff, the same as to any other order. If the right of a plaintiff to dismiss were absolute and the action of the court following thereon ministerial only, the rule might not apply. But this right is not absolute in the sense that the court has no power over, or discretion with respect to, its exercise. On the contrary, the court, in its discretion, may refuse to dimiss whenever justice to the court, or its officers, or to any of the parties, requires imposition of terms, or retention of the cause upon the docket. *Sheedy v. McMurtry,* 44 Nebr., 502, 503; *Beals v. Western Union Telegraph Co.,* 53 Nebr., 602. In the case first cited this court said: "The existence of the right of a plaintiff to dismiss at any time during the pendency of a cause, as a general proposition, must be qualified, and is not absolute in the sense that it takes the subject without the control of the court in which the cause is pending, so that it can not, within its discretion, impose the condition of the payment of costs as obligatory and precedent to a dismissal of the action." This discretion has been exercised to require payment of costs. *Sheedy v. McMurtry, supra;* to protect rights of attorneys under agreements as to fees, *Byron v. Durrie,* 6 Abb. New Cas. [N. Y.], 135; to protect a defendant in his plea of estoppel from the danger of possible transfer of a lien, *Stevens*

v. Railroads, 4 Fed. Rep., 97; and to enable a defendant to obtain restitution, *Lane v. Morton,* 81 N. C., 38. Of course, there must be some real and substantial right which has accrued to the adverse party in the very cause sought to be dismissed. Collateral consequences, such as subjection of the defendant to further litigation, or purposes not connected with the action in question, will not be allowed to interfere with the right given to plaintiffs by statute. *Banks v. Uhl,* 6 Nebr., 145. Hence, ordinarily, the dismissal will be allowed as of course. *Beals v. Western Union Telegraph Co.,* 53 Nebr., 602. But we know of no case appealing to a court more strongly for application of its discretionary power than one in which money or property has been taken under an unwarranted and improvident judgment, which has been reversed, and the adverse party is entitled to restitution. It would require convincing argument and strong weight of authority to persuade us that a dismissal could be had as a matter of right in such case, before mandate filed and without reasonable opportunity to direct the court's attention to the claim for restitution, and the defendant thus deprived of his summary remedy and driven to the difficult and expensive remedy of another action. The discretion of the court in such cases is grounded on the requirements of justice to itself, its officers, and the adverse parties. It depends upon the existence of rights which would be jeoparded by dismissal, not upon the manner in which the court becomes cognizant of such rights. The absence of a formal claim or assertion thereof upon the record does not necessarily give the plaintiff advantage. It was within the discretion of the district court to refuse to dismiss the cause in order to protect the defendant's right of restitution. That being so, it had power, during the term, to set aside an unadvised dismissal for the same purpose.

Where a party to a cause has obtained money or property under or by virtue of a judgment which is afterwards reversed, the court has power to compel restitution by summary proceedings in that cause. *Anheuser-Busch*

Brewing Ass'n v. Hier, 55 Nebr., 557, 558; *Northwestern Fuel Co. v. Brock,* 139 U. S., 216; *Bickett v. Garner,* 31 Ohio St., 28; *Eames v. Stevens,* 26 N. H., 117. Such restitution is a matter of right and does not depend upon the merits of the controversy between the parties, the probabilities of another judgment to the same effect, or the solvency of the party entitled to the restitution. *Hier v. Anheuser-Busch Brewing Ass'n,* 60 Nebr., 320; *Bickett v. Garner, supra; Morgan v. Hart,* 9 B. Mon. [Ky.], 79. "The defendant having been put out of possession by an abuse of the process of the law, the law must be just to itself, as well as to the defendant, by restoring him to that of which he was wrongfully deprived. When the defendant is restored to the possession, then, and not until then, will the court be in condition in which it can honorably to itself pass upon the further rights of the parties." *Hier v. Anheuser-Busch Brewing Ass'n, supra.* In the common-law practice, whenever the record showed that money had been collected by virtue of and applied upon the reversed judgment, a writ of restitution issued as of course. If the facts were not sufficiently disclosed by the record, a writ of *scire facias* issued. *United States Bank v. Bank of Washington,* 6 Pet. [U. S.], 8, 17; *Gay v. Smith,* 36 N. H., 435; *Martin v. Woodruff,* 2 Ind., 237. Under our practice, the order to show cause entered by the district court would be the equivalent of the latter proceeding. In the case at bar there is only a return of the sheriff that he served the peremptory writ of mandamus upon the defendants. There is no further return, and the record does not disclose whether the warrant was drawn, issued and delivered, nor whether it was paid in whole or in part. Did the record show compliance with the writ and payment and receipt of the money in obedience thereto and in consequence thereof, restitution should be awarded as of course, and we should feel bound to direct a judgment of that nature in the district court. *Anheuser-Busch Brewing Ass'n v. Hier,* 55 Nebr., 557. But, as such facts are made to appear *aliunde,* we think the course entered upon

by the district court, namely, the order to show cause why restitution should not be made, was right, and that the court erred only in not pursuing the path it had taken. We are asked to make certain admissions in the briefs of counsel for relators the basis of a direction of judgment of restitution. But we do not think those admissions are so clear and unequivocal as to warrant us in so doing. Much is said in argument, by way of illustration or hypothesis, to which the full weight of an admission in open court ought not to be given. Unless an admission of counsel is made as such expressly with the expectation that it will be treated and acted on as such, or is so clear and unequivocal that its purport may not be mistaken, it should not be made the basis of a judgment.

It is recommended that the judgment be reversed and the cause remanded for further proceedings under the order to show cause why restitution should not be adjudged not inconsistent with this opinion.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, the judgment of the district court is reversed and the cause is remanded for further proceedings under the order to show cause why restitution should not be adjudged not inconsistent with said opinion.

REVERSED AND REMANDED.

SCHOOL DISTRICT NO. 30 OF HALL COUNTY V. SCHOOL DISTRICT OF THE CITY OF GRAND ISLAND.

FILED NOVEMBER 20, 1901. No. 10,387.

Commissioner's opinion, Department No. 3.

1. **School District:** LICENSE MONEY. A school district is not entitled to any of the proceeds of the fines and license money collected under the ordinances of a city, unless some part of its territory is included within the territorial limits of such city.

2. **Boundaries of City:** ORDINANCE. An ordinance defining the boundaries of a city can not be accepted as evidence of the annexation of contiguous territory, not included in the corporate limits prior to the passage of such ordinance.

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

I. J. Dunn, Charles G. Ryan and *R. R. Horth,* for plaintiff in error.

W. H. Thompson and *Othman A. Abbott, contra.*

DUFFIE, C.

This action was brought to recover from the defendant a portion of the fines and licenses collected by the city of Grand Island during the years 1893, 1894 and 1895. The petition alleges that part of the territory comprising school district No. 30 lies within the corporate limits of the city of Grand Island, and that it is entitled to recover its proportionate share of fines and license money collected by said city, which have all been paid to the defendant. A demurrer to the petition was sustained and the plaintiff asks us to review this ruling.

State v. Brodboll, 28 Nebr., 254, and *State v. White,* 29 Nebr., 288, are both authority to the effect that where a part of two or more school districts is embraced within

the corporate limits of a city or village, they are entitled to a division of the fines and license money collected by such municipality. The petition in this case alleges that a part of plaintiff's territory was included within the corporate limits of the city of Grand Island by an ordinance passed by the city council in February, 1888. An examination of sections 95 and 99, chapter 14, Compiled Statutes, 1887, will disclose that there were, at that time, but two methods of attaching contiguous territory to a city of the second class. The first method required a request for annexation by a majority of the inhabitants of the territory proposed to be annexed, and an affirmative vote of a majority of all the members of the city council in favor of said annexation. The second was by proceedings in the district court. It is nowhere alleged in the petition that either of these methods was pursued by the city of Grand Island in annexing a part of the plaintiff's territory. On the contrary, what is claimed to have that effect is set out in the petition and is shown to be an ordinance which merely defines the corporate limits of the city. This ordinance does not, upon its face, purport to annex any territory not theretofore included within the boundaries of the city. If the proceedings alleged in the petition are the only proceedings undertaken to make a part of plaintiff's territory a part of the city of Grand Island, it was wholly ineffectual; and while the city and the inhabitants of so much of plaintiff's territory as is within the limits of the city as defined by said ordinance might be estopped, as between themselves, from questioning their relation on account of matters alleged in the petition, such estoppel could not be urged against a third person who had done nothing to recognize the relation which plaintiff claims existed between this territory and the city.

We are of the opinion that the district court was right in sustaining the demurrer, and we recommend that the ruling of the district court be affirmed and the case remanded with directions to allow the plaintiff to amend,

and show, if it can, that a part of its territory is legally within the territorial limits of the city of Grand Island.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, and the case remanded with directions to allow the plaintiff to amend its petition if it so elect; otherwise the judgment appealed from to become final.

JUDGMENT ACCORDINGLY.

GRAINGER BROTHERS V. FIRST NATIONAL BANK OF SUTTON.

FILED NOVEMBER 20, 1901. No. 10,486.

Commissioner's opinion, Department No. 3.

1. **Appeal:** NEW ISSUE: WAIVER. On the trial of a case appealed from justice court, the plaintiff can not complain of the action of the court in admitting competent evidence offered by the defendant in support of a material allegation of the answer on the ground that such allegation presents a new issue not interposed in the justice court, where no objection was made to the answer by motion or otherwise, but plaintiffs joined issue thereon by filing a reply. Plaintiff should have moved to strike from the answer any new issues made in the district court which were not properly pleaded and which he did not wish to try.

2. **Garnishment After Execution.** Where, in a garnishment proceeding after judgment and return of execution unsatisfied, the garnishee appears and answers and the creditor commences an action against him for the reason that his disclosure is unsatisfactory, the statute contemplates that the creditor shall in his petition state wherein the answer of the garnishee is untrue or insufficient; but where the garnishee appears and refuses to answer, and suit is brought against him in justice court for failure to answer, and the garnishee in such suit answers by general denial only, and appeals to the district court from a judgment entered against him by the justice, and in his answer in the district court on such appeal, admits for the first time his possession of property belonging to the judgment defendant and asserting a mortgage lien against such property, the

plaintiff may, by his reply, put in issue the validity of the mortgage.

3. **Chattel Mortgage:** CONTEST. The validity of a chattel mortgage asserted by a garnishee and under which he has taken possession of the mortgaged property, may be contested by the judgment creditor.

ERROR from the district court for Clay county. Tried below before HASTINGS, J. *Reversed.*

Frank H. Woods, for plaintiffs in error.

Thomas H. Matters, contra.

Argued orally by counsel for both parties.

DUFFIE, C.

On the 13th of July, 1895, William Griess, a merchant doing business in the town of Sutton, Nebraska, made to the First National Bank a mortgage on his stock of goods. This mortgage was withheld from record until September 5, 1895. Between the dates of the making of the mortgage and its filing for record, Grainger Bros., the plaintiffs in error, sold to Griess groceries to the amount of $183.67, on which there was a balance due of $128.67 at the date of filing the mortgage. September 6, 1895, Grainger Bros. obtained judgment in justice court for the balance due upon their account, and on the following day an execution was issued which was returned wholly unsatisfied for want of goods upon which to levy, and thereupon a summons in garnishment was issued and served upon the defendant in error, which had, on September 5, 1895, filed its mortgage and taken possession of the mortgaged property. On answer day the cashier of the bank appeared, demanded his fees, which were paid, and then refused to make any disclosure relating to property of any kind held by the bank belonging to Griess, but stood mute. September 21, 1895, Grainger Bros. brought an action in justice court against the bank for failure to answer as

garnishee. The bank appeared to the action and for answer filed a general denial. Evidence was offered on behalf of the plaintiffs, but the bank offered no evidence and judgment went against it for the sum of $136.05 and costs taxed at $13.25. From this judgment the bank appealed to the district court. The case was tried to a jury and verdict was returned for the defendant, upon which judgment was entered, from which judgment error is taken to this court.

In its petition filed in the district court, the plaintiffs allege that "at the time the garnishment summons was served upon the said defendant bank, it had in its possession and under its control, property of the said William Griess to the value of $7,000." The answer of the defendant alleges, in substance, that it had possession of a stock of goods belonging to William Griess, but that it had a lien thereon by virtue of its chattel mortgage made to secure an amount due and owing it in excess of the value of such goods. To this answer a reply was filed which need not be further noticed than to state that it alleged facts and circumstances tending to show that the mortgage was fraudulent as to the plaintiff. On the trial plaintiffs objected to any evidence being offered in support of defendant's mortgage or the amount due thereon, for the reason that the only defense made in justice court was a general denial and that other or further defense could not be made in the district court. We discover no error in the ruling of the district court in admitting evidence in support of the answer filed by the defendant. If the answer raised other or different issues than were presented in justice court, the plaintiffs should have moved to strike such issues from the answer. Instead of doing so, they joined issue thereon by filing a reply, and they can not now be heard to object to the trial of an issue which was made without objection on their part. The court refused to receive any evidence tending to show the fraudulent character of the defendant's mortgage; and while the reason for refusing this evidence does not clearly appear from the

record, we understand, from the brief of plaintiffs in error, that the court was of opinion that the fraudulent character of the mortgage should have been alleged in the plaintiff's petition, and could not be raised by the reply.

In the examination of this question it will be observed that the action was originally commenced in justice court by garnishment proceedings instituted against the defendant in error. This was purely a statutory proceeding. Where execution is returned unsatisfied, the judgment creditor may file with the justice of the peace, from which execution issued, an affidavit to the effect that he has good reason to and does believe that any person or corporation (naming them) have property of and are indebted to the judgment debtor, whereupon the justice shall issue summons as in other cases, requiring such person or corporation to appear in court and answer such interrogatories as shall be propounded to him, it or them, touching the goods, chattels, rights and credits of the said judgment debtor in his, its or their possession or control. Code of Civil Procedure, sec. 244. If the garnishee fail to appear and answer, or if he appear and answer and his disclosure is not satisfactory to the plaintiff, the plaintiff may proceed against him by filing a petition in his own name. Code of Civil Procedure, sec. 225.

Whether an action may be maintained against the garnishee who appears and refuses to answer, is not a question in this case. It is probable that where suit is brought against a garnishee for an unsatisfactory answer, the statute contemplates that the petition filed against him should show wherein such answer is unsatisfactory or untrue; and if the bank had answered in this case and disclosed its mortgage claim, alleging it to be a valid lien upon the debtor's property in its possession, the better practice, undoubtedly, would be to require the plaintiffs to state in their petition any objection to the mortgage which they might have. The circumstances of the case, however, take it out of the general rule. The bank refused to make any answer. It is undisputed and

undeniable that the bank had possession of a large amount of property belonging to William Griess. The mortgage held by the bank did not give it title to the property, but merely created a lien thereon. The property was still the property of Griess, subject to any valid lien held by the bank. When garnished, the bank refused to answer. When sued, its answer was a general denial only. It did not even then state what claim it made to this property or by what right it was held, and it was only after appealing to the district court that it disclosed its claim and put the plaintiff in possession of the facts. Then for the first time it said to the plaintiffs: "We are in possession of your debtor's property, but we hold it by virtue of a chattel mortgage to secure a debt due from Griess." This was a plea in the nature of a confession and avoidance, and undoubtedly plaintiffs might reply to that, saying that the claim which is now set up to this property is a fraudulent claim. This pretended lien is of no validity as against our demand. The exceptional circumstances surrounding this case, we think, demand that this rule should be applied. The plaintiffs could not anticipate that the defendant would set up a claim to the property under a fraudulent mortgage, if it was fraudulent, even if they knew of the mortgage. One is not bound to proceed upon the theory that his adversary will assert what is not well founded in law and in fact. If the mortgage is in fact fraudulent, the plaintiffs had a right to suppose that it would not be interposed as an obstacle to the collection of their claim, and when it was for the first time interposed in the answer of the defendant filed in the district court, the plaintiffs had a right to avoid the effect of that answer, if they could, by pleading and showing the mortgage to be fraudulent as to them.

It is insisted that by attempting to reach this property by proceedings in garnishment, instead of by a direct levy on the property, the plaintiffs are in no position to challenge the validity of the defendant's mortgage. The rule contended for by the defendant is not applicable to the

circumstances of this case. It is undoubtedly true that one who attempts by garnishment proceedings to reach money due on a fraudulent sale of property made by his debtor can not impeach the sale or challenge the bona fides of the transaction. This is founded upon the well known principle that one can not claim the benefits of a transaction and at the same time repudiate it. One who claims the benefits of a sale can not deny the change of title to the property, any more than one can maintain conversion for his property and then deny title in the defendant. The title to mortgaged chattels, under the holding in this state, does not pass to the mortgagee. The mortgagor is still the owner of the property. The interest of the mortgagee is a lien simply, with the right of possession. If the mortgage is fraudulent as to creditors, the lien of the mortgagee is ineffectual as to them, and they may garnish the mortgagee if in possession, and show that the property is the property of the debtor, unincumbered by any mortgage lien, because of the fraudulent character of the transaction. *Grand Island Banking Co. v. Costello,* 45 Nebr., 119.

We recommend that the judgment of the district court be reversed and the case remanded for a new trial.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

HERMAN KOUNTZE ET AL., APPELLANTS, V. CITY OF OMAHA, APPELLEE.

FILED NOVEMBER 20, 1901. No. 10,352.

Commissioner's opinion, Department No. 3.

1. **Special Statute:** GENERAL ENACTMENT. A special statute relating to a particular subject will not ordinarily be held inconsistent with a general enactment of such a nature that but for the special statute it would have included the subject-matter of the latter. In such case the general act operates according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special act; and this is so, whether the general and special provisions are contained in the same statute, or in independent acts adopted at the same or different times.

2. **Charter:** CONSTITUTION. Section 110 of the Omaha City Charter Act, *held* not to be violative of any constitutional guaranty and to be valid.

APPEAL from the district court for Douglas county. Heard below before FAWCETT, J. *Affirmed.*

Congdon & Parish, for appellants.

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

Argued orally by *Congdon,* for appellants; by *Scott, contra.*

AMES, C.

The act of the legislature commonly and not inappropriately known as the "Omaha Charter" contains the following section: "The mayor and city council shall have the authority to create street improvement districts for the purpose of improving the streets, alleys or other public grounds therein, by paving, repairing, macadamizing, curbing and guttering, or recurbing and guttering, in such manner as may be determined upon. But the improvements named shall only be authorized upon the following conditions, to wit: The mayor and city council may order

such improvement except repaving, by ordinance and cause it to be made, when it is embraced in any district the outer boundaries of which shall not exceed a distance of three thousand feet from any of the streets surrounding the court house grounds of the county within which city is located. The mayor and city council may order such improvement, except repaving, and cause it to be made upon any street or alley within any district in the city, but if a protest signed by persons representing a majority of the taxable feet fronting on any street or alley ordered to be so improved in the improvement district shall have been filed with the city clerk within thirty days after the approval and publication of the ordinance ordering such work, then such improvement shall not be authorized. The mayor and city council shall order such improvement and cause it to be made in any district within the city, when a petition signed by persons representing a majority of the taxable feet front upon such street or alley shall have been filed with the city clerk." Compiled Statutes, ch. 13*a*, sec. 110. Omitting the first sentence, this section may, for the purposes of this discussion, be treated as composed of three clauses, the first apparently conferring upon the mayor and council unrestricted power to require by ordinance the improvement of streets in districts the outer boundaries of which shall not exceed three thousand feet from the streets surrounding the court house grounds; the second seeming to limit such power in any district, in such manner as to prevent its exercise in any case in which, within thirty days from the passage of the ordinance, a protest shall be filed by the persons therein mentioned; and the third enabling petitioners representing a specified street frontage in any district to peremptorily require the making of the improvement. Acting pursuant to the first clause, the mayor and council by ordinance created two districts within the specified area adjacent to the court house and ordered them paved. Within thirty days thereafter persons owning a majority of the taxable feet fronting upon the streets in these districts filed with the city

clerk a written protest against making the improvement. The city authorities threatening and being about to proceed with the making of the improvement, notwithstanding the protest, the persons, or part of them, who were parties to that document, began this action in the district court of the county, seeking to perpetually restrain the city from entering upon the execution of the work. The trial resulted in a judgment in favor of the defendant, dismissing the action, and for costs, and the plaintiffs brought the cause here by appeal.

It is first contended by appellants that the powers conferred upon the mayor and council by the first clause of the above quoted section of the statute are limited by the provisions of the second clause with respect to the protest, because the second is literally applicable to "any district in the city," although it is conceded by them, in argument, that such a construction would annul the first, and in practical effect strike it from the enactment. We do not think such a construction is required or is justifiable. The alleged conflict between the two clauses appears to us to be more apparent than real. The draughtsman of the act and the legislature, we think, used the word "any" in the second clause as meaning "any other," a sense in which it is not infrequently used colloquially. But whether this is so or not, it is a well settled rule of statutory construction that a special statute, relating to a particular subject, will not be ordinarily held inconsistent with a general enactment of such a nature that but for the special statute it would have included the subject-matter of the latter. In such case the general act operates according to its terms on all the subjects embraced therein, except the particular one which is the subject of the special act, and this is so whether the general and special provisions are contained in the same statute or in independent acts adopted at the same or different times. If the legislature had in such case intended that the general enactment should obliterate the special one, it is to be presumed that they would have made that intent known by the use of unambiguous lan-

guage. Sutherland, Statutory Construction, secs. 157 and 216 *et seq.*, and authorities cited in notes; *Crane v. Reeder*, 22 Mich., 322; Endlich, Interpretation of Statutes, sec. 399, and authorities cited. This rule has especial force when the conflict is alleged to arise in the same act, or in a single section of an act. In such cases the special provision is treated as an exception from the general terms of the statute; per Christiancy, J., in the case above cited. In all such cases the one controlling principle is to ascertain the intent of the legislature. Sutherland, Statutory Construction, sec. 218. It seems to us entirely clear that the legislature by the enactment in question intended to make a special regulation with respect to the specified area adjacent to the court house.

It is further contended that if the construction which we have adopted is the true one, the act is unconstitutional and void, because of depriving the appellants of their property without due process of law and denying them the equal protection of the law. We do not think that this contention can be upheld. The legislature, except to the extent it is restrained by the constitution of the state, has plenary powers over the subjects of taxation and of special assessments for local improvements, and may require, or authorize municipal corporations to require, such improvements to be made, at such times and upon such terms and conditions as they may see fit. The enactment in question makes no provision with respect to the cost of the improvement, or the material to be used in making it, or the manner of raising the money with which to pay for it. It would have been competent to commit the propriety of paving the streets of Omaha to the uncontrolled discretion of the mayor and council in all cases. Instead of so doing the legislature chose to confer upon the property owners the rights of protest and petition named in the act, except with respect to the specified area surrounding the court house. In other words, the act grants to a part of the taxpayers of Omaha certain privileges and immunities which it withholds from certain

others; but by so doing it deprives the latter of no property, immunity or protection to which they are entitled or which is guaranteed to them by any constitutional enactment, and they suffer no injury because of the fact that their neighbors enjoy these things which they do not enjoy. The act may be capricious and in a sense unjust, but it does not deprive the appellants of their liberty or of their property, or of any right they possessed antecedently to its adoption. Nor do we think the provision assailed by appellants is local or special legislation within the meaning of our constitution. Different parts of a considerable city are affected by varying circumstances, which render an absolute uniformity of regulations with reference to the pavement and drainage of streets, the construction and maintenance of sewers, the establishment of so called "fire limits" and the preservation of the health and peace, quite impracticable. To meet these varying conditions the city authorities must of necessity be entrusted with considerable discretion, and limitations upon their authority with respect to certain neighborhoods and their inhabitants may reasonably enough, in some instances, be omitted or suspended as to other parts of the city and its residents.

To what extent such variety may be introduced into laws for the government of municipalities, is a matter committed to the discretion of the legislature with which the courts are powerless to interfere, unless some positive constitutional guaranty is infringed, which we do not find to have been done in the case at bar.

We recommend that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE PETERS V. MINNIE KILLIAN.

FILED NOVEMBER 20, 1901. No. 10,380.

Commissioner's opinion, Department No. 3.

Proceedings in Bastardy Purely Statutory. Proceedings in bastardy are purely statutory and the courts can try such issues and make such orders, in them, as the statute contemplates, and none other. A settlement between the parents of an illegitimate child, in order to be operative as a stay or termination of such proceedings, must be of such nature and made and attested in such manner as the act prescribes and the district court can take judicial cognizance of none other. In that proceeding the court can not try the issue whether the father or the mother of the child is the more suitable person to be entrusted with its custody.

ERROR from the district court for Cass county. Tried below before RAMSEY, J. *Affirmed.*

Matthew Gering and *Jesse L. Root,* for plaintiff in error.

A. J. Graves, contra.

Argued orally by *Gering* and *Root,* for plaintiff in error; by *Graves, contra.*

AMES, C.

This is what is commonly called a "proceeding in bastardy," pursuant to chapter 37 of the Compiled Statutes. In the justice's court, as appears from the transcript of the justice, the defendant therein, plaintiff in error here, by his attorney, offered to confess judgment for the benefit of the complainant for the sum of $175 and costs, and offered to pay said sum and costs into court for her use; but it does not appear that she accepted of or consented to such judgment or payment, or that the transaction had any of the features of a settlement such as is contemplated by section 1 of the chapter. Nor does it appear that any bond such as is prescribed was given or offered to be given to the county commissioners of the county, and in

the absence of such a settlement the justice is not authorized to accept such a bond. The defendant was then recognized to appear at the next term of the district court for the county in the manner provided by the statute. In the district court the defendant filed a verified answer, in which he admitted his paternity of the child, then born, and admitted that the complainant was and had hitherto been an unmarried woman, and averred affirmatively that he and the complainant had made some time previously "a verbal agreement" by which he was to pay her $175 in full settlement of all matters and differences between them, which amount he offered to pay to the clerk for her benefit, and further offered to pay all costs accrued in the cause. In addition to this the defendant pleaded certain matters tending to show, as he claimed, that he was, and that the complaint was not, a suitable person to have the care, custody, nurture and education of the child, and prayed that he be awarded the same and that the alleged settlement be by the judgment of the court carried into effect. All this affirmative matter, together with the offers it contained, was by the court, on motion of the complainant, stricken from the answer. Afterwards, upon motion of the complainant and upon the confessions remaining in the answer, the court entered the usual judgment against the defendant, determining the paternity of the child and adjudging the sums to be paid for its maintenance and the time and manner of their payment, and requiring the defendant to give security for obedience to the judgment in the manner provided by the statute.

The defendant brings the case here by a petition in error, but we are unable to discover any error in the record. Proceedings in such cases are purely statutory and the courts can try such issues and make such orders, in them, as the statute contemplates and none other. A settlement between the parents of an illegitimate child, in order to be operative as a stay or termination of such proceedings, must be of such nature and made and attested in such manner as the act prescribes, and the district court

can take judicial cognizance of none other. In that proceeding the court can not try the issue whether the father or the mother of the child is the more suitable person to be entrusted with its custody. We recommend, therefore, that the judgment of the district court be affirmed.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CARPENTER PAPER COMPANY, APPELLEE, V. NEWS PUBLISHING COMPANY, IMPLEADED WITH HECTOR H. TYNDALE, APPELLANT.

FILED NOVEMBER 20, 1901. No. 10,436.

Commissioner's opinion, Department No. 3.

1. **Equitable Appeal:** FINDINGS: REVERSAL. On an appeal to this court in an equitable action, the judgment will be reversed if essential findings of fact are wholly unsupported by the evidence. It will also be reversed, if essential special findings are in conflict with a general finding and the former are sufficiently supported by the evidence.

2. **Chattel Mortgage:** DELAY IN FILING: NOT VOID AGAINST CREDITORS GUILTY OF LACHES. Delay in making a chattel mortgage of record, does not render the instrument void as against creditors who fail in obtaining a lien upon the property until after the mortgage has been filed for record and possession has been taken under it.

3. **Wrong Without Tort.** In the view of the law, a wrong without resulting damages is not a tort or legally actionable.

4. **Agreement to Do Lawful Act.** A man can not be punished for agreeing to do, or for doing pursuant to an agreement, an act which, in the absence of the agreement, he might have lawfully done.

5. **To Withhold Chattel Mortgage from Record.** A creditor can not complain of the withholding of a chattel mortgage from record, pursuant to an agreement between the parties thereto, unless he make it appear that an injury has resulted from the omission to file the instrument for record.

APPEAL from the district court for Lancaster county. Heard below before CORNISH, J. *Reversed.*

John P. Maule, for appellant.

Stephen L. Geisthardt, contra.

Argued orally by counsel for both parties.

AMES, C.

On the 17th day of January the News Publishing Company, a corporation engaged in publishing a newspaper and in the job printing business in Lincoln, in this state, executed and delivered to Hector H. Tyndale a chattel mortgage upon all its tangible property, bills receivable, choses in action, and effects, to secure the payment of an indebtedness from it to the mortgagee of $6,000. Manual delivery of the mortgage was on the same day made to Troilus H. Tyndale as agent for Hector; but the instrument was not filed for record until the 12th day of the following March, and the mortgagor remained in possession, conducting the business as its own until the 16th day of the next October, when the mortgagee went into possession. On the 5th day of November, 1896, the Carpenter Paper Company recovered a judgment against the News Company and began proceedings in garnishment against one Sam E. Low, who was a member of the latter company, and also the clerk of the district court, and afterwards supplemented the proceedings by an action in equity, seeking to compel Low to account for, and pay over to the plaintiff, certain sums of money alleged to have been collected by Low from litigants in his court as compensation to the News Company for publishing in its paper notices required to be published in legal proceedings. The pleadings underwent some mutations which need not to be recited in detail, and it is sufficient to say that the cause was finally tried and submitted to the court, pursuant to a stipulation of the parties, upon a petition by the Paper Com-

pany attacking the mortgage as being fraudulent, as against them and other creditors of the mortgagor, for the reason, among others, that it was secretly withheld from record by agreement of the parties to it, for the purpose of enabling the mortgagor to conduct its business and obtain credit as the owner, without incumbrance, of the property described in it, and alleging that the indebtedness, or a part of it, for which the plaintiff's judgment was recovered, was incurred during the interval between the execution and the recording of the mortgage, and in consequence of the reliance by the plaintiff upon such apparent ownership. Issue was taken upon this petition, both by the News Company and by the mortgagee, who was a nonresident of the state but who appeared voluntarily. The petition prayed that the mortgage be adjudged fraudulent and void as against creditors of the mortgagor, and for the application of the property, or the proceeds of it, upon a sale, to the satisfaction of the claim of the plaintiff. After issue joined, but before the trial, Hector disposed of the tangible property for a sum more than sufficient to satisfy the plaintiff's claim, by a statutory foreclosure of his mortgage.

The court by its judgment found the "facts generally in favor of the plaintiff and against the defendant, and that as a matter of law the plaintiff is entitled to the relief prayed in his petition." At the request of the defendants, the court also made a series of special findings of fact, some of which may be regarded as inconsistent with the general finding, and one of which is complained of as defective and insufficient, because of a failure to find whether the debt, or any of it, to the plaintiff, was contracted during the time the mortgage was being withheld from the record; but there is no evidence that it was so contracted. That the point would be immaterial if the mortgage was assailed solely for the reason that it was omitted for a time from record, was definitely decided by this court in *Forrester v. Kearney Nat. Bank*, 49 Nebr., 655. The Paper Company did not recover its judgment until nearly eight

months after the instrument was filed for record, nor until nearly a month after the mortgagee had taken possession under it. With respect to the alleged agreement to keep the mortgage from the record, the court found especially as follows: "That the mortgage aforesaid given by the News Publishing Company was for money loaned in the amount described in the mortgage; that at the time of the execution and delivery of said mortgage the same was given by the News Publishing Company and its officers with the understanding and expectation that the same would not be placed on record immediately but should be held from record so as to keep the knowledge thereof from the public and the creditors of the News Publishing Company; that while no binding agreement was made between the News Publishing Company and said Hector H. Tyndale for the withholding of the same from record and no consideration passed for such a promise, so that the said Tyndale was left free to place the same on record, if he had desired, yet at the time of taking said mortgage said Tyndale knew of the expectation of the News Publishing Co., in that particular and shared in the intent." This finding goes to the furthest limit warranted by the evidence in support of the alleged agreement mentioned. We think that the use of the qualifying word "binding" is of no significance. In the view of the law, an agreement which is without consideration and which the party making is at liberty to keep or not as he chooses, and which is therefore not binding or obligatory upon him, is not an agreement at all. The finding, therefore, amounts to an express negation of this allegation of the petition. But, further than this, it appears to the writer that it would be somewhat inconsistent to hold that a man may be punished for agreeing to do, or for doing pursuant to an agreement, that which in the absence of the agreement he might lawfully have done. May a man be charged with wrong doing because of having agreed to do a lawful act? But consistently with *Forrester v. Kearney Nat. Bank, supra,* the mortgage was equally valid with a new mortgage given

and recorded at the date when the mortgage in suit was filed for record and possession taken, which, as has been said, was before the Paper Company obtained its judgment. The Paper Company, however, insists that the above-quoted finding should be interpreted as finding, in effect, that the alleged agreement did exist, or that if not, this court should so find from the evidence disclosed in the record—and it combats the proposition just stated by arguing that on account of the agreement the mortgage was actually fraudulent at its inception, and, that such being the case, it was not validated as against creditors by making it of record, or by taking possession under it. The fact, if it had been found, would not, we think, have bettered the plaintiff's case. The agreement not to make the instrument of record, supposing there to have been such an agreement, was not contained in the mortgage itself, nor alleged, found nor proved to have been any part of the consideration for its execution, but was collateral to and independent of it. The plaintiff claims to have been defrauded and injured, not by the mortage, which rested upon a sufficient consideration and was a valid instrument, but by the collateral agreement and its fulfillment. But it is not found nor proved that this agreement or its consequences wrought the plaintiff any injury, because it does not appear that he was misled by it to his damage, or that he extended any credit to the News Company in ignorance of it. When the mortgage was made of record, the agreement ended and ceased to be capable of working iniquity. The mortgage was thus freed from this incubus which, in its short life, does not appear to have inflicted any harm upon anybody. A fraud, whether inhering in a contract or not, is a wrong, but, like other wrongs, it is not in a legal sense a tort or actionable, unless it has resulted in damages to some innocent person. Cooley, Torts, page *62, and cases cited. Now, it is not made to appear that the plaintiff or any of the creditors of the News Company suffered any damages on account of this alleged collateral agreement, and consequently, now that, if it ever existed, it

has come to an end, it can not be made the ground of legal complaint. The plaintiff had judgment below as prayed in its petition, and the defendants appealed.

It is recommended that the judgment of the district court be reversed and that the action be dismissed at the costs of the appellee.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and that the action be dismissed at the costs of the appellee.

REVERSED AND DISMISSED.

FARMERS' BANK OF NEBRASKA CITY ET AL. V. ALEXANDER GARROW ET AL.

FILED NOVEMBER 20, 1901. No. 10,368.

Commissioner's opinion, Department No. 3.

1. **Jury:** REQUEST FOR SUBMISSION: ESTOPPEL. Where a question is submitted to the jury by the court, after the request of a party for its submission, such party will not be heard to say that a finding thereon adverse to him is not sustained by sufficient evidence.

2. **Assignment of Error Not Specific.** The assignment in a petition in error that a verdict is contrary to law is not sufficiently specific to entitle it to consideration in this court.

3. **Instruction.** A party will not be heard to complain of an instruction when the matter objected to in such instruction is, in substance, embodied in one tendered by himself.

4. ———. It is not error to refuse to give an instruction tendered, when the same ground is covered by instructions given by the court on its own motion.

ERROR from the district court for Otoe county. Tried below before RAMSEY, J. *Affirmed.*

Monroe L. Hayward, Byron Clark, C. A. Rawls and *W. H. Pitzer,* for plaintiffs in error.

John V. Morgan and *John C. Watson, contra.*

Argued orally by *Clark,* for plaintiff in error; by *Morgan* and *Watson, contra.*

ALBERT, C.

Alexander Garrow and Ernest D. Garrow, plaintiffs, filed their petition in the district court against the Farmers' Bank of Nebraska City and the Union Bank of Union, defendants. The essential allegations of the petition, so far as material at this time, are as follows: That on or about the 24th day of June, 1895, the plaintiffs entered into a contract with one Frank P. Tinney, whereby the latter agreed to purchase, for the plaintiffs, a carload of hogs and ship the same to the plaintiffs at Nebraska City, and the plaintiffs agreed to deposit a sufficient sum of money in the said Farmers' Bank and allow Tinney to draw against it in the purchase and payment thereof; that thereupon the plaintiffs deposited $600 with the said Farmers' Bank, upon the express agreement and understanding, between the plaintiffs and said bank, that it was deposited for the sole purpose hereinbefore mentioned; that at the time the money was deposited, as aforesaid, the said Tinney was indebted to the said Union Bank in the sum of about $600; that the defendant banks, who were jointly engaged in business, conspiring together to cheat and defraud the plaintiffs, wrongfully applied the amount deposited on the said indebtedness of Tinney, and refused to allow him to draw against said deposit in the purchase and payment of the said carload of hogs. The defendants filed separate answers. The Farmers' Bank, after a general denial, alleged that, at the time of the deposit, one of the plaintiffs handed the money to its cashier, and directed him to transfer the proceeds to the Union Bank, and place it to Tinney's credit, without any further instructions in

the premises; that the bank transferred the same as directed. The Union Bank, after denying most of the allegations of the plaintiff's petition, alleged that the plaintiffs vested Tinney with the full title to the said deposit, and allowed him to obtain credit thereon; that Tinney had been engaged for a long time in buying and shipping stock, and had been in receipt of money from the plaintiffs, and others, which he received and treated as his own, and which he deposited and checked out in his individual name, and was vested at all times with full title to the money and the purchases made therewith; that the plaintiffs were estopped, by their course of dealing, to claim any money which they had deposited in trust with Tinney. The affirmative allegations of the answers were denied in the reply. On the issues thus joined a trial was had to a jury, which resulted in a verdict for the plaintiffs, and from a judgment rendered thereon the defendants prosecute error to this court by separate petition.

Many errors are assigned, but, under the long established rules of this court, only those argued will be noticed. One of the principal grounds urged for a reversal of the judgment of the lower court is that the verdict is not sustained by sufficient evidence. But each question, on which it is claimed the evidence fails, was submitted to the jury by the court, after the defendants had tendered instructions, asking the submission of such questions. It is a settled rule of practice, that where a party asks the submission of a question to the jury, and such question is submitted to the jury, he will not be heard to say that a finding thereon, adverse to him, is not sustained by sufficient evidence. *Martensen v. Arnold,* 78 Ill. App., 336; *Dunlap v. Griffith,* 47 S. W. Rep. [Mo.], 917.

It is also urged specifically that the verdict is contrary to the instructions 3, 6 and 11, but that objection is not included in any assignment in the petition in error, unless it be the assignment that the verdict is contrary to law, which is not sufficiently specific to insure its consideration in this court.

Complaint of the third and fourth paragraphs of the charge to the jury is urged on the grounds hereinafter mentioned. Such instructions are as follows:

"3. You are instructed that the law is, that trust funds may be followed through any number of transmutations or changes and reclaimed by the owner, so long as such funds can be distinguished in the hands of the trustee or his assigns. And in this case, if you find from a preponderance of the evidence, that the money in question, was, by plaintiffs, deposited in defendant bank, the Farmers' Bank of Nebraska City, and thereafter transferred to the Union Bank of Union, by order and under the directions of plaintiffs or either of them, for the sole and only purpose to pay for a carload of hogs to be purchased by said Tinney in the name of and for plaintiffs; and if you further find from the evidence that defendant banks conspired together for the purpose of converting said money and did so convert said money to the defendant, the Union Bank of Union, in payment of Tinney's overdraft at said bank, then your verdict should be for plaintiffs.

"4. You are instructed, gentlemen of the jury, that if you find from a preponderance of the evidence, that plaintiffs entered into a contract with one Frank P. Tinney, on or about June 24, 1895, whereby said Tinney agreed to purchase for said plaintiffs a carload of hogs and ship the same to plaintiffs at Nebraska City, Nebraska, and that plaintiffs agreed with said Tinney to deposit a sufficient sum of money in the Farmers' Bank of Nebraska City and allow said Tinney to draw against said sum for the purchase and payment of said hogs and that the title to said hogs was to be in said plaintiffs and to be shipped in the name of said plaintiffs; and if you further find from the evidence that said plaintiffs, pursuant to and under such agreement, deposited a check drawn on the Nebraska City National Bank for the sum of $600.00, with the defendant, the Farmers' Bank of Nebraska City, Nebraska, for the express purpose of permitting said Tinney to draw against said sum of money in payment of said carload of hogs and

for no other purpose; and if you further find from a preponderance of the evidence that there was an understanding and agreement between the plaintiffs and defendant banks, that said sum of $600.00, should be used and applied for the sole purpose of purchasing and paying for said carload of hogs; and if you further find that defendant banks or its officers entered into a collusion for the purpose of having said money deposited with the defendant, the Union Bank of Union, and procured the same to be deposited with the defendant, the Union Bank of Union, to the personal credit of said Frank P. Tinney, and there applied upon the account and overdraft of said Tinney, without consent of plaintiffs, then your verdict should be for plaintiffs for the sum of $600.00, with interest thereon at seven per cent. per annum, from the 24th day of June A. D., 1895, less any amount the evidence shows to have been paid thereon, which amount you will ascertain by computation and fix in your verdict."

One objection urged against both of these instructions is, that they include a clause to the effect "that the hogs were to be purchased for plaintiffs and in their names." The defendants insist that there is no evidence that such clause was part of the contract between the plaintiffs and Tinney. We are unable to see how the defendants were prejudiced by this clause being included in the instructions. There is certainly evidence to the effect that the hogs were to be purchased for the plaintiffs; whether they were to be purchased in their names is wholly immaterial. If, in presenting the plaintiffs' theory of the case, the court included more than it should have included, it might have afforded the plaintiffs just cause of complaint, had the verdict been the other way, but it certainly could not operate to the prejudice of the defendants. The specific objection to instruction No. 4 is, that there was no evidence to warrant the submission to the jury of the question of collusion between the banks. It is a well established rule that instructions are to be considered as a whole. Taking the fourth instruction as a whole, as regards the part ob-

jected to, in our opinion it does not differ materially from the first and second instructions asked by the defendant, which are as follows:

"1. You are instructed that to entitle plaintiffs to a verdict in their favor it is necessary that you find from the evidence that the defendant banks, each knowing that the money in dispute belonged to plaintiffs and that the plaintiffs were the real owners after they had it credited to Tinney, agreed the one with the other to convert it to the use of the Union Bank of Union; and that the act of the Union Bank in retaining said money was the result of said agreement and if you believe from the evidence that the defendant, Farmers' Bank, by its officers, did not so agree, collude and conspire with the defendant, Union Bank, your verdict should be for the Farmers' Bank, defendant.

"2. Before you find a verdict for the plaintiff you must believe from the evidence that each of the defendants took part in the conversion or that one of them converted it as a result of an agreement to which each defendant was a party and that said funds were trust funds and actually belonged to plaintiffs."

Defendants, having asked the submission of the question of collusion to the jury, can not now complain that the court adopted their theory and submitted it. *American Fire Ins. Co. v. Landfare,* 56 Nebr., 482; *City of Omaha v. Richards,* 49 Nebr., 244; *Jonasen v. Kennedy,* 39 Nebr., 313; *Richards v. Borowsky,* 39 Nebr., 774.

There is the further objection that the verdict is contrary to instructions 3 and 4. So far as that objection relates to instruction No. 3, it is already disposed of. So far as it relates to No. 4, it is confined to the proposition that there is no evidence of collusion to procure the deposit to be made to the personal credit of Tinney. As we have already seen, the defendants requested the submission of that issue to the jury, and they can not now be heard to say that the adverse finding thereon is not sustained by sufficient evidence.

It is urged on behalf of the Farmers' Bank, that it simply performed its duty in the premises and followed the instructions of the plaintiffs, therefore it is not liable. If it were in collusion with its codefendant, it is certainly liable with its codefendant. The question of collusion was submitted to the jury by the court after the defendants themselves, as we have seen, had requested its submission. Therefore we are not permitted to disturb the finding of the jury on that question.

The defendants also complain of the refusal of the court to give an instruction, tendered by them, on the question of estoppel. In our opinion, the question is fully covered by paragraph six of the instructions given by the court on its own motion; hence the refusal to give that tendered by the defendants was not error.

After a careful examination of the record in this case, we would say that we not only fail to find reversible error, but feel satisfied that the affirmance of the judgment will work no injustice. We therefore recommend that the judgment of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ELLEN S. BEALL, APPELLANT, V. CHARLES MCMENEMY, APPELLEE.

FILED NOVEMBER 20, 1901. No. 10,434.

Commissioner's opinion, Department No. 3.

1. **Dower-Limitation, Ten Years.** An action for dower in the district court is within the statute of limitations and must be brought within ten years from the time it accrued.

2. **Tenant in Common: ENTRY.** The rule that an entry by one tenant in common is the entry of all the cotenants has no application where there is an actual ouster of the other cotenants or some act deemed by law equivalent thereto.

3. **Ouster Question of Fact.** Ouster is a question of fact to be determined from the evidence.

4. **Evidence Sufficient.** Evidence examined, and *held* sufficient to warrant a finding of ouster.

APPEAL from the district court for Washington county. Heard below before POWELL, J. *Affirmed.*

A. C. Wakeley and *John Lothrop,* for *appellant.*

Walton & Mummert and *Osborn & Aye, contra.*

ALBERT, C.

This action was brought by the appellant to recover dower in certain lands in Washington county. A trial to the court resulted in a finding and decree for the defendant, and the plaintiff brings the case here on appeal.

The determination of one question will dispose of this case, and that question is whether plaintiff's cause of action was barred by the statute of limitations when this case was commenced. If it was, the decree of the district court should be affirmed; if not, it should be reversed. This question involves two others, namely, whether an action in the district court for the recovery of dower is within the statute, and, if so, whether the statute had run in this case. We shall consider these two questions in their order.

1. Plaintiff cites many cases in support of the proposition that an action for the recovery of dower is not within the statute of limitations. But none of those cases, so far as we have been able to examine, are based on statutes worded like ours, and for that reason lose much of their force. While many of the earlier cases hold that actions for the recovery of dower are not within the statute, the trend of modern authority is in the other direction. *Proctor v. Bigelow,* 38 Mich., 282; *King v. Merritt,* 67 Mich., 194; *Beebe v. Lyle,* 73 Mich., 114; *Tuttle v. Willson,* 10 Ohio, 26; *Care v. Keller,* 77 Pa. St., 487; *Rice v. Nelson,* 27 Ia., 148. A study of our own statute makes it difficult

to conceive of a case that does not fall within its limits. After specific provisions as to the time within which certain actions may be brought, comes section 16 of the Code of Civil Procedure, which is as follows: "An action for relief not hereinbefore provided for, can only be brought within four years after the cause of action shall have accrued." From the section quoted, it seems clear that the legislature intended to cover every form of action. Section 6 of the Code, as it stood at the time of the trial of this case below, was as follows: "An action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages." In *Gatling v. Lane*, 17 Nebr., 80, Judge MAXWELL, construing this statute, says: "The statute is now held to be a statute of repose, which is available against the enforcement of stale demands. * * * The effect of the statute is to quiet titles to real estate, * * * If no action is commenced within the statutory period the occupier obtains an absolute right of exclusive possession of the premises, not only against the former owner but all the world." The language of the statute, as well as the construction placed upon it by this court, is sufficiently comprehensive to include claims for dower. In our opinion, an action for the recovery of dower is within the statute of limitations, and barred if not brought within ten years from the time it accrues.

2. It sufficiently appears from the evidence that the plaintiff was married to Robert T. Beall in 1862, and that he died in 1875; that from 1863, to the time of his death, he and the plaintiff resided together in this state as husband and wife; that at the time of the death of her husband he and one E. A. Allen were seized in fee of the land in controversy, each owning an undivided one-half. Some two years after the death of the said husband the whole of the land was sold for taxes to J. H. Hungate, who afterward, on December 22, 1881, conveyed the premises to the defendant. In June, 1882, the defendant procured a con-

veyance from E. A. Allen of his undivided one-half in the premises, and in July or August following entered upon the premises, made some improvements and continued in possession until the following December, when he conveyed to another party, who at once entered upon the land and continued in possession for about five years and then reconveyed to the defendant, who at once entered upon and continued in possession of the land until the trial of this suit in the lower court. Thus, it will be seen, that at the time the defendant went into possession he held two deeds, —one from Hungate to the whole of the land, and one from Allen, the cotenant of plaintiff's husband, to an undivided one-half. Hungate had only a tax title, and could convey no greater title to the defendant than he had himself. But a tax deed, or a deed based thereon, is sufficient to give color of title. *Lantry v. Parker,* 37 Nebr., 353; *Twohig v. Leamer,* 48 Nebr., 247.

But plaintiff insists that the defendant must be presumed to have entered upon and held the land under his valid title to an undivided one-half of the land, and, therefore, his entry and possession was the entry and possession of all the cotenants, and not adverse to the plaintiff. As a general rule, the entry and possession of one tenant in common is the entry and possession of all, and therefore not adverse. But the rule has no application where there has been an actual ouster of the cotenant, or some act equivalent thereto. 1 Am. & Eng. Ency. Law [2d ed.], 801, and cases there cited. Ouster is a question of fact, which involves, to some extent, the intentions and motives of the party in possession. *Highstone v. Burdette,* 54 Mich., 329; *Cummings v. Wyman,* 10 Mass., 464. The evidence shows that, some fourteen years before the commencement of this action, the defendant took possession of the land; that within six months he conveyed it to another, who at once entered upon and took possession and continued in possession for about five years, when it was reconveyed to the defendant, who again took possession and held the same until the trial of this case. During all these fourteen years the

defendant, and those claiming under him, had the exclusive possession of the land and the exclusive enjoyment of the rents and profits. A sale of the land by one tenant in common has been held to amount to an ouster of his cotenants. *Culler v. Motzer,* 13 S. & R. [Pa.], 356, 15 Am. Dec., 604. It is not necessary to go to that length in this case. It is sufficient to say that, in our opinion, the sale of the land by the defendant fourteen years before the commencement of this action, coupled with the other facts and circumstances mentioned, is sufficient to warrant a finding of ouster, or of acts equivalent thereto, and that plaintiff's cause of action was barred by the statute of limitations.

It is recommended that the decree of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

EDWARD J. SMITH, TRUSTEE, APPELLEE, V. JONAH B. ALLEN ET AL., APPELLEES, IMPLEADED WITH JAMES A. OLLIS, JR., ET AL., APPELLANTS.

FILED NOVEMBER 20, 1901. No. 10,521.

Commissioner's opinion, Department No. 3.

1. **Denial:** ISSUE. A denial, though coupled with an allegation showing a lack of knowledge of the matters denied, is sufficient to raise an issue.

2. ———: ———. INFORMATION AND BELIEF. A party entering such denial is not required to state that he makes the same on information and belief, nor to allege a lack of knowledge or information sufficient to form a belief.

3. **Cross-Petition:** FAILURE TO TRAVERSE: FINDING: SUFFICIENT EVIDENCE. A party failing to plead to a cross-petition, the court having jurisdiction of his person, will not be heard to say that an adverse finding thereon is not sustained by sufficient evidence.

4. ———: NOTICE. A cross-petition was filed after the answer day fixed by the summons. Thereafter some of the other defendants filed answers to the original petition, and were represented by attorneys at the trial of the case. *Held*, That such defendants are chargeable with notice of the filing of the cross-petition and, as to them, no summons thereon was required.

APPEAL from the district court for Douglas county. Heard below before FAWCETT, J. *Reversed in part.*

J. W. Eller and *E. J. Clements*, for appellants.

Tibbets Bros., Morey & Anderson and *James H. Van Dusen, contra.*

Argued orally by *Eller*, for appellants; by *Tibbets Bros.* and *Van Dusen, contra.*

ALBERT, C.

The plaintiff, Edward J. Smith, brought this action as trustee of the estate of Philo R. Hurd, deceased, against the defendants, W. B. Van Sant, James A. Ollis, G. W. Stancliffe and others, not necessary to mention, to foreclose a real estate mortgage. The defendant Van Sant filed an answer and cross-petition, asking the foreclosure of another mortgage on the same property. The other defendants above named each filed an answer to the petition, but failed to plead to the cross-petition. A trial was had, resulting in a finding and decree for the plaintiff and the cross-petitioner, in accordance with the prayer of their respective petitions. The case is here on appeal.

One ground urged for a reversal of the decree is that the evidence fails to show that no action at law had been had for the recovery of the debts secured by the respective mortgages. That such fact must be alleged, and, if denied, proved, to warrant a decree of foreclosure, is too well established to admit of controversy. *Jones v. Burtis*, 57 Nebr., 604; *Kirby v. Shrader*, 58 Nebr., 316. That it was not proved in this case is conceded. But, on behalf of the plaintiff, it is urged that such fact is alleged in his

petition and is met by no sufficient denial in the answers. The allegation referred to is made in paragraph 6 of plaintiff's petition. The answers of the appellants, among other things, each contain the following: "Relating to the allegations in said petition contained in paragraphs 1 to 10, inclusive, he (the defendant) has no personal knowledge and denies each and every allegation therein." Plaintiff contends that a defendant has no right to interpose an unqualified denial, except on positive knowledge, and lacking positive knowledge, he must deny on information and belief or allege a lack of knowledge or information sufficient to form a belief. That such rule prevails in many of the code states is true; but it is based on a statutory requirement to that effect which is not to be found in our Code of Procedure. As regards denials, the only requirement of our Code is that contained in section 99, which is as follows: "The answer shall contain: First—A general or specific denial of each material allegation of the petition controverted by the defendant. Second—A statement of any new matter constituting a defense, counter-claim, or set-off, in ordinary and concise language and without repetition." It will be seen that no specific provision is made for a denial, where the defendant lacks positive knowledge, or upon information and belief. However wise such provision might be, this court has no authority to supply it. Are we to infer then, from this, that the authors of the Code intended to force the defendant to the alternative of admitting allegations of the truth of which he had no knowledge, or to verify an unqualified denial of such matters? We think not. It seems to us to be more consistent with the spirit of the Code to permit the defendant to spare his conscience by a disclaimer of knowledge, and at the same time enter a denial for the purpose of putting the plaintiff to the proof of his allegations. The denials were sufficient in this case, and the failure of the plaintiff to establish the allegation mentioned is fatal to his decree. The other questions discussed in this connection are not likely to arise on another trial.

As regards the cross-petitioner, Van Sant, the defendants, having failed to plead to his cross-petition, will not now be heard to say that any of the allegations therein contained are not established by the evidence. *Gadsden v. Thrush,* 56 Nebr., 565. But the defendants insist that the decree in favor of Van Sant must be reversed, because his cross-petition was filed after the answer day fixed by the summons served on them. In support of this proposition they cite *Havemeyer v. Paul,* 45 Nebr., 373. That case is not in point. There the supplemental petition was filed after the answer day and after the defendant had answered. After answering, he made no further appearance in the case. In the case at bar, the defendants filed answers to the plaintiff's petition after the cross-petition of Van Sant was filed, and were present, by their attorney, at the trial of the case. Under such circumstances, they are chargeable with notice of the filing of the cross-petition and no summons thereon was required, so far as they are concerned.

It is recommended that the decree in favor of the cross-petitioner, Van Sant, be affirmed, and that in favor of the plaintiff be reversed and the cause be remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, that portion of the decree of the district court in favor of the cross-petitioner, Van Sant, is affirmed, and that portion of the decree in favor of the plaintiff is reversed, and the cause remanded for further proceedings according to law.

JUDGMENT ACCORDINGLY.

MARTHA A. GOODING V. LEWIS E. RANSOM.

FILED DECEMBER 4, 1901. No. 10,360.

1. **Order of Sale Unnecessary.** A decree of foreclosure constitutes the authority of a sheriff to sell the property therein described, and an order of sale need not issue.

2. **Failure to Note Date of Receipt Does Not Invalidate Sale.** The failure of a sheriff to note on an order of sale the hour of the day on which the order came into his hands, will not invalidate the sale.

3. **Order of Sale: TIME OF RETURN.** A decree is not invalidated, merely because the order of sale contains no provisions as to the time such order is returnable.

4. **Error Not Presumed.** Error will not be presumed, but it must affirmatively appear.

ERROR from the district court for Cedar county. Tried below before EVANS, J. *Affirmed.*

Addison M. Gooding, for plaintiff in error:

The error taken arises upon confirmation of the sale of certain real estate in the village of Hartington. The record will disclose the following facts, orders, sales, etc.: Decree was rendered April 18, 1896, and stay of nine months taken. First order of sale issued March 10, 1897; certificates and copy of appraisement filed March 11, 1897. Second order of sale issued August 17, 1897, and the first order returned: "No sale for want of bidders." There were no certificates asked for or filed, but on the 26th day of August an instrument relative to the appraisal was filed; second order of sale returned September 29, 1897.

We will consider the first and second assignments of error together. Combined they are: "The order of sale does not conform to the decree of the court and the manner of sale of the property was not in accord with the decree and order of sale." The decree shows that the mortgage covers a "strip eighty-seven feet deep off the east or front end of said lots 4, 5 and 6, of block 43, of the village of

Hartington," together with an additional part of said lot 4. The decree then provides that "eighty-seven feet deep, the east end of lots 5 and 6, in block 43," shall be offered for sale first. The land then ordered to be first sold is simply a line on the earth's surface, on the east end of said lots 4 and 5, eighty-seven feet deep. The tract to be sold is described by but one dimension, and that is depth on the east boundary thereof. The decree next provides that the "balance of said premises" are to be sold. If the court considers this to mean the remainder or some part of said lots 4 and 5, and that is the only syntactical construction, then it follows that the manner of sale was not in accordance with the decree and order of sale based thereon.

Third assignment—Property not sold as directed by order. The order of sale requires that eigthy-seven feet off of said lots 4, 5 and 6 be first sold. The return thereto shows that but eighty-seven feet off of said lots 4 and 5 were first sold. *Beatrice Paper Co. v. Beloit Iron Works,* 46 Nebr., 900, 904.

Fourth assignment—The hour of receiving the order of sale was not indorsed thereon. This, under the ruling of the court in *Burkett v. Clark,* 46 Nebr., 474, becomes material.

Fifth assignment—The order of sale was not made returnable, as provided by law. This is a material defect. The same should be returnable in sixty days. *Burkett v. Clark, supra.* If the clerk could extend the time to the first day of the following term of the district court, he could extend the time indefinitely and perpetuate a cloud upon the defendant's title, in case of a fraudulent or wrongful sale. Code of Civil Procedure, sec. 510.

Sixth assignment—There was no application for clerk's, etc., certificates as to liens and incumbrances. Under the ruling in *Burkett v. Clark, supra,* this requirement is as well for the benefit of the defendant as of the plaintiff. The sheriff has no authority to advertise the property for sale before this is done. Unless this is done, the defendant has no basis for a motion to set aside and vacate the

appraisement, and is deprived of that right under the ruling of this court, upon objections to confirmation of sale.

Seventh assignment—There was no copy of appraisal filed, as required by law. The return of the sheriff shows that on the 26th day of August, 1897, notice of sale was caused to be published. There was no attempt to file a copy of appraisal before that day. The filing of such before notice of sale is caused to be published is essential. *Burkett v. Clark,* 46 Nebr., 475. However, on said day, there was an instrument in writing, relating to the property in question, but there was no indorsement thereon showing the same to be a copy of appraisement. We submit that a copy of any instrument must be shown to be such in some way, by some indicia, before it can be recognized as such and action taken upon it as upon the original.

We respectfully contend that the sale should be set aside and the costs taxed to the defendant in error.

Elberti Ready and *Homer A. Miller* filed no brief *contra.*

NORVAL, C. J.

This proceeding was taken to review the order of the court below confirming the sale of real estate made by the sheriff under a decree of foreclosure. The contention is that the order of sale does not conform to the decree, in that the decree designated which portion of the property should be first offered for sale, while the order of sale contained no such provision. But this variance is immaterial, since the issuance of an order of sale was wholly unnecessary. The decree constituted the authority of the officer to make the sale, and it disclosed that the part of the property required to be first offered was the only tract sold, the remaining portion of the premises not having been sold for want of bidders.

The sheriff failed to note in his return the hour of the day the order of sale came into his hands. But the omission did not vitiate the sale, and *Burkett v. Clark,* 46 Nebr., 474, does not so hold.

Nor is the sale invalidated because the order of sale contained no provision that it should be returned within sixty days from its date. The sale was had and return made within the period specified, which was sufficient. The statute prescribes the time within which a sheriff shall make the sale of real estate and file his return, and the order of sale need not contain any provision upon the subject.

Objection is made that there were no applications to the county clerk, clerk of the district court and county treasurer for certificates as to liens and incumbrances against the property. This point is not available, because the transcript before us does not purport to be a complete copy of the entire record below. The clerk of the district court merely certifies that the transcript contains copies of certain enumerated papers and proceedings in the case. Error must affirmatively appear. It will not be presumed. For the same reason we can not consider the objection that no copy of the appraisement was filed in the time required by law.

The order of the court confirming the sale is

AFFIRMED.

MCCORMICK HARVESTING MACHINE COMPANY V. WILLIAM M. DUNN.

FILED DECEMBER 4, 1901. No. 10,510.

1. **General Exemption from Forced Sale.** To any head of a family who has neither lands, town lots nor houses subject to execution as a homestead there is exempt from forced sale on execution personal property not exceeding $500 in value.

2. **Trover:** FALSE INVENTORY AND OATH NO DEFENSE. To an action for conversion against an officer for releasing a levy upon exempt personal property, it is no defense that the inventory and oath of the debtor filed under section 522 of the Code of Civil Procedure are untrue.

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

John P. Maule and *H. H. Wilson,* for plaintiff in error.

No appearance *contra.*

NORVAL, C. J.

Plaintiff in error was plaintiff below. A single ruling is presented for review, and that is, did the district court err in sustaining a general demurrer to the petition and dismissing the action? The petition alleges, in effect, that plaintiff recovered a judgment against one William B. Carpenter, before a justice of the peace, in the sum of $124.57; that an execution was issued on said judgment and delivered to William M. Dunn, the defendant herein, as sheriff, for service; that he thereupon levied and took into his possession two mules, four horses and two sets of harness, of the value of $250; that afterwards Carpenter claimed said property was exempt from levy and sale under the writ by virtue of section 521 of the Code of Civil Procedure, and duly filed an inventory, under oath, for the whole of his personal property, in compliance with and pursuant to section 522 of said Code; that the sheriff called three disinterested freeholders, who appraised the value of the property so inventoried at $401; and that thereupon the officer discharged said levy, released the property seized and delivered the same to Carpenter, and then returned the execution wholly unsatisfied; that the latter during all of said time was a resident of this state and head of a family, and owned a lot and a house thereon in which he lived with his family and occupied as a homestead, of which facts, when Carpenter filed his said affidavit and inventory, plaintiff informed the sheriff, and warned him not to release the property from the levy, and the officer agreed not to do so if plaintiff would execute to him an indemnifying bond against loss or damages, which plaintiff did, yet the defendant released his said levy; and that by reason thereof plaintiff is unable to collect the said judgment.

By section 521 of the Code of Civil Procedure, there is exempt from forced sale, on execution, to all heads of families, who have neither lands, town lots nor houses subject to exemption as a homestead, the sum of $500 in personal property. Carpenter, the debtor, duly filed an inventory of his property, under oath, pursuant to section 522 of said Code. The property was thereupon appraised at a sum less than $500. Therefore, under the provisions of section 523 of said Code, Carpenter was entitled to a return of all the property seized under the execution, unless the inventory and affidavit thereto attached were not conclusive upon the officer. That he may not assail them or question their truthfulness, has been distinctly held by this court. *People v. McClay,* 2 Nebr., 8; *Smith v. Johnson,* 43 Nebr., 754; *Daley v. Peters,* 47 Nebr., 848; *Kriesel v. Eddy,* 37 Nebr., 63; *Bender v. Bame,* 40 Nebr., 521. With the rule announced in these decisions we are content. The petition failed to state a cause of action, and the demurrer thereto interposed was properly sustained.

AFFIRMED.

DAVID M. HAVERLY V. STATE OF NEBRASKA, EX REL. ED HALPIN.

FILED DECEMBER 4, 1901. No. 12,365.

1. **Title of Act.** Legislation which is not within the scope of the title of the act is unconstitutional.

2. **Amendment:** REPEAL. No law can be amended, unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed.

3. **Unconstitutional Statute.** That portion of section 11, article 2, chapter 13, Compiled Statutes, relating to the election of an assessor for county purposes in cities having more than 25,000 and less than 40,000 inhabitants, is inimical to section 11, article 3, of the constitution, and is void.

ERROR from the district court for Douglas county. Tried below before ESTELLE, J. *Affirmed.*

George W. Shields, for plaintiff in error.

John C. Cowin, contra.

NORVAL, C. J.

The state, on the relation of Ed Halpin, instituted a proceeding in mandamus in the court below to compel the respondent, as county clerk of Douglas county, to name in the notices of the general election in November, 1901, the office of county assessor for each of the six precincts of the city of South Omaha, to be filled at said election. At the hearing a peremptory mandamus was issued as prayed, and the respondent has prosecuted error therefrom.

Douglas county is under the commissioner system of government. The city of South Omaha has six wards, and the same number of voting precincts, and the sole question presented for consideration is whether one or six county assessors are to be elected from said city. Section 7, chapter 26, Compiled Statutes, entitled "Elections," provides, *inter alia,* that "in counties not under township organization, one (1) county judge, one (1) sheriff, one (1) coroner, one (1) county treasurer, one (1) county clerk, one (1) county surveyor, one (1) county superintendent of public instruction shall be elected in the year eighteen hundred seventy-nine (1879) and every second year thereafter, and in each precinct two (2) justices of the peace and two (2) constables shall be elected in the year eighteen hundred and seventy-nine (1879) and every second year thereafter, except as hereinafter provided, and one (1) assessor, and one (1) overseer of highways for each road district shall be elected in the year eighteen hundred and seventy-nine (1879) and annually thereafter, and one (1) county commissioner shall be elected annually who shall serve three (3) years." It is plain enough that the foregoing requires the election annually of an assessor in each precinct. The statute is not susceptible of any other legitimate construction, which is conceded by respondent;

but his counsel invokes the provisions of section 11, article 2, chapter 13, Compiled Statutes, relating to cities having populations between 25,000 and 40,000, within which class is the city of South Omaha. This section declares that "precinct lines in that part of any county, not under township organization, embraced within the corporate limits of any city governed under the provisions of this act, shall correspond with the ward lines in such city, and such precinct shall correspond in number with the wards of the city and be co-extensive with the same. Provided; that when a ward is divided into election districts, the precinct corresponding with such ward shall be divided so as to correspond with the election district. And provided further; that no justice of the peace or constables shall be elected in such precinct, and every such city shall constitute a district for the election of justices of the peace and constables, and in every such district there shall be elected two justices of the peace and two constables at the times provided by law for the election of such officers in other districts. All cities of this class shall constitute one precinct for the election of an assessor, for county purposes only, who shall be elected at the same time and in the same manner as the election of assessors in other precincts of said county." While the city of South Omaha is divided into six wards and as many precincts, the section of the act by which it is governed, copied above, expressly provides that in all cities of the class to which South Omaha belongs one assessor shall be elected for county purposes only. In that respect it is in conflict with the provisions of section 7, chapter 26, Compiled Statutes, already referred to. If the provisions of said section 11 relating to the election of assessor are valid legislation, then the writ was wrongfully issued, and the judgment must be reversed. Said provision is assailed by relator as being unconstitutional upon two grounds. First. It is not embraced within the title of the act, which is "An Act, to incorporate cities of the first class, having less than forty thousand and more than

twenty-five thousand inhabitants and regulating their duties, powers and government." It is fundamental that legislation which is not within, but is outside of and foreign to, the scope and purpose of the act of which it forms a part, as expressed in the title thereof, is in violation of section 11, article 3, of the constitution, which declares that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title." The decisions of this court upon this subject are uniform and too numerous to make their citation necessary. Tested by the constitutional restriction upon the power of the legislature, it is very evident that that portion of the section of the statutes under consideration can not be upheld. The provision relating to election of an assessor in a city of the class of South Omaha for county purposes is wholly foreign to the title of the act. It has nothing to do with regulating the duties, powers or government of a city of that class, but related solely to county affairs and is therefore in conflict with the clause of the constitution, quoted. The other constitutional objection to the statute urged is that it is amendatory of section 7, chapter 26, Compiled Statutes, without referring to and setting out the section so amended, and hence falls within the constitutional inhibition of section 11, article 3, which provides that "no law shall be amended unless the new act contain the section or sections so amended and the section or sections so amended shall be repealed." This objection is likewise good. Said section 7 makes provision for the election of assessors for county purposes, and said section 11 also attempts to provide for the elections for county purposes in the cities of the class of South Omaha. Section 11 is, therefore, amendatory of section 7, and the last act does not contain the section so amended. It follows that the judgment of the district court is right, and it is accordingly

AFFIRMED.

STATE OF NEBRASKA, EX REL. JEREMIAH HOWARD, V. DAVID M. HAVERLY.

FILED DECEMBER 4, 1901. No. 12,366.

Assessor: CITIES. In cities having more than 25,000 and less than 40,000 inhabitants, an assessor for county purposes is to be elected annually in every precinct in such city.

ORIGINAL application for mandamus to compel the respondent to print on the ballots for the coming election, the name of the office of assessor for South Omaha. *Writ denied.*

George W. Shields and *J. J. Breen,* for relator.

John C. Cowin, contra.

NORVAL, C. J.

The questions in this case are identical with those in *Haverly v. State,* 63 Nebr., 83, just decided, and following the opinion in that case, the writ must be denied.

WRIT DENIED.

STULL BROTHERS, APPELLEES, V. JOHN SEYMOUR, APPELLANT.

FILED DECEMBER 4, 1901. No. 10,660.

1. **Judicial Sale:** NOTICE. The notice required for the sale of land upon execution or order of sale need not contain a statement of the amount due upon the judgment or decree for the satisfaction of which the sale is to be made.

2. ———: ———: DESCRIPTION OF PROPERTY. The notice of sale required to be given by section 497 of the Code of Civil Procedure is sufficient if it describes the property about to be sold with reasonable certainty. *Pearson v. Badger Lumber Co.,* 60 Nebr., 167.

3. **Provisions of Law:** FAILURE TO COMPLY. A failure to comply literally with all the provisions of the law relating to the sale of real property upon execution or order of sale will not justify a court in denying a motion for confirmation, where it is evident that such failure was not prejudicial to the rights of the defendant.

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

B. O. Hostetler, for appellant.

Flansburg & Williams and *William Gaslin, contra.*

SULLIVAN, J.

This case comes here by appeal. The order complained of ratifies the action of the sheriff of Buffalo county in making a sale of real estate under a decree of foreclosure. The defendant, Seymour, resisted the motion for confirmation upon various grounds.

In his brief filed in this court the first proposition for which he contends is that the notice of sale was defective, because it did not contain a statement of the amount due upon the decree. Upon this point it is only necessary to cite *Stratton v. Reisdorph,* 35 Nebr., 314, and *Amoskeag Savings Bank v. Robbins,* 53 Nebr., 776, in which it is held that no such statement is required by the statute.

Another objection to the notice of sale is that it does not mention either the county or state in which the mortgaged premises are situate. This, in our opinion, was not a fatal omission. A notice of this kind should, to be valid, contain a description of the land about to be sold. No case holds otherwise. In *Pearson v. Badger Lumber Co.,* 60 Nebr., 167, it was said: "A notice of sale which states that the sale is to be made by virtue of an order issued out of the district court in a certain case, entitling it, is a sufficient compliance with the statute"; but the court was there considering, not whether there was a sufficient description of the property, but whether the decree under which the sale had been made was properly described. There must, of course, be a description; but one that points out the land with reasonable certainty meets the requirement of the statute. In the notice which we are now considering the section, township and range were given and this description was not applicable to any other land in Nebraska.

It was also stated that the sale was to be made in execution of a decree rendered by the district court of Buffalo county in an action wherein William Stull and others were plaintiffs and John T. Seymour and others were defendants. This information should, it would seem, be sufficient to convey to the public with tolerable clearness the idea that the land in question was within the jurisdiction of the court and within the county in which the sheriff was authorized to exercise his functions. We can not imagine that any one intelligent enough to read the notice would fail to grasp its meaning.

Before the first publication of the notice of sale there was filed in the office of the clerk of the district court a copy of the appraisement, which is in one particular conceded to be defective; but as the original appraisement, which was filed shortly after it was made, has never been assailed and is, apparently, fair and just, it is evident that the defendant was not prejudiced in any way by the failure of the sheriff to comply literally with the statute.

The order of confirmation is right and is

AFFIRMED.

KATE E. DARR, APPELLEE, V. CHARLES F. SPENCER ET AL., IMPLEADED WITH JACOB NISLEY ET AL., APPELLANTS.

FILED DECEMBER 4, 1901. No. 10,715.

1. **Holder of Mortgage by Assignment:** SUBROGATION: CONDITION BROKEN: RIGHT TO FORECLOSE: INEQUITABLE CONDUCT. The owner and holder of a real estate mortgage acquired by purchase and assignment succeeds to all the right of his assignor and may, where he has been guilty of no inequitable conduct making redemption difficult or the propriety of it doubtful, maintain an action to foreclose at any time after condition broken.

2. ——: ——: RIGHT OF ACTION: FRAUD OF THIRD PARTY. One who in good faith buys a mortgage in the open market may enforce it by action although aware, at the time of the purchase, that the mortgagor was being embarrassed in making redemption by reason of the fraud of a third person.

APPEAL from the district court for Dawson county. Heard below before SULLIVAN, J. *Affirmed.*

E. A. Cook and *Warrington & Stewart,* for appellants.

Henry D. Rhea, contra.

SULLIVAN, J.

This action was brought by Kate E. Darr against Charles F. Spencer, Jacob A. Nisley, Rhoda S. Nisley and others to foreclose a real estate mortgage. The court found the issues in favor of the plaintiff and rendered a decree of foreclosure, from which the Nisleys have appealed. It is conceded that the mortgage is a valid lien, that it is owned by the plaintiff, and that the debt which it was given to secure was past due and unpaid when the action was instituted. The new matter alleged as a defense is, in substance, that Charles F. Spencer, George Quinby, and George B. Darr entered into a conspiracy to defraud the Nisleys of the mortgaged property, and by deceit, artifice and false representations induced them to convey said property to Spencer in exchange for certain worthless notes; that the district court of Dawson county, in an action brought for that purpose, adjudged the transaction to be fraudulent and decreed a reconveyance; that the action in which such decree was rendered has been appealed to this court and is still undetermined; and that plaintiff bought the mortgage, and is now seeking to enforce it, in order to aid Spencer, Quinby and Darr to accomplish, indirectly, their fraudulent purpose. The court found specially that the Nisleys had been defrauded, but that the plaintiff had no part in the transaction. That Mrs. Darr paid for the mortgage with her own money and is the real owner of it, seems to be admitted. Upon these facts there can, we think, be no serious doubt about the correctness of the conclusion reached by the district court. It may be, under the circumstances disclosed by the record, that neither Spencer

nor those associated with him would be permitted to acquire the mortgage and by enforcing it take advantage of the embarrassing situation in which they had placed the Nisleys; but the plaintiff occupies an entirely different position; her case rests upon firmer ground. She owes no duty to the appellants; she has done nothing to cloud their title; she has neither made redemption difficult nor the propriety of it doubtful. She acquired by purchase the right which her assignor had and, being guilty of no inequitable conduct, is entitled to enforce it as he might have done. Whether, when she bought the mortgage, she had knowledge of the fact that appellants had been defrauded, does not appear and is unimportant. The right of foreclosure has been lawfully exercised and the judgment of the district court is, therefore,

AFFIRMED.

WILLIAM KUKER V. CAROLINE BEINDORFF.

FILED DECEMBER 4, 1901. No. 10,730.

1. **Inferior Court:** RECORD: JURISDICTION. The records of inferior courts must affirmatively show that such courts have acted within the scope of their authority.

2. **Jurisdictional Facts:** PRESUMPTION. Jurisdictional facts will not be presumed in order to sustain the judgments of inferior courts, but when it appears that jurisdiction has once attached the presumption that the subsequent proceedings were regular will be indulged until the contrary is shown.

3. ——: ——: ADJOURNMENT. The statute not requiring a justice of the peace to enter upon his docket the hour when an order of adjournment is made, where jurisdiction has attached, it will be presumed that such order was made at the proper time.

4. **Transcript:** BILL OF EXCEPTIONS: EVIDENCE ALIUNDE. This court is not authorized to look beyond the transcript and bill of exceptions for evidence of what transpired at the trial.

5. **Attachment:** RECORD: REVIEW. An assignment of error that the justice failed to state in his docket that a writ of attachment was issued, presents no question for review where the record fails to disclose any order dissolving or sustaining the attachment.

6. **Bill of Particulars:** ENTRY ON DOCKET. The failure of the justice of the peace to enter the bill of particulars at large upon his docket is not prejudicial error.

ERROR from the district court for Douglas county. Tried below before KEYSOR, J. *Affirmed.*

John H. Grossmann and *Arthur E. Baldwin,* for plaintiff in error.

Joseph Crow and *Van Etten & Rich, contra.*

SULLIVAN, J.

The action in which this proceeding had its origin, was commenced before a justice of the peace and was aided by attachment. The summons was made returnable December 31 at 9 A. M., and was duly served upon the defendant, William Kuker, who appeared in the case only for the purpose of challenging the jurisdiction of the court. On the application of the plaintiff, Caroline Beindorff, the trial was adjourned from December 31 to January 8 at 9 A. M. On the day last named, at 10 o'clock A. M., the defendant was defaulted and judgment rendered against him for the amount claimed in the bill of particulars. This judgment having been affirmed by the district court, the record is brought here for review.

The principal ground relied upon for a reversal is that the record does not show that the plaintiff appeared before the justice on December 31 at 9 A. M. or within one hour thereafter. The transcript does show that the plaintiff appeared and obtained a continuance on December 31, but at what hour this was done is not disclosed. We quite agree with counsel for defendant that the hour at which plaintiff appeared and secured the adjournment is of vital importance, but we can not assent to the proposition that the justice, by failing to formally note the hour, lost jurisdiction of the case. It is true, of course, that the records of inferior courts must affirmatively show that they acted within the

scope of their authority. Their judgments can not be supported by presuming the existence of jurisdictional facts. But, when it appears that jurisdiction has once attached, the presumption will be indulged that they proceeded regularly, unless the contrary is shown. *Smith v. Victorin*, 54 Minn., 338; *Goodwin v. Barnett*, 28 N. E. Rep. [Ind.], 115; *Jewett v. Sundback*, 5 S. Dak., 111; *Bacon v. Bassett*, 19 Wis., 54; *Driscoll v. Smith*, 59 Wis., 38; 1 Jones, Evidence, 31; 12 Am. & Eng. Ency. Law [1st ed.], 274. From the opinion in *Driscoll v. Smith, supra*, we make the following excerpt: "The summons was returnable February 25th, at one o'clock in the afternoon. The entry in the docket is 'February 25, 1881, case called,' etc. Section 3623, Revised Statutes, requires the justice to call the case for trial at the hour specified in the process. Section 3754, Revised Statutes, requires the justice to enter in his docket 'the time when the trial is had,' and 'when the parties appeared before him.' The statute does not require that the exact hour of calling the case should be entered on the docket. *Bacon v. Bassett, supra.* All reasonable presumptions must be indulged in, in favor of the proceedings, before even a justice's court, and the presumption is that the case was called at the hour named in the process, nothing appearing to the contrary, and the statute not requiring the hour of calling it to be entered in the docket. *Bacon v. Bassett, supra,* is directly in point." In the case under consideration the justice had acquired jurisdiction of the parties and the subject-matter. He had authority at 10 o'clock to entertain a motion to postpone the trial, and it will be presumed that he made the order of adjournment at that time. He was required by the statute (Code of Civil Procedure, sec. 1086) to enter upon his docket the fact that the trial was adjourned, "stating on whose application, whether on oath or consent, and to what time," but he was not required to state at what hour the order was made. To sustain defendant's contention upon this point would be to hold that the justice, after having ob-

tained jurisdiction, lost it by failing to enter on his docket a fact which the statute did not require him to enter there. The case of *Muller v. Plue,* 45 Nebr., 701, cited by counsel for defendant, was correctly decided, but the facts in that case were entirely different from those in the case at bar. In that case the justice never acquired jurisdiction, and consequently there could be no presumption in favor of the regularity of his proceedings. In this case jurisdiction attached and every jurisdictional fact is evidenced by the record. The justice had, therefore, authority to render judgment on the merits, and there is nothing to indicate that such judgment is erroneous.

It is said that the justice delegated his judicial powers and that judgment was not rendered at the time required by the statute; but nothing of this kind appears in the record, and we are not authorized to look elsewhere for evidence of what transpired at the trial.

There is no merit in the assignment of error grounded on the failure of the justice to state in his docket that a writ of attachment was issued. It appears from the officer's return that a writ was issued and levied upon defendant's property, but we find no order in the record either dissolving or sustaining the attachment. In fact, excepting the order of adjournment, the justice made no interlocutory order which the defendant is entitled to have reviewed.

The failure to enter the bill of particulars at large upon the docket is complained of, but we can not conceive how the omission, if it were error, could prejudicially affect defendant's rights.

It is said that the record does not show that the note in suit had matured when the action was commenced, but the bill of particulars stated that the amount claimed was due, and we suppose the statement was sustained by the proof.

Complaint is made because the district court did not consider defendant's objections to the jurisdiction of the justice of the peace. These objections are in the record, but, after examining them, we are persuaded that they con-

tain nothing which could have rightfully influenced the district court or induced it to alter its decision. The judgment is

AFFIRMED.

STATE OF NEBRASKA V. STANDARD OIL COMPANY OF INDIANA.

FILED DECEMBER 4, 1901. No. 11,074.

Referee's Report: EXCEPTIONS: FINDINGS OF FACT: UNCHALLENGED VERDICT. Where a case is tried by referees and no exceptions to their report are filed within the time limited for that purpose, the findings of fact stand as an unchallenged verdict, upon which it is the duty of the court to pronounce judgment.

In 1897 the legislature of Nebraska passed an act known as the "Anti-Trust Law," which was introduced by Senator Gondring, of Columbus (Senate File 330), and went into effect July 10 of that year. Session Laws, 1897, ch. 79, p. 347; Compiled Statutes, 1901, ch. 91*a*, entitled "Trusts." Under section 4 of said act, Constantine J. Smyth, attorney general, on November 22, 1899, commenced this action to prohibit the defendant, a foreign corporation, from doing business in this state. January 16, 1900, the defendant filed a demurrer to plaintiff's petition, on the ground that this court had no jurisdiction, (1) because the supreme court is a court of enumerated powers and has no original criminal jurisdiction, and this action is criminal in its character; (2) because the supreme court has no jurisdiction in a special proceeding of this kind. This demurrer was overruled. Afterwards the attorney general made application for an order requiring the defendant to allow the attorney general to inspect and copy its books and records to obtain evidence to maintain the allegations of the petition herein. December 5, 1900, the supreme court handed down an opinion sustaining such motion. 61 Nebr., 28. The case was thereafter referred to Hon. Addison S. Tibbets and Hon. C. C. Wright. The remaining history of the case is disclosed by the opinion.—REPORTER.

Frank N. Prout, Attorney General, for the state.

Alfred D. Eddy, John M. Thurston, James M. Woolworth, W. D. McHugh and *McCoy & Olmsted, contra.*

SULLIVAN, J.

This action was brought for the purpose of preventing the Standard Oil Company, a foreign corporation, from continuing to do business in this state in violation of the anti-trust law. The issues were tried before referees, who, after hearing the evidence, made the following report: "That the evidence does not sustain the allegations of the plaintiff's petition. And as a conclusion of law we do find that the plaintiff is not entitled to the relief demanded, and that the defendant is entitled to judgment of dismissal in its favor." No exceptions to this report having been filed within the time limited for that purpose, it stands now as an unchallenged verdict, upon which the defendant is entitled to judgment as a matter of course.

The state having, according to the conclusion of the referees, failed to establish the essential averments of its petition, judgment on the merits will be rendered against it.

JUDGMENT ACCORDINGLY.

MARION O. AYRES V. THURSTON COUNTY.

FILED DECEMBER 4, 1901. No. 12,267.

1. **Public Corporation:** MONEY JUDGMENT. Where a public corporation, other than a sovereign state, incurs a legal liability, it may, unless otherwise provided by statute, be sued and a money judgment recovered against it.

2. **Lawful Claim:** RIGHT OF ACTION. The existence of a lawful claim implies, ordinarily, the right to enforce such claim by action.

3. **Counties:** ACTION: CLAIM: COUNTY BOARD: JURISDICTION. The provision of our statute (Compiled Statutes, 1901, ch. 18, art. 1, sec. 20) declaring that counties may be sued either in law or

in equity is express authority to enforce by action any claim of which the county board has not exclusive original cognizance.

4. ——: ——: ——: ——: COUNTY WARRANTS. County warrants are not within the class of claims which must, in the first instance, be presented to the county board for examination and adjustment.

5. ——: ——: ——: ——: ——: COLLECTION WRONGFULLY APPLIED. An action to recover a money judgment upon a county warrant may be maintained when the money for the payment of such warrant has been collected and wrongfully applied by the county authorities to the payment of other claims against the county.

ERROR from the district court for Thurston county. Tried below before GRAVES, J. *Reversed.*

Robert E. Evans, for plaintiff in error.

Hiram Chase, contra.

SULLIVAN, J.

This action was brought to recover a money judgment upon general fund warrants issued by the county of Thurston to Marion O. Ayres. The petition charges that the warrants were duly issued; that they are valid; that they were presented for registration and registered according to law; that since their issuance and registration from three to seven years have elapsed; that the funds against which they were drawn, and out of which they should have been paid, came long since into the hands of the county treasurer and were by the county authorities wrongfully applied to the payment of other claims against the county. It is also alleged that the county has refused either to pay the warrants or to make any provision for their payment. The defendant demurred to the petition, on the ground that the facts pleaded were insufficient to constitute a cause of action. The court sustained the demurrer, and the plaintiff failing to amend, judgment on the merits was given against him. This decision can not be sustained. It is grounded on the erroneous assumption that an ordinary

action can, under no circumstances, be maintained upon a warrant issued by a county or other political subdivision of the state. The general current of authority is certainly the other way. "Where a county refuses," says Valentine, J., in *Commissioners v. Brewer,* 9 Kan., 307, "to pay a claim against it, there seems to be no good reason why it may not be sued as well as any other corporation, or as any individual under like circumstances." The doctrine of the cases seems to be that where a public corporation other than a sovereign state incurs a legal liability it may be sued and judgment recovered against it. *Gillett v. Commissioners,* 18 Kan., 410; *Armstrong v. Tama County,* 34 Ia., 309; *Savage v. Supervisors Crawford County,* 10 Wis., 44; *People v. Clark County,* 50 Ill., 213; *International Bank v. Franklin County,* 65 Mo., 105; *Heffleman v. Pennington County,* 3 S. Dak., 162; *Hockaday v. Commissioners,* 1 Colo. App., 362. The existence of a lawful claim implies, ordinarily, the right to enforce such claim by action. The cases which counsel for defendant cites in support of his contention that counties are not liable to suit, unless made so by express statute, are cases in which there was no legal liability. *Wehn v. Commissioners,* 5 Nebr., 494; *Woods v. Colfax County,* 10 Nebr., 552. In these cases the remedy was denied, because the right did not exist. A recovery was not allowed, because there was no valid claim. In the case now before us it is conceded that the county is indebted to the plaintiff and is under a legal and moral obligation to pay him the amount due upon his warrants. The provision of the statute (Compiled Statutes, 1901, ch. 18, art. 1, sec. 20) declaring that counties may be sued either in law or equity means, of course, that they may be sued in any court of competent jurisdiction by any one having a lawful demand against them, and is express authority for the enforcement by suit of any claim which the county board is not required to consider and pass upon in the first instance. The warrants in suit are based upon claims duly audited and allowed; the liability of the defendant for their payment is unalterably fixed by

the orders under which they were issued, and they are, therefore, not within the class of claims of which the county board has exclusive original cognizance. While the question here considered has never before been squarely presented to this court for decision, it was assumed in *Brewer v. Otoe County,* 1 Nebr., 373, and again in *Pollock v. Stanton County,* 57 Nebr., 399, that an action upon a county warrant could be maintained under the circumstances disclosed by the petition in this case.

The judgment is reversed, and the cause remanded.

REVERSED AND REMANDED.

EDWIN T. PETERS, APPELLANT, V. EDWARD T. HUFF, APPELLEE.

FILED DECEMBER 4, 1901. No. 9,186.

1. **Abstract of Title:** QUÆRE. Whether in matters pertaining to the title of real estate a person may rely on an abstract of title duly made and certified, and without making an examination of the public records in order to free himself from the charge of culpable neglect, when relief is asked in a court of equity on the ground of mistake, *quære.*

2. **Abstract of Title:** When the record discloses that a person seeking relief in a court of equity, on the ground of mistake as to the condition of title to real estate with respect to which he had acted, relied on an abstract of title of which there is no evidence showing it to have been prepared by a competent and qualified abstracter, or to include or purporting to include information regarding the condition of the title as affected by pending suits regarding which the mistake occurred, and on account of which the relief was prayed, it can not be said the party asking the relief was free from culpable neglect, and a decree denying him such relief will not be disturbed on appeal.

3. **Reaffirmed.** Judgment of affirmance on former hearing, 60 Nebr., 625, adhered to.

APPEAL from the district court for Lancaster county. Heard below before HOLMES, J. Rehearing of case reported in 60 Nebr., 625. *Judgment of affirmance adhered to.*

Amasa Cobb and *Andrew E. Harvey,* for appellant.

Wolfenbarger & Williams, Addison S. Tibbets, James E. Philpott and *Lambertson & Hall, contra.*

HOLCOMB, J.

On a former submission of this cause a decision was rendered affirming the judgment of the trial court. *Hayden v. Huff,* 60 Nebr., 625. Appellant Hayden applied for and was successful in obtaining a rehearing. Since the order granting the rehearing the action has been revived in the name of Edwin T. Peters, as administrator of the estate of Hayden, now deceased. The rehearing was granted solely for the purpose of further investigating the question of whether in matters pertaining to the transfer of real estate a party may rely on an abstract of title to such real estate, without examination of the public records affecting the title thereto, and be free from the charge of culpable negligence and entitled to equitable relief, on the ground of mistake, by way of subrogation to the rights of a mortgagee whose mortgage had been satisfied in ignorance of other incumbrances attaching to the land, inferior to such mortgage, but which became effective and collectible by the satisfaction of such mortgage lien. A full statement of the case is contained in the decision first rendered, and need not here be repeated. From the statement of the case therein made and the opinion following, the logical deduction is that in no instance can reliance be had on an abstract of title properly made and certified to by a competent and qualified abstracter, but resort must be had in all cases to the official records showing the condition of the title, and of which constructive notice is always imputed, in order to free one dealing with respect to such title from negligence which will preclude any relief by a court of equity on the ground of mistake. From this position we wish to recede and thus leave the question an open one, to be decided in a proper case, when the question is fairly

presented by the record. In the case at bar, as disclosed by the record, at the time the appellant purchased the property on which existed the mortgage, which he afterwards paid, and as to which he asks for equitable relief against subsequent liens existing thereon, by being subrogated to the rights of the mortgagee, and to be allowed to foreclose his mortgage lien, the only information possessed by the purchaser as to the state of the title was furnished by the grantor, who produced an abstract of title to the property described in the deed of conveyance at the time of the purchase. The abstract itself is not introduced in evidence; nor is there anything showing the subjects covered by its terms, and the certificate of the abstracter. Whether the abstracter was competent and qualified to prepare abstracts of titles, and certify thereto, we have no evidence whatever, aside from an answer by appellant to a question propounded by the court giving the name of the abstracter who prepared an abstract furnished him, and saying he was a bonded abstracter. We are entirely in the dark as to what the abstract contained, or whether it was such, and contained all necessary information which would justify a reasonably prudent person in placing reliance on the instrument as containing all necessary information as to the state of the title, as the same might be affected by pending suits. In this case there were judgment liens on the land covered by the satisfied mortgage, by virtue of actions pending and begun prior to the first day of the term of the district court at which they were rendered, which, because of the pendency of the suits, related back and became liens as of the first day of the term. The land, it appears, had been conveyed during the same term and before the judgments were rendered. It is not shown that the abstracter purported to give any information or certify in the abstract furnished to any fact regarding suits pending at the time it was prepared; and it is probably true that the abstract and certificate did not purport to cover and include the condition of the title as affected by pending litigation either by or against the then owner of the fee.

Suppose the question was one as to knowledge, actual or constructive, of taxes which were a lien, and an abstract made no mention of taxes, could a party who relied on such abstract, and made no examination of the record, be held free from negligence? Or, in case a party personally examined the records affecting the title to real estate in which he was interested, but made no examination for suits pending when a term of court was in session, can it be said that he is diligent in protecting his rights, and entitled to favorable consideration by a court of equity whose relief must depend on his alertness in the management of his affairs, and freedom from negligence? The appellant was charged with constructive notice of what was contained in the public records affecting the title to the property by him purchased; and while that, of itself, will not prevent him from obtaining equitable relief of the nature applied for in this action, yet, to excuse him from the charge of culpable neglect, justifying a court of equity in the exercise of its equitable powers, to relieve him from his mistake, it should appear that he acted upon such information as a reasonably prudent man would ordinarily rely on; and where, as in the present case, there is nothing disclosed by the record showing that he made an examination of the public records, or relied on an abstract of title made by a qualified abstracter, purporting to show the pending litigation, or that none was pending which might affect his title, it can hardly be said that he has brought himself within the rule warranting a court of equity in granting him relief, or that the condition of affairs in which he found himself was not brought on by his own lack of effort, amounting to culpable negligence. For these reasons, and because of what is said in the first opinion, the judgment therein rendered will be adhered to and the decree of the lower court

AFFIRMED.

G. H. WIEDEMAN V. CLARENCE E. HEDGES.

FILED DECEMBER 4, 1901. No. 10,585.

1. **General Denial:** TESTIMONY. When an answer to a petition consists of a general denial, the defendant may introduce such testimony as will tend to disprove the testimony given by the plaintiff in support of his petition. For such purpose no other allegations in the answer are necessary. *Broadwater v. Jacoby*, 19 Nebr., 77.

2. **Value of Materials:** VERBAL CONTRACT: GENERAL DENIAL. In an action against a defendant for the value of materials alleged to have been sold to him under a verbal contract, he may, under a general denial, prove that the contract on which the cause of action is based was made with and the material sold to a third party.

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

Mockett & Polk, for plaintiff in error.

M. L. Easterday, contra.

HOLCOMB, J.

In the court below the defendant in error, plaintiff therein, began an action for the recovery of the value of certain material alleged to have been sold the defendant, plaintiff in error, under a verbal contract, to be used in the manufacture of certain machinery by the defendant and others associated with him, which material, at the defendant's request, was furnished to the foreman engaged in the manufacture of such machinery. The answer was a general denial. Verdict and judgment were rendered against the defendant, and to secure the reversal thereof he prosecutes error in this court.

On the trial the defendant offered evidence tending to prove that he and others, as partners, were engaged in the manufacture of the machinery referred to, and that the material for which the suit was brought was contracted for by the partnership, and sold to it by the plaintiff, and not to the defendant individually. All such evidence was ex-

cluded on the objection of the plaintiff, and the rulings thereon duly excepted to by the defendant. By these rulings error was committed to the defendant's prejudice. Evidence tending to prove that the contract pleaded in the petition and relied upon by the plaintiff as his cause of action was made with and the material sold to the partnership, it occurs to us, would controvert and rebut the facts which the plaintiff must establish in order to maintain his action, and, if so, the offered testimony was admissible under a general denial. *Broadwater v. Jacoby,* 19 Nebr., 77; 1 Ency. Pl. & Pr., 818, and authorities there cited. If suit is brought against A. for goods alleged to have been sold him, it would seem that the facts necessary to be established under the petition before a recovery could be had could hardly be more directly controverted than by evidence establishing the fact that the contract was made with and the goods sold to B., and all such testimony is admissible under a general denial. The learned trial court, it appears, took the view that the defendant's liability was collateral, in that he had assumed and agreed to pay for the goods sold the partnership, and it was immaterial who was liable on the original undertaking. But counsel for plaintiff contends that the suit is founded on an original undertaking of the defendant, who thereby became a debtor by virtue of a contract entered into whereby he bought and agreed to pay for the material in the first instance, and to whom alone credit was extended, and the petition is evidently framed on that theory. The defendant's liability under the allegations of the petition, if existing, is that of a principal debtor on an original and independent undertaking; and, to relieve himself of the alleged obligation, he should, under his general denial, be permitted to offer evidence tending to prove that the contract sued on was made with and the goods sold to a third party. For the reason stated, the judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

S. WARREN LAMSON, APPELLEE, V. DAVID BOHRER ET AL., APPELLANTS.

FILED DECEMBER 4, 1901. No. 10,724.

Judicial Sale: ORDER: OMISSION OF INFERIOR LIEN: REVIEW. Where real estate is sold in pursuance of an order of the district court entered in a decree of foreclosure, and there is omitted from the order under which the sheriff acts in making such sale a sum found and decreed to be a third lien, and the property did not sell for enough to satisfy the prior liens, such omission in no way prejudices the rights of the owners of the fee title to the land so sold, and is not sufficient ground for setting aside such sale.

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

Dryden & Main, for appellants.

William Gaslin, contra.

HOLCOMB, J.

On an application for confirmation of a sale of real estate made in foreclosure proceedings the owners of the fee title objected to the entry of the order on the ground "that the order of sale and all proceedings thereunder were based upon the original decree and were not in accordance with the decree as modified November 12, 1897, in that a lien of David Bohrer for $892.25 was entirely omitted from said proceedings." The objection was overruled and the sale confirmed, from which order defendants appeal.

From the record it appears that in the rendition of a decree in the action, the plaintiff was given a first mortgage lien on the mortgaged premises for the sum of $2,606.70, and a tax lien for the sum of $257.49. One of the defendants was given a junior tax lien for $230.40, which was decreed to be a second lien. Another defendant was given a third and mortgage lien for the sum of $390. The

property was ordered sold, and the proceeds brought into court, to be applied on the several liens found to exist according to their priorities. Afterwards, and on the 12th day of November, 1897, on motion of one of the defendants, the decree first rendered was modified so as to give the moving defendant a second mortgage lien on the same premises for $892.25, thus displacing the lien for $390, above mentioned, which, by the modified decree, was made a fourth lien. The property was sold under and in pursuance of the decree first rendered, omitting therefrom the subsequent modification with reference to the third lien as found and determined in the modified decree. In the original decree and as modified the proceeds were directed to be brought into court for distribution, to be applied in the order of priority as fixed therein. The property was duly appraised, sold, and return made by the sheriff of his doings in executing the decree under which he acted. The property was appraised at the sum of $3,526.35, and purchased at the sale thereof by the plaintiff for $2,950, which, after deducting costs, left $2,875.90 to be applied in satisfaction of the decree. The plaintiff's lien alone, which, under the modified decree as well as the original, was a first and senior lien to all others, was not satisfied in full from the proceeds of the sale. After deducting the costs, there yet remained the sum of $638.75 unsatisfied. Nothing remained to be applied on the junior liens found in the decree. How, then, can it be said that any of the parties have been prejudiced by the failure to include in the decree under which the land was sold the modification which only affected subsequent liens as to their respective priority? Plaintiff's mortgage and tax lien at all times remained the senior incumbrance, as first determined in the original decree. What was in fact done and the legal effect thereof, was to omit from the decree under which the sheriff proceeded, mention of the third lien found to exist when the decree was modified. The question, in any view of it, affects only the junior lienors, and does not extend to any of the rights of the holders of the legal title. It is

a matter which perhaps might have a direct bearing on the distribution of the proceeds in the event the amount for which the land sold was sufficient to more than satisfy all liens superior to the third. The proceeds under the original as well as the modified decree were to be brought into court, and there distributed in the order of priority as found by the decree. The court yet had control of the distribution of the proceeds, and could direct their application to the satisfaction of the several liens in conformity with the modified decree. The owner of the fee, unless there was an excess above the amount required to satisfy all liens found existing on the land and the costs of the proceedings, would have no substantial legal or equitable interest in such proceeds. He could only insist that the lands be sold as provided by law, and the proceeds applied, as far as they would reach, in satisfaction of the liens adjudged against the property. This right has been accorded to the owner of the land in the present instance. The irregularity can only be regarded, under the facts as disclosed by the record, as a harmless error, not prejudicial to the substantial rights of the parties complaining, and is therefore no sufficient ground for sustaining the objection interposed and setting aside the sale of the premises made in the manner stated. *Cooper v. Foss,* 15 Nebr., 515; *Miller v. Lanham,* 35 Nebr., 886; *Warren v. Foreman,* 19 Wis., 44.

The final order of confirmation was properly entered, and is therefore

AFFIRMED.

TOWN OF DENVER V. DANIEL J. MYERS.

FILED DECEMBER 4, 1901. No. 10,731.

1. **Road District:** NOT A POLITICAL ENTITY OR CORPORATION. A road district is not a political entity or corporation in which property rights may invest, and which, as such, has corporate powers or capacity to conduct the affairs for which it is created.

2. **Road Overseer:** OFFICER OF TOWNSHIP. A road overseer is not an officer of the district, but of the township in which the road is situated.

3. **Highways:** DUTIES: TOWNSHIP AND COUNTY: POWER AND AUTHORITY. The duties, power and authority relating to public highways devolve on the township and county which are by law directly empowered to act regarding such matters.

4. **Road Overseer:** BREACH OF OFFICIAL DUTY: RIGHT OF ACTION. A town or a township in counties under township organization may maintain an action for a breach of official duty by a person holding the office of road overseer.

5. ———: ———: DUTY TO ACCOUNT. It is the duty of a road overseer to account to the proper officer or officers for all the moneys coming into his hands, the disbursements made, and for what purpose.

6. **Report:** COMPREHENSIVE: INTELLIGIBLE: CORRECTNESS. The law implies that such report shall be sufficiently comprehensive and intelligible that its correctness may be inquired into and passed upon by those whose duty it is to examine and to approve the accounting so made.

7. **Road Overseer:** ACCOUNT: APPROVAL BY BOARD. Before the road overseer is authorized to apply district road funds in his own hands to his own use for time consumed in warning hands, overseeing work, and making his report as provided by section 96, chapter 78, Compiled Statutes 1901, his account therefor must be presented to and approved by the town board.

8. ———: DISBURSEMENT OF FUNDS: RESPONSIBILITY. In the disbursement of funds coming into the hands of a road overseer in the repair and improvement of the public highways, he is charged with the responsibility of a faithful discharge of the duties imposed; and if in making such disbursements he pays more than the services or materials are reasonably worth in the market, and the disbursement is not made in good faith, or is made fraudulently or corruptly, the excess payment will be unauthorized, for which he would be liable as for misconduct in office.

9. **Witness:** INSTRUCTION. Where a defendant has been called by and given testimony on behalf of the plaintiff, it is error to instruct the jury "that a party presenting a witness is bound by the testimony of such witness, even though it be unfavorable to his side of the case."

10. **Conflicting Instructions.** Where there are two conflicting instructions which are confusing to the jury and leave them in doubt and uncertainty as to which is correct, the incorrect instruction will be deemed prejudicially erroneous.

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

Tibbets Bros. & Morey, for plaintiff in error.

McCreary & Button, contra.

HOLCOMB, J.

This is a civil action begun on the authority of the town board by the plaintiff, a political subdivision of Adams county, which is governed by the township organization law, against the defendant as road overseer of one of the road districts within the township. The action is founded on the alleged receipt of moneys from the township treasurer by the defendant for use in repairing and improving the public highways over which he was overseer, and for his failure to account for such moneys, or the disbursement thereof. A trial to the court and jury resulted in a verdict and judgment in favor of the defendant, and the plaintiff prosecutes error therefrom in order to obtain a reversal of such judgment.

We are met at the threshold of the inquiry with the objection on the part of the defendant that the petition does not state a cause of action, and therefore in no event can plaintiff obtain any relief. If the objection is well taken, it is useless to proceed further in the consideration of the alleged errors relied on to secure a reversal of the judgment rendered below. The objection, as we understand counsel, is that the road district of which the defendant was the supervisor is a political entity,—a municipal corporation,—authorized to sue and to be sued and to conduct its business as such corporation, and that, upon the payment of the money sought to be recovered by the town treasurer to the road supervisor, the road district became vested with the right to the money so paid, and the township thereby lost all interest therein, or right to maintain an action for an accounting showing the expenditure of

such funds. The objection, as we view the statute, is unsound and untenable. The road district is not a political entity or corporation in which property rights may vest, and which as such has corporate powers or capacity to conduct the affairs for which it is created. The county and townships are divided into road districts merely for the purpose of the election of road supervisors, and the better caring for and improving the same by that officer. A road overseer is not an officer of the district, but of the township in which the road district is situated. This is made manifest by a casual perusal of the different sections of the statute relating to the subject. By chapter 18, article 4, sections 18 and 20, Compiled Statutes, 1901, road overseers are, with others, specifically enumerated as township officers; and they are so recognized in the general laws providing for their election, qualification, and the duties to be by them performed. A road district has no legal existence as a political subdivision in the sense that it may own or control property, or manage the corporate affairs relating to the establishment and improvement of the public highways within its borders, through its officers or agents chosen for that purpose. There is no statutory authority empowering a road district to exercise corporate rights and powers for any purpose. The duties, power and authority relating to public highways devolve on the township and county, which are by law directly empowered to act regarding such matters. Section 17 of article 4 of the chapter mentioned provides what the corporate name of a town shall be, and that all actions by or against the town shall be in its corporate name. Section 62 provides for the bringing of suits in its corporate name, either at law or in equity. Section 43 provides that every person retiring from a town office is in duty bound required to deliver to his successor in office all records, books, papers, moneys and property belonging to such office held by him. By section 96 of chapter 78 it is made the duty of each road overseer to make a settlement of his accounts when required by the town board, showing the amount of money coming into

his hands, and how the same has been expended. From the foregoing it would seem quite clear what the powers, duties and relations of each are, and that in a proper case the township could maintain an action for a breach of official duty by a person holding the office of road overseer. For these reasons the objection to the sufficiency of the petition must fall.

The real controversy between the plaintiff town and the defendant road overseer is over the disbursement of the sum of $150 which was received by the overseer from the township treasurer to be used in the improvement of the public highway in the district of which he was the overseer. A report was filed by the defendant, as road overseer, with the town board, which was considered at two or three meetings of the board and then rejected, and this action was instituted to recover the whole sum received by the defendant. The items of expenditure were of the most general character and gave no very intelligent idea of how the money was applied. Of the $150 received, all but $12 was reported as being paid to the defendant himself or to his son, to the latter $84. The correctness of the account was controverted because $3 per day for man and team was paid to the son, when it is claimed the value of such services did not exceed $2.50 per day, and the items paid by the defendant to himself were disputed altogether. The defendant, in the performance of his official duties, was acting as the agent or trustee of the township, and he is and should be held accountable for a faithful discharge of the duties he had undertaken by the acceptance of the trust. It was his duty faithfully to account to the proper officer or officers for all the moneys coming into his hands, the disbursements made, and for what purpose, with sufficient certainty that the correctness of the report so made might be examined into and determined; and on his failure to do so an action would lie for the money so received and for which he failed to account. It is his duty, under the statute, to make such report; and it is implied that the report shall be sufficiently comprehensive and intelligible

that its correctness may be inquired into and passed upon by those whose duty it is to examine and approve the accounting so made. It is likewise his duty to account to and hand over to his successor all moneys and property in his hands at the close of his term of office.

In the account of the defendant to the town board is a claim of $8 for four days warning hands, at $2 per day, and $12 for six days in overseeing work on the roads at $2 per day; total, $20. By section 96, chapter 78, it is provided that in the settlements required to be made by the road overseer with the town board, he shall be allowed the same amount as is allowed overseers in their settlements in counties not under township organization, which sum shall be paid out of any money belonging to his district, and if there be not sufficient money belonging to the district he may be paid out of the township road fund, or for any balance due him he may receive from the town board a certificate which may be received in payment for labor tax for any succeeding year. By referring to section 82, governing settlements with overseers in counties not under township organization, it is provided that the overseer shall be allowed $2 per day, including the time necessarily spent in notifying the hands, superintending the work on roads and making out his return, but not to exceed the sum of $30 in any one year.

As we construe these sections, before a road overseer is entitled to take and apply to his own use funds in his possession belonging to the road district, or out of the township road fund, or before receiving a certificate by which he may have his labor tax applied, he is required to submit to the town or county board his claim for services of the kind specified, and for the amount allowed per day, not exceeding the total sum mentioned in any one year and have the same examined and allowed, whereupon he becomes entitled to compensation for such services by one or more of the methods pointed out by the statute. The defendant in the case at bar seems to have rested his defense on his right to perform the services mentioned, and

make his own charges therefor, and take from the funds in his hands for the improvement of the roads the sum so charged, regardless of the approval or disapproval of his account by the town board. This can not be the law, and if allowed to prevail, would be the subject of much abuse if not direct official dishonesty.

It is argued by plaintiff in error that the defendant having admitted the receipt of the money with which he is charged, it was his duty to account for its disbursement in the manner provided by law, and the burden was on him in the action to show disbursement of the entire sum received in the manner provided by law. This is perhaps stating the rule too broadly. He came by the funds rightly, and for any misappropriation or failure to disburse them in the manner provided by law an action would lie, but the burden of proving the cause of action alleged in the petition would not change because of an admission of the receipt of the funds. It was his duty to account for the funds so received, and this duty he could be compelled to perform. He was also charged with a faithful discharge of the duties he assumed when he accepted the office, and if in making disbursements of the funds received by him for the purpose of improving and repairing the public highways, he pays more than the services or materials are reasonably worth in the market and does not act in good faith regarding the matter, or acts fraudulently or corruptly, the excess payment would be unauthorized, and he would be liable as for misconduct in office. In other words, he is held to a faithful and honest conduct of the affairs of his office in the disbursement of funds coming into his hands, as well as in all other respects.

It is also argued that the evidence will not justify a verdict for the defendant which in effect finds that he has lawfully disbursed the funds coming into his hands, and for this reason the verdict is unsupported by and contrary to the evidence. The defendant was called as a witness on behalf of the plaintiff for the purpose of showing where and when the work had been performed and the material

furnished for which the charges were made in his report to the town board, which report was pleaded in his answer and introduced in evidence. On cross-examination the defendant was asked: Q.—"Was the money as appears from that statement paid out by you for work and material in that road district?" A.—"Yes, sir." The statement referred to was the one made to the town board and rejected. This answer, with the statement, is all the evidence showing or tending to show the disbursements made by the defendant of the sum sued for. Without deciding the question of whether the evidence is insufficient to support the verdict of the jury in the way it was submitted to them for their consideration, we pass to an instruction which has a material bearing on the jury's consideration of the evidence before them and must, we think, be condemned because not properly submitting to the jury the questions of fact in the case. The defendant, as stated, was called by the plaintiff, and the evidence just referred to was elicited in cross-examination of the defendant by his counsel.

In the instructions to the jury at the request of the defendant, one was given as follows: "The jury is instructed that a party presenting a witness is bound by the testimony of such witness even though it be unfavorable to his side of the case." Under this instruction, conceding the defendant's testimony to be sufficient to support a finding in his favor, the jury could do nothing but find for him. They had no choice in the matter and were not at liberty to weigh and consider all the facts and circumstances of which there was evidence. The plaintiff, declares the instruction, is bound by the testimony of the defendant, although unfavorable to its theory of the case; that is, the defendant having been called as a witness on behalf of the plaintiff, and having said the money he received was all disbursed as shown by his report, the plaintiff is bound by the statement and precluded from proving its case by other competent evidence. The instruction can not be upheld. It was manifestly prejudicial to the plaintiff, in view of the circumstances under which the evidence was submitted.

As we read brief of counsel for defendant, they do not undertake to defend the instruction. All that is said in its defense is that another instruction correctly stating the law on the same point was given. But this can not obviate the evil contained in the incorrect instruction. The jury, in all probability, gave the erroneous instruction all the weight its language imported. In any event, the two conflicting instructions could at best only confuse the jury, and leave them in doubt and uncertainty as to what was in fact the law regarding the weighing of testimony given under the circumstances. *Farmers' Bank v. Harshman,* 33 Nebr., 445; *Chicago, B. & Q. R. Co. v. Anderson,* 38 Nebr., 112; *Wasson v. Palmer,* 13 Nebr., 376; *Fitzgerald v. Meyer,* 25 Nebr., 77; *Howell v. State,* 61 Nebr., 391. That the instruction quoted is erroneous, see McKelvey, Evidence, p. 327 *et seq.;* 1 Rice, Evidence, pp. 610-613, and authorities cited; *Hunter v. Wetsell,* 84 N. Y., 549; *Babcock v. People,* 13 Colo., 515; *Wallach v. Wylie,* 28 Kan., 138.

The judgment must be reversed and a new trial awarded, which is accordingly done.

REVERSED AND REMANDED.

HANS J. KERR V. STATE OF NEBRASKA.

FILED DECEMBER 4, 1901. No. 12,022.

1. **Application for Continuance:** DISCRETION OF TRIAL COURT. An application for a continuance is addressed to the sound discretion of the trial court and its ruling thereon will not be held erroneous, unless an abuse of discretion is disclosed by the record.

2. **Due Diligence:** MATERIALITY OF EVIDENCE: CUMULATIVE TESTIMONY. When due diligence is not shown to have been exercised, or when the materiality of the proposed evidence does not appear, or when the proposed evidence may be procured from witnesses within the jurisdiction of the court, it is not error to overrule an application for a continuance for the purpose of securing the same character of testimony from witnesses residing in other states.

3. **Motion for New Trial:** NEWLY DISCOVERED EVIDENCE. It is not error to overrule a motion for a new trial on the ground of newly discovered evidence, where it does not appear that such evidence, if introduced on a retrial, would probably change the result reached on the first trial.

4. **Application for Continuance:** AFFIDAVITS: BILL OF EXCEPTIONS. Affidavits in support of an application for a continuance or of a motion for a new trial, not made a part of the bill of exceptions and found only in the transcript of the record certified to by the clerk of the trial court, are not properly presented to a reviewing court for consideration in determining whether the lower court correctly ruled on such application.

5. **Jurors:** CHALLENGE TO ARRAY: TALESMEN: TWO YEARS LIMIT. It is not a good ground of challenge to the array of jurors selected for a regular term of court that in selecting the names from which to draw those required to be summoned to serve as jurors the county commissioners selected the names of several persons who had served on the regular panel or as talesmen within two years next preceding such term, and that of those drawn to serve at such term there were but nineteen who had not previously and within two years performed jury service in the same court.

6. ———: ———: ———. It is the duty of the county commissioners, so far as practicable, to select the names of those against whom the objection of prior jury service can not be urged; but where five of those drawn and summoned to serve on the regular panel are disqualified to serve in a cause, if objection be interposed on that ground, this is no sufficient reason for sustaining a challenge to the entire panel.

7. **Intoxicating Liquor:** EVIDENCE: ANALYSIS. Where there is evidence tending to prove that a liquor claimed to be intoxicating was of the same kind and quality as that alleged to have been sold in violation of law, it is not error to admit the testimony of a witness who has analyzed such liquor as to its intoxicating properties.

8. **Instruction:** REQUEST: REVIEW. Where no cautionary instruction has been requested with reference to the consideration of the testimony of witnesses employed as detectives, a defendant can not predicate error because of the trial court's failure to instruct the jury on that point.

9. **Other Assignments.** Other assignments of error examined, and found not well taken.

10. **Evidence:** VERDICT. Evidence examined, and found sufficient to support the verdict of the jury.

ERROR from the district court for Phelps county. Tried below before ADAMS, J. *Affirmed.*

Hall & Reed and *Rhea & Manatt,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy,* for the state.

HOLCOMB, J.

The defendant in the court below was prosecuted for selling intoxicating liquors without having a license therefor as required by law. The information contained several counts of alleged different sales, on two of which he was convicted after a trial to the court and jury on a plea of not guilty. He was adjudged to pay a fine of $200 on one of the counts on which he was found guilty, and $100 on the other, and the costs of the prosecution. To secure a reversal of the judgment thus imposed he brings the case to this court by proceedings in error.

It is practically admitted that the defendant made the sales charged and the defense interposed that the liquor sold is what is denominated "malt mead," being a "soft" or "temperance" drink as expressed by him, and non-intoxicating. He was engaged in conducting "a temperance saloon," selling, as is contended, only non-intoxicating drinks, cigars, etc. Among the refreshing drinks he dispensed to his thirsty patrons was a liquor put up in quart bottles, and labeled "Malt Mead," which he claims he sold at the time the unlawful sales charged were made, and that such liquor was not intoxicating, and did not contain in it a percentage of alcohol sufficient to intoxicate. It also appears from the evidence that besides the malt mead, which was contained in bottles labeled as such, the defendant dispensed liquors from unlabeled quart bottles of which he had a barrel or more, and which it was testified was the liquor sold which was charged in the information, and that it was beer, and intoxicating. At the time of the

arrest of the defendant the liquors then in his possession were seized, and in the seizure was a barrel of bottled liquors unlabeled and another barrel the bottles in which were labeled "Malt Mead." The witnesses for the state testified that the bottles purchased from the defendant, for the illegal sales of which he was being prosecuted, had no labels upon them. The jury were justified from the evidence, from our view of the record, in finding that the sales of liquor charged were other than malt mead, and were, in fact, as testified, beer, and intoxicating. This finding might properly be reached entirely aside from the question of whether malt mead was an intoxicating liquor, regarding which there seems to be a controversy. The evidence warrants the conclusion that the unlabeled bottles did not contain the same liquors as those labeled "Malt Mead."

Of the alleged errors complained of it is contended the trial court erred in overruling a motion for a continuance, presented by the defendant at the term of court at which he was tried and convicted. The term began December 17, 1900. On September 17 prior thereto the defendant was arrested, charged with the offense for which he was tried, and after a preliminary hearing was required to enter into a recognizance for his appearance in the district court on the first day of the next term to answer such charge. The motion for a continuance was based on the allegation that H. W. Wiley, of Washington, D. C., and Dr. P. Fisher, of Milwaukee, Wis., were important witnesses on defendant's behalf ; that they were practical chemists, and would testify that the kind of beverage which defendant was charged with selling contained less than one and one half per cent. of alcohol, and was not intoxicating; that he knew of no other witnesses by whom he could prove the same facts, and that since the preliminary examination he had written to various parties for the testimony set out, and did not find out until December 15 the names and locations of the witnesses mentioned; that the witnesses, if given an opportunity to analyze malt mead, would testify that it was

not intoxicating. An additional affidavit was filed in support of the motion in which it is stated that the parties selling the liquors to the defendant, who resided in St. Joseph, Mo., were material witnesses, and would testify that at the time of sale they represented to the defendant that the malt mead sold was a temperance drink, and non-intoxicating, and contained less than one and one-half per cent. of alcohol, and that the liquors were purchased upon the representations so made. If such representations were in fact made as alleged and relied on they could hardly operate as a defense, if in fact intoxicating liquors were being sold in violation of law. We find no such abuse of discretion in the ruling of the trial court on the motion for a continuance as amounts to prejudicial error. The rule is firmly established that an application for a continuance is addressed to the sound discretion of the trial court and will not be disturbed, unless it appears that there has been an abuse of discretion. The defendant did not, in his application, show that he had used due diligence in procuring the desired testimony, nor did he show that the liquors sold, or the same kind, could not have been analyzed by other competent practical chemists easy of access and within the jurisdiction of the court, of whom, we are all cognizant of the fact, there are many. The materiality of the evidence is not satisfactorily shown. The affidavit was obviously intended to show that there was a brand of malt mead which, upon analysis, would be found to contain less than one and one-half per cent. of alcohol, and non-intoxicating. But the defendant made affidavit to no state of facts showing that the liquors purchased by him and then sold, for which he was charged with violating the law, are of that identical brand. The statement in the affidavit that if the absent witnesses had an opportunity to analyze the kind of liquor sold they would testify it contained less than one and one-half per cent. of alcohol, is a mere conclusion. What per cent. of alcohol the liquor sold or that of the same kind unsold contained, and whether or not it was intoxicating, was a matter which any competent prac-

tical chemist could determine upon analysis; and many of them could have been procured, if desired, within the state, and without the necessary time and expense to secure the testimony of those of the same profession in Washington or Wisconsin. The affidavit disclosed no reasonable probability of securing the testimony of the witnesses mentioned upon any material fact in issue in the case. Their testimony to the effect that a liquor called "malt mead," which was non-intoxicating, was brewed, and sold in the market, could avail the defendant nothing in the absence of any evidence connecting the liquors sold by him as of the same kind and quality.

In the motion for a new trial one of the grounds assigned was newly discovered evidence. The showing in support thereof consisted of what are purported to be the depositions of the witness Dr. P. Fisher heretofore mentioned, and another, holding a subordinate position, as analytic chemists of beers malted by the Pabst Brewing Company, of Milwaukee, Wis., in which they testify to the manufacture by that company of a liquor called "malt mead" and that it is non-intoxicating. What has been said regarding the materiality of the testimony spoken of in the affidavit for a continuance applies equally well to the motion for a new trial on the ground of newly-discovered evidence. As before stated, the jury were justified in finding that the liquor sold was not malt mead and was intoxicating; and, even though it be conceded that malt mead was a non-intoxicant, that fact need not necessarily and probably would not change the result in the event of a retrial. This of itself is sufficient to sustain the action of the trial court in overruling the application for a new trial on that ground. Another and insurmountable obstacle presents itself, which will not permit defendant's contention being sustained with respect to the ruling complained of, and that is, the affidavit in support of the motion is not incorporated in the bill of exceptions, but is found in the transcript of the record certified to only by the clerk of the district court, of which it legitimately forms no part. The

affidavits may very properly be disregarded altogether, and it follows that the court's ruling is conclusively presumed to be correct and in consonance with the evidence pertaining to the matter.

It is next argued that error was committed in the ruling of the trial court on a challenge by the defendant to the array of jurors selected for that term of court and in overruling the challenge so made. The objection to the list of names or panel of jurors selected to serve during that term of court was based on the claim that in selecting the names from which to draw those required to be summoned to serve as jurors during the regular term of court the county commissioners selected the names of several persons who had served on the regular panel or as talesmen within two years next preceding the term at which the defendant was tried, and that of those drawn to serve at such term there were but nineteen who had not previously and within two years performed jury duty in that court. The objection is untenable. While the fact of the service of a juror within two years in the same court is a good ground for challenge for cause, and while it is the duty of the county commissioners so far as is practicable to select those against whom this objection can not be urged, the fact that five of those thus selected are disqualified to serve if objection be interposed on that ground is no sufficient reason for sustaining a challenge to the entire panel.

It is also contended that the court erred in admitting the testimony of an expert witness, a chemist, who testified in behalf of the state as to the result of a chemical analysis of the liquor contained in unlabeled bottles found in a barrel in defendant's possession at the time of defendant's arrest and the seizure of the liquors spoken of, and who testified that the contents of the bottle analyzed was a heavy beer, containing about five per cent. of alcohol, and was intoxicating. It is claimed there is no evidence showing any relation or connection between the liquor analyzed and that sold by defendant some fifteen days prior to the time of seizure. The liquor appeared to be the same and

was contained in similar unlabeled bottles, and there is direct evidence by witnesses for the state tending to prove that it was the same kind and quality, and tasted the same, and was intoxicating, as was that sold for which the defendant was being prosecuted. Whether or not it was the same kind and quality of liquor as that sold was a proper question of fact for the jury under the evidence, and no error was committed by the introduction of the testimony objected to.

It is also argued that the trial court erred because it failed to give to the jury a cautionary instruction with reference to their consideration of the testimony of certain witnesses on behalf of the state who had been employed as detectives for the purpose of securing evidence of defendant's violation of the law by selling intoxicating liquors without being licensed so to do. Since no request was made for an instruction of the nature mentioned, no error was committed because of a failure to instruct on that point.

Some other objections are presented and argued which have been examined and found not well taken, and which are not deemed worthy of a more extended discussion.

Lastly, it is argued that the evidence is insufficient to support the verdict. The sale charged was admitted, and there is direct and positive evidence that it was an intoxicating liquor, that it was beer with the intoxicating qualities commonly attributed to that liquor, and that it did in fact intoxicate those purchasing and using it. While there was a determined effort to make it appear that the liquor sold was what is termed "malt mead," which is, perhaps, a milder drink than beer is commonly regarded to be, and while there is a conflict in the evidence on that point, and whether malt mead is intoxicating, it was for the jury to determine the credibility of the several witnesses and the weight to be attached to the testimony of each and all of them; and their finding will not be disturbed merely because the evidence is conflicting. Their verdict is supported by ample competent evidence, and can not rightfully be overturned.

The defendant's guilt having been established in the mode prescribed by law, the judgment of the trial court should be permitted to stand, and the same is accordingly

AFFIRMED.

PLANO MANUFACTURING COMPANY V. JOHN NORDSTROM.

FILED DECEMBER 4, 1901. No. 10,646.

Commissioner's opinion, Department No. 1.

1. **Special Appearance:** GENERAL APPEARANCE. A general appearance in justice court without further objection, after the overruling of a special appearance and motion to quash service of summons on its agent, by a foreign corporation, confers jurisdiction on the justice to render judgment against it, and also on the district court on appeal.

2. **Appeal:** AMOUNT OF DAMAGES: INCREASE: JURISDICTION. On appeal, the amount of damages claimed on the same causes of action may be increased, if not beyond the jurisdiction of the lower court.

3. **Principal and Agent:** APPARENT AUTHORITY. Principal is bound by the acts of an agent within the limit of his apparent authority, if the other party has no reason to question his authority.

4. ——: FRUITS OF CONTRACT. Principal can not retain the fruits of an agent's contract and repudiate the agreement itself.

ERROR from the district court for Saunders county. Tried below before SEDGWICK, J. *Affirmed.*

George W. Cooper and *V. L. Hawthorne,* for plaintiff in error.

Samuel H. Sornborger and *George W. Simpson, contra.*

HASTINGS, C.

The petition in error in this case embraces thirty assignments. The errors complained of and argued in the brief of plaintiff in error, defendant below, are not so numerous. They are: First, lack of jurisdiction of the person of the defendant on the ground that it does not appear that

the defendant company was doing business in the state; second, that the issues were changed, because on the appeal the plaintiff was permitted to allege and show the payment of the second of the two notes, which it was claimed should have been given up to him, whereas before the justice he had claimed compensation for the payment of only the first of them; and, third, error of the court in giving instructions Nos. 4 and 7, both relating to the actions of one McNear, who was claimed by the plaintiff to have been the agent for the defendant company. It is claimed that there was no evidence either of authority on the part of McNear to make the contract sued upon, or of ratification by the company. If this is true, the two instructions are undoubtedly erroneous. It therefore becomes necessary to examine these three grounds of error, and none of the others need be considered.

As to the first, the action was begun in justice court by the filing of a bill of particulars setting out that the defendant company is a corporation organized and doing business in the state of Illinois, and plaintiff bought of it in the year 1895 a Plano harvester and binder; that the machine did not do satisfactory work, and in November an agreement in writing was made, as follows:

"WAHOO, NEBR., Nov. 26, 1895.

"This agreement made this 26 day of Nov. between the Plano Mfg. Co. and John Nordstrom: Whereas, Mr. Nordstrom bought in the season of '95 one Plano H. & B. which failed to do good work, said Plano Mfg. Co. agree to, in the season of '96, repair free of charge said machine and make it do good and satisfactory work. In consideration John Nordstrom gives 2 notes $40 each,—one due June 1st '97, $40; 1 due June, '98, $40,—and in case the Plano Mfg. Co. fails to make said machine do good work, said notes shall be refunded, or another machine put in its place. Plano Mfg. Co. by N. D. McNear, agent, E. G. Burklund";

that the machine failed to work satisfactorily and in accordance with the terms of this agreement, and plaintiff

demanded a new machine or a return of his notes, and got neither, but was compelled to pay $49.20 to take up the first one of the notes. Summons was served on McNear, agent for said company, in Saunders county, Nebraska. The defendant appeared specially and filed a motion and affidavit to dismiss for want of jurisdiction. This motion was overruled by the justice, and the defendant then filed an application for a continuance, which was granted. On November 19, the time set, the parties appeared and by mutual agreement the cause was again continued until November 27. On that day a trial was had, resulting in a judgment for plaintiff, from which the defendant company appealed. On the appeal a petition was filed by plaintiff substantially like the bill of particulars, on which defendant moved for judgment on the ground that it showed no cause of action and no jurisdiction. An amended petition was then filed, alleging that the transactions occurred in Saunders county, and alleging damages at the sum of $80 and interest from November 26, 1895, at 10 per cent., by reason of the sale and transfer of the two $40 notes mentioned in the contract and their non-return. To this petition the defendant company answered, admitting the sale of the harvester and binder; admitting the giving of the two notes and their sale, and denying every other allegation in the petition. Defendant also alleged that it was a corporation organized and doing business in Illinois; that the action was instituted by filing a bill of particulars in justice court, a copy of which was set out; that a trial was had on that bill of particulars and judgment rendered for $45; that the bill of particulars showed that it was then a foreign corporation and contained no allegation of its doing business in Nebraska, or that it was engaged in any corporate act or acts in this state; that the justice had no jurisdiction, and the district court acquired none by appeal; that the order allowing plaintiff to amend his petition so as to state jurisdictional facts is void, and that the facts in the amended petition constituted no right of action and raised a different issue

from the one on which the cause was tried in the justice court. The plaintiff moved to strike out from the company's answer all that portion relating to the jurisdiction of the action, and also separately that portion relating to the change of the issue. The former was stricken out by the court, but the latter was permitted to remain. Plaintiff replied by a general denial, and the case was tried upon these pleadings, and resulted in a judgment for plaintiff in the sum of $99.37. The defendant contends that there is error in the three respects above stated.

In the careful brief of counsel a number of cases are collected holding that where it appears that action has been brought in any state against a foreign corporation, unless the record discloses some facts giving jurisdiction in that state over the person of the defendant, the proceedings are not valid. Counsel for the plaintiff admits that such is the law, but he says that the general appearance, by an application to continue after the overruling of defendant's special appearance, and the further continuance by agreement a second time, are a general appearance in the action and give the justice complete jurisdiction, and cites section 72 of the Code of Civil Procedure. This ground seems to be well taken. Possibly, after the overruling of his special appearance, counsel for defendant could have answered in the justice court, specially setting up the lack of jurisdiction, and preserved the question by an appeal from the determination upon it, and could quite possibly have done so while at the same time answering to the merits. Nothing of the kind seems to have been done. After the overruling of the special appearance defendant took continuances as suggested and engaged in the trial, and after rendering of judgment against it, took this appeal. The authority of the justice to go on with the case after overruling the objection to his jurisdiction and after the general appearance without further objection, is undoubted. No question remains as to the jurisdiction over defendant's person.

The second claim of error does not seem any better

taken. It is true that in the original bill of particulars the damages arising out of the breach of this contract are alleged at only $49. It is true that in the amended petition in the district court the damages are alleged at $80 and interest. But the change is entirely within the power of amendment on appeal proceedings possessed by the district court. The action is upon the same contract. It merely claimed damages for both notes whose return is provided for in that contract, instead of for one of them. In *Union P. R. Co. v. Ogilvy,* 18 Nebr., 638, it is held that the power of amendment in the appellate court is limited to the highest sum for which judgment could have been rendered below. The judgment in this case is quite within that rule, and by distinct implication that decision permits an amendment which does not depart from the original cause of action, and is within that limit. It is not believed that the trial court committed any error in this respect.

With regard to the third claim of error, it is admitted that McNear and Burklund were handling defendant's goods for the purposes of sale as defendant's agents; that they obtained the notes in exchange for defendant's harvester; that the notes were accepted and had been sold, and it would seem that if the defendant proposes to hold the benefit of the contract made by McNear and Burklund, it must carry out their stipulations under which the notes were procured. The evidence seems amply to have justified the jury in saying that in making this settlement with the plaintiff, Burklund and McNear were acting within their apparent authority. If so, of course, their principal is bound by their acts with reference to one who had no notice of any defect of such authority. *Webster v. Wray,* 17 Nebr., 579; *Lorton v. Russell,* 27 Nebr., 372; *McMurtry v. Brown,* 6 Nebr., 368. The company must have known what McNear and Burklund were doing when it received the notes, and when it sold them it must be held to have accepted their settlement according to its terms.

It is therefore recommended that the judgment of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOHN DONAHUE ET AL. V. POTTER & GEORGE COMPANY.

FILED DECEMBER 4, 1901. No. 10,673.

Commissioner's opinion, Department No. 1.

1. **Application for Continuance:** REVIEW: AFFIDAVITS: BILL OF EXCEPTIONS. To obtain a review of the action of a trial court on an application to continue, the affidavits on which it was heard must be made a part of the bill of exceptions.

2. **Option Contract:** ENFORCEMENT. A duly executed option contract for the sale of real estate, otherwise unobjectionable, when accepted, and the price tendered by the party to whom it was made within the time stipulated, and before withdrawal, is enforceable.

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

J. J. O'Connor, for plaintiffs in error.

Gaines, Kelby, Storey & Martin, contra.

HASTINGS, C.

In their brief two errors are urged by plaintiffs here and defendants in the court below as fatal to the decree in this action. The first error is that the motion for a continuance on behalf of defendant below was erroneously overruled, and, second, that the proof discloses no consideration for the option contract for the sale of real estate to obtain the specific performance of which this action is brought. With regard to the first error, there is nothing before us. We do not know upon what the court below acted, and, of

course, in such case its action is presumed to be right. The bill of exceptions purports, by the certificate of the stenographer, to contain the evidence taken at the trial and the affidavits used on the hearing of the motion for a new trial. The certificate of the judge is simply that the bill of exceptions contains the evidence taken at the trial. Upon what the court acted in passing on the application to continue, there is nothing to inform us, and the complaint of its action in this respect can not be considered. The second error complained of does not seem any more fatal. The option contract was at all events a written offer, available to the other party by its terms whenever accepted, if not sooner withdrawn. *Smith v. Gibson,* 25 Nebr., 511, 517. Probably the particular contract under consideration was not revocable. It appears clearly from the evidence that it was part of the agreement under which a loan of $3,000 was procured for the defendants Donahue, and distinctly a part of that transaction. If so, it was, of course, not revocable prior to its expiration after the actual furnishing of the money on the part of plaintiff company. At all events, it was not withdrawn, but was, on the contrary, carried out by the execution of a deed in accordance with its terms. The deed was then placed in escrow until the proper payments could be computed and made, and was on the following day, under a pretense of verifying the descriptions, obtained by the defendants. The decree seems to be fully sustained by the evidence.

It is recommended that the decree of the district court be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is

AFFIRMED.

FARMERS' & MERCHANTS' NATIONAL BANK OF GALVA, ILLINOIS, APPELLANT, V. CHARLES W. MOSHER ET AL., APPELLEES, IMPLEADED WITH DIXON NATIONAL BANK, OF DIXON, ILLINOIS, ET AL., APPELLANTS.*

FILED DECEMBER 4, 1901. No. 9,891.

Commissioner's opinion, Department No. 1.

1. **Right of Insolvent to Dispose of His Property.** In the absence of a mutual fraudulent intent the law does not interfere with the right of a person, be he solvent or insolvent, to make such disposition of his property, based upon a valid consideration, as his judgment dictates.

2. **Right of Insolvent to Employ Attorneys.** An insolvent debtor has the right to employ attorneys to defend his estate and himself, and to transfer his property in payment of such contemplated services, provided it is done in good faith and the property transferred does not exceed a reasonable fee for the service which might be reasonably anticipated.

3. **Verdict:** DIVIDENDS. The vendee or pledgee of shares of stock in a corporation is entitled to all dividends which are declared on the stock after the sale or pledge, regardless whether the transfer has been made upon the books of the corporation.

4. **Corporation as Garnishee.** Under our statute, prior to the adoption of section 485*a* of the Code of Civil Procedure, a corporation may properly be made a garnishee, where the only property sought to be attached is the capital stock of the corporation owned by the defendant.

5. **Stockholder:** REAL AND APPARENT INTEREST. The real and not the apparent interest of a stockholder in the property of the corporation represented by shares of stock registered in his name, may be reached by garnishee process served on the corporation.

6. **Actual Rights of Stockholder.** The real actual rights and interests of a stockholder, will be reached by the garnishment upon the corporation without regard to the apparent interest of the owner.

7. **Evidence.** Evidence examined, and *held* to sustain the finding and decree.

8. **Motion for New Trial.** Where no motion for a new trial has been filed in the lower court, and it is sought to review the judg-

*Rehearing allowed.

ment on error proceedings, this court will look into the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree rendered, but this court will not go back of the verdict rendered by the jury or the findings of fact made by the trial court to review anything done or proceedings had.

APPEAL from the district court for Lancaster county. Heard below before HOLMES, J. *Affirmed.*

A. C. Ricketts, Henry H. Wilson, Lionel C. Burr, S. B. Pound, Roscoe Pound, Cobb & Harvey, John H. Ames, E. F. Pettis and *Nathan S. Harwood,* for appellants.

Charles O. Whedon, Charles E. Magoon and *Lambertson & Hall, contra.*

DAY, C.

This suit is a creditors' bill brought by the Farmers' & Merchants' National Bank of Galva, Illinois, in the district court of Lancaster county, against Charles W. Mosher and Richard C. Outcalt and some twenty-nine other defendants, referred to hereinafter by name as occasion requires. Its object is to set aside certain conveyances of real and personal property claimed to have been made by Mosher and Outcalt in fraud of their creditors, and also to subject certain stocks alleged to be owned by them, in various corporations, to the payment of plaintiff's judgment. A number of the defendants named in the bill filed answers and cross-petitions, setting up their respective claims to priority upon the property sought to be reached, and praying for general equitable relief. From a finding and judgment adverse to the claims of plaintiff, and also to defendants the Dixon National Bank, the People's National Bank and the La Salle National Bank, the plaintiff and the defendants above named have brought the case to this court by appeal, and the defendant, Kent K. Hayden, receiver, has brought the case to this court on error. The facts which form the basis of

the claims of the respective parties will sufficiently appear in the further consideration of the case. On January 26, 1893, the plaintiff herein commenced an action in the district court of Lancaster county against the defendants Mosher and Outcalt, and procured the issuance of an attachment, which on January 27 was levied upon certain lands, hereinafter referred to, and also on said day plaintiff caused notices in garnishment to be served upon the Farmers' & Merchants' Insurance Company, the Western Manufacturing Company, the Lincoln Gas Company, and others not necessary to be mentioned. On June 25, 1894, the plaintiff recovered a judgment in said attachment suit against Mosher and Outcalt for the sum of $5,430.50, upon which execution was issued, and returned wholly unsatisfied. On January 26, 1893, the defendants the Dixon National Bank and the People's National Bank each brought an action in the district court of Lancaster county against Charles W. Mosher, and procured attachments to be issued and notices in garnishment served on said day upon the Lincoln Gas Company, the Farmers' & Merchants' Insurance Company, the Western Manufacturing Company and others. On June 14, 1894, the Dixon National Bank and the People's National Bank recovered judgments in their respective actions against said Mosher, the former for the sum of $10,805, and the latter for $10,818.60. On January 28, 1893, the La Salle National Bank brought an action in the district court of Lancaster county, and on the same day caused attachment and garnishment to be issued and served upon the Western Manufacturing Company, the Lincoln Gas & Electric Light Company, the Farmers' & Merchants' Insurance Company, and others. On June 15, 1894, the La Salle National Bank recovered a judgment in said attachment suit against Mosher for $5,479.16.

It is conceded that the attachment and garnishment levied by the Dixon National Bank and the People's National Bank is prior to the attachment and garnishment of the plaintiff, and that the attachment and garnishment of the plaintiff is prior to that of the La Salle National Bank.

It appeared from the answers of the several garnishees in each of the foregoing suits that the books of the several corporations disclosed that Mosher was at the time of the serving of the notice of garnishment the owner of 500 shares of stock in the Western Manufacturing Company, 250 shares of stock in the Farmers' & Merchants' Insurance Company and 2,580 shares of stock in the Lincoln Gas Company. The attachments in each of the foregoing suits were confirmed and an order of sale issued of the attached property. Pursuant to this order the sheriff offered for sale 500 shares of Western Manufacturing Company stock, 250 shares of the Farmers' & Merchants' Insurance Company and all profits and dividends thereon, 2,580 shares of the Lincoln Gas Company known as "new issue," and 250 shares of the Lincoln Gas Company known as "old issue." At this sale, held August 1, 1894, the stock in the Lincoln Gas Company was sold to W. Q. Bell for $2,000. The 500 shares of stock in the Western Manufacturing Company were sold to the Dixon National Bank and the People's National Bank for $100, and 250 shares of stock in the Farmers' & Merchants' Insurance Company were sold to the Dixon National Bank for $100.

The Farmers' & Merchants' National Bank insists there are three funds out of which it is entitled to be paid the amount of its judgment. These will be considered in the order of their presentation in the briefs:

First, it is contended that 350 shares of stock of the Lincoln Gas Company transferred by Mosher on January 22, 1893, to C. O. Whedon and C. E. Magoon should be applied in payment of its judgment. The gist of this contention is that the consideration for the transfer, being largely for services to be performed in the future, is void as to existing creditors. The facts out of which the controversy between the plaintiff and Whedon and Magoon arises are as follows: On the day prior to the suspension of the Capital National Bank of Lincoln, on January 23, 1893, C. W. Mosher, who was president of said bank, employed Whedon and Magoon as attorneys to defend him

and his interests in all matters wherein the services of attorneys were required, and also that they should act as attorneys for Louise P. Mosher, the wife of said C. W. Mosher, in such litigation as she should be, or become, involved in. At the time of said employment, as payment in full for services theretofore rendered, and for services to be performed in the future under the employment then entered upon, Mosher sold, transferred and delivered to Whedon 200 shares of the capital stock of the Lincoln Gas Company, and to Magoon 150 shares. At the time of the delivery of these shares of stock they stood in the name of Mosher upon the books of the company. The defendants, Whedon and Magoon, pursuant to said employment, rendered services as attorneys to said Mosher, during all the time which has elapsed since the employment, appeared for him in at least 120 civil cases in the state and federal courts, and also defended him in a number of criminal actions. The proof is clear that the services performed under the employment were fairly and reasonably worth the amount paid by Mosher. The plaintiff practically concedes that fraudulent intent did not exist in this transaction, as a matter of fact, but contends that this transfer is one which the law makes fraudulent. A very able and exhaustive brief has been filed by plaintiff in support of this contention, but viewed in the light of our statutory enactments and the decisions of our own court, we think the position untenable. Section 20 of chapter 32 of the Compiled Statutes of 1899 provides as follows: "The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact, and not of law, and no conveyance or charge shall be adjudged fraudulent, as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration." In *Heidiman-Benoist Saddlery Co. v. Schott,* 59 Nebr., 20, it is said: "The validity of the mortgage depended upon the intention of the parties, and that, according to the provisions of our statute, was not a question of law for the court." In *Lepin v. Coon,* 54 Nebr.,

664, it is said: "The intent with which the sale of the stock was authorized or permitted was the vital question to be decided. It was a question of fact and not of law." It has been held that the inferences to be deduced from the proofs are inferences of fact and not of law. It may be the inference is unavoidable,—none the less it is an inference of fact. *Shaw v. Robinson*, 50 Nebr., 403, 419. The essential thought running through all our cases bearing on this question is that to make a conveyance a fraudulent transfer, a fraudulent intent participated in by both parties to the transfer must exist. In the absence of a mutual fraudulent intent, the law does not interfere with the right of a person, be he solvent or insolvent, to make such disposition of his property, based upon a valid consideration, as his judgment dictates. But it is insisted that by the terms of the employment Mosher was to receive future benefits, and for that reason the law will hold the transfer fraudulent. We think this contention not well founded. An insolvent debtor may secure to himself the future benefits of a transaction, if the parties to it have entered into it in good faith, and the transaction be not merely a device to defraud creditors. Indeed, the transactions are rare in the affairs of mankind where future benefits do not arise. Suppose an insolvent debtor were to purchase a suit of clothes, or food, would the fact that he would receive some future benefit from his purchase, render the transaction fraudulent and void, and subject the merchant who sold the goods or provisions liable to the creditors of the insolvent for the purchase price? We think not. It is only when the transaction is of such a magnitude and extent, and the future benefits so great, as to convince the court of its fraudulent character, that it will be adjudged reprehensible. In our view, an insolvent debtor has the undoubted right to employ attorneys to defend his estate and himself, and the transfer of his property in payment of such contemplated services, where it is reasonable and done in good faith, is not a fraud upon other creditors. That the services of counsel were necessary in this case is

amply sustained by the proofs and there is no contention that the amount paid was unreasonable. The case of *Morrell v. Miller,* 43 Pac. Rep. [Ore.], 490, is in point. The facts sufficiently appear in the following extract from the opinion: "The 'attendant circumstances' in the case at bar, others than those related, may be briefly stated: Miller was under arrest for a grave offense, then thought to be more serious than it afterwards proved to be, he being apprehensive that Morrell would die of the wound received at his hands. He had incurred a civil liability to Morrell because of the assault made upon him, and had previously transferred all of his property, of the aggregate value of $5,585.60, to Lord, for the purpose of securing his fees for services as an attorney, with a declaration of trust that the balance should be disposed of as he and Lord should agree. * * * There are some attendant indicia of fraud, such as the transfer of all of Miller's property of such considerable value to Lord, the declaration of a secret trust in connection therewith, and the inadequacy of consideration for the second deed. But, upon the other hand, Miller was deeply interested. He was in the toils of the law, charged with a grave offense, and his object was to extricate himself therefrom. The purpose of making such use of his property as to secure able counsel to conduct his defense, and to attend to other apprehended litigation, was perfectly legitimate. His right to be heard by counsel is a constitutional right, and he should be permitted, unless hindered by legal process, the free and untrammeled use of his property to obtain legal assistance; otherwise, constitutional privileges would be invaded. * * * There being no evidence that these fees were purposely fixed at the amounts specified for the purpose of covering up Miller's property to render it inaccessible to his creditors, we can not say that, because of the largeness thereof, the contract supporting them is void, and ought to be disregarded." In *In re Luce,* 83 Cal., 303, it is said: "The payment by an insolvent debtor and the acceptance by his attorneys of their fee in advance, out of the goods of the

insolvent, if the salable value of the goods does not exceed a reasonable fee for the service which might be reasonably anticipated, and the goods are not to be returned, does not render the parties liable to the charge of a fraudulent conspiracy." *Reed v. Mellor,* 5 Mo. App., 567; *Lyon v. Marshall,* 11 Barb. [N. Y.], 241. The trial court found that Mosher had transferred, assigned and delivered to the defendants Magoon and Whedon 350 shares of the capital stock of the Lincoln Gas Company in payment for attorney's fees for services rendered and to be rendered in the future; that the stock was not transferred for the purpose of hindering, delaying or defrauding creditors; that the transfer was based on a valid consideration; that they were the lawful owners and holders thereof and were entitled to have said stock transferred on the books of the company, and were entitled to the earnings and profits accruing thereon. We think the evidence amply sustains the finding of the court with respect to these shares of stock and that the judgment with respect to them is right.

The second fund out of which plaintiff asserts its judgment should be paid is certain dividends accruing to Mosher and Outcalt, and placed to their credit on the books of the gas company upon capital stock standing in their names upon the books of said company. It appeared that the capital stock of the gas company had been largely increased since its organization, and in order to distribute pro rata among its stockholders this increase of capital stock, the old shares were called in by the company for cancelation, and in lieu thereof new shares in the increased amount were issued to the holder. To illustrate: a stockholder having $25,000 of old issue was entitled, on surrendering his shares, to receive $45,000 of new issue. Upon the basis of new issue, Mosher was entitled to receive 2,580 shares and Outcalt 970 shares. At the time of the garnishment Mosher had received all of the shares to which he was entitled, as shown by the books, except 464 shares, and these were withheld, pending the surrender of the old shares. Of these shares claimants have appeared for all

except 100. Of the 970 shares which Outcalt was entitled to receive there had been delivered to him all but 131, and claimants had appeared for all of these. It is a settled rule of law that as between the vendor and vendee of shares of stock, that the vendee is entitled to all the dividends on the stock which are declared after the sale of the stock regardless whether the transfer has been made upon the books of the corporation. *Gemmell v. Davis,* 75 Md., 546; *Black v. Homersham,* 4 L. R. Ex. Div. [Eng.], 24; 2 Cook, Corporations [4th ed.], sec. 539. And a pledgee is likewise entitled to dividends on the stock held in pledge, but must, of course, account to his pledgor when the pledge is redeemed. Cook, Stockholders, 468; *Central City Nat. Bank v. Wilder,* 32 Nebr., 454. These general rules are, of course, subject to such exceptions as would arise by contract between vendor and vendee and also such as would arise by payment of dividends by the corporation to the holder of stock certificates, as shown by the books, without notice of a transfer. The exceptions, however, need not be considered, for the facts of this case present only the general rule. The testimony shows that the dividends were declared on the stock standing in the name of Mosher on the books of the corporation and the amount of the dividends was credited to him. This transaction, however, did not make it Mosher's money. The record shows that all of the shares were transferred before any dividends were declared, except the 464 shares, and if these did not pass to the several persons now claiming to be owners, they passed by the sale from the sheriff to Bell, and in either event could not be applied in discharge of plaintiff's judgment. The fact that the corporations may have wrongfully paid to Mosher, or his assigns, dividends which should have been paid to the vendees or pledgees of the stock affords to plaintiff no cause of complaint—that is a matter to be settled between the company and such transferees or pledgees. Let us now revert for a moment to the sale of the stock under the order of sale issued in the attachment suits at the instance of the People's National

Bank and the Dixon National Bank, in which it will be remembered the Mosher stock in the gas company was bought by Bell for $2,000. It is contended by a number of transferees and pledgees of the stock that Mosher and Outcalt had no attachable interest in the stock and also that prior to the enactment of section 485*a* of the Code of Civil Procedure stock in a corporation could not be attached by the service of notice in garnishment on the corporation. In our view, under the express and sweeping provisions of sections 201, 207, 208, 212 and 221 of the Code, stock of the attachment defendant in a domestic corporation may be reached by garnishment. It would unduly prolong this opinion to quote at length the several statutory provisions above cited. Suffice it to say that section 201 provides that the order of attachment shall be directed to the sheriff and requires him to attach "stocks, or interests in stocks." Sections 207 and 208 provide that corporations may be garnished, and the manner of service of the process. Section 212 provides that the garnishee shall stand liable to the attaching creditor for all property in his hands from the time that he is served with notice. Section 221 provides for the appearance of the garnishee to make disclosure, "and in case of a corporation, any stock therein held by or for the benefit of the defendant, at or after the service of the notice." Our Code of Civil Procedure upon this subject was evidently adopted from Ohio. Sections 194, 200 and 214 of the Ohio Code are identical with sections 201, 207 and 221 of our Code. The interpretation placed upon like sections by the supreme court of Ohio meets our approval. In *National Bank of New London v. Lake Shore & M. S. R. Co.*, 21 Ohio St., 221, the court says: "Under our statute, a corporation may properly be made a garnishee in a case where the only property sought to be attached is capital stock of the company, owned by the defendant or held for his benefit. And such garnishee from the time of the service of notice upon it, becomes liable to account to the attaching creditor for such stock and its proceeds if he

finally succeed in the action." In *Norton v. Norton*, 43 Ohio St., 509, it is said: "The interest of a stockholder in the property of a private corporation, represented by certificates of shares registered in his name, may be reached by garnishee process served upon the corporation." From the foregoing provisions of the statute, and upon the authority of the decisions cited, we are clearly of the opinion that the stock of a debtor may be reached by notice of garnishment duly served upon the corporation and that the equitable interest of the debtor may be seized by such notice and applied in payment of the debt. Such garnishment would not hold any stock which had been previously transferred in good faith, to a purchaser or pledgee, although a formal transfer thereof may not have been made upon the books of the corporation. The real, actual rights and interests of a stockholder will be reached by the garnishment, without regard to the apparent interest of the owner. If this position is correct, it follows that such interest as Mosher may have had in the stock was held by the notice of garnishment issued at the instance of the People's Bank and the Dixon National Bank and that his interest in the stock, whatever it might be, was sold under the order of sale to Bell.

The third fund out of which plaintiff contends it should be paid is certain real and personal property which it is alleged was fraudulently transferred to D. E. Thompson. As affecting this branch of the case, the record discloses that on November 14, 1891, Thompson sold to Mosher and Outcalt 180 shares of stock in the Capital National Bank for $22,500 and in payment thereof took the note of Mosher and Outcalt for said amount payable five years after date. To secure the payment of this note 200 shares of stock of the Lincoln Gas Company were assigned to Thompson as collateral security. This stock was held by him until December, 1892, when, by agreement between Mosher and Thompson, the gas stock was surrendered and in lieu thereof certain lands in York and Lancaster counties were deeded to Thompson. These lands were given as security

for the indebtedness. It was also shown that Thompson had sold the lands in York county prior to the commencement of the present suit, and that the lien created by plaintiff's attachment upon the lands in York county had been released by the attorneys for the plaintiff, and that the lands had brought at sale all they were reasonably worth, and that the amount of the sale had been credited upon the note, and that there was still a balance due thereon of about $15,000. The lands in Lancaster county Thompson still held, and upon these the plaintiff was given a second lien. The court found upon the pleading and the evidence that the note for $22,500 was given for a valuable consideration, and that to secure the same Mosher and Outcalt conveyed by warranty deed the lands alleged to have been so conveyed and fully described in the petition; that said conveyances were intended as security for payment of the note and were not given by Mosher and Outcalt or accepted by Thompson for the purpose of hindering, delaying or defrauding creditors, but for a lawful purpose. This finding of the trial court upon this branch of the case is sustained by the evidence. There was some claim made that the Capital National Bank was insolvent at the time Thompson sold his stock; that the stock was worthless at the time, and, therefore, there was no consideration to support the note. There was not, however, sufficient evidence to establish that the transfer was a device to defraud creditors, and we think the transfer of the stock was a sufficient consideration. As before stated, the Dixon National Bank and the People's National Bank purchased at the sheriff's sale the 250 shares of stock in the Farmers' & Merchants' Insurance Company standing in the name of Mosher on the books of the company; the company, however, refused to transfer these shares to the purchasers because the stock was claimed by Henry Mansfield. In its cross-petition the Mansfield estate claimed a first lien upon said shares of stock and prayed a foreclosure of its lien. The court found generally in favor of the Mansfield estate, that, prior to the commence-

ment of the proceedings at law by the plaintiff and the cross-petitioners, the executors of the estate of Henry Mansfield, deceased, held 250 shares of the stock of the Farmers' & Merchants' Insurance Company which had been duly assigned to Henry Mansfield as collateral security for the indebtedness of $22,500 described in the cross-petition, and that the estate of Henry Mansfield was entitled to a first lien upon the certificates of stock for the sum of $34,392.36 with interest from date of decree. It was ordered that the stock be sold as upon execution and the proceeds applied first to the payment of said lien and any remaining to be paid into court to be distributed upon the further order of the court. No useful purpose can be subserved by a review of the transactions between Mosher and Henry Mansfield. We have gone over the record, and the findings and judgment of the trial court meet our approval.

Kent K. Hayden, receiver, seeks to review the judgment of the trial court by proceeding in error, but the record discloses that he filed no motion for a new trial. The rule is well established in this state that to obtain a review of a case on error in this court a motion for a new trial must have been filed and the errors relied on specifically pointed out to the district court. *Harrington v. Latta,* 23 Nebr., 84; *Cruts v. Wray,* 19 Nebr., 581; *Hansen v. Kinney,* 46 Nebr., 207.

There are a number of other questions argued in the voluminous and numerous briefs of counsel representing the different interests in this case, but in our view the foregoing opinion sufficiently reviews the important questions presented. We have carefully examined the record and in our opinion it sustains the finding and judgment of the lower court.

We therefore recommend that the judgment be affirmed.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HARRISON VANSYOC V. FREEWATER CEMETERY ASSOCIATION.

FILED DECEMBER 4, 1901. No. 10,700.

Commissioner's opinion, Department No. 1.

1. **Certificate of Clerk to Bill of Exceptions.** Where a certificate of the clerk of the district court attached to the record certifies "that the above and foregoing is the original bill of exceptions, and also a true and perfect transcript of the record in the above-entitled cause, as the same is on file and of record in my office," it is a sufficient authentication.

2. **Action for Damages by Fire:** INSUFFICIENCY OF PETITION. A petition which alleges that defendant set out a fire on his premises, that it spread to plaintiff's premises and damaged plaintiff, without an allegation of facts showing negligence on the part of defendant, does not state a cause of action.

3. **Negligence:** PRESUMPTION. The law does not presume negligence; he who relies upon the want of ordinary care as the basis of a cause of action must plead and prove it.

ERROR from the district court for Harlan county. Tried below before BEALL, J. *Reversed.*

Webster S. Morlan and *C. L. Miller,* for plaintiff in error.

R. L. Keester and *E. C. Dailey, contra.*

DAY, C.

The Freewater Cemetery Association commenced this action in the district court of Harlan county against Harrison Vansyoc to recover damages alleged to have been sustained by it by reason of a fire which it is claimed defendant set out, and which it is charged spread upon and over the plaintiff's land and damaged its property. The trial resulted in a verdict in favor of the plaintiff for $75, upon which judgment was subsequently rendered, to review which the defendant has brought error to this court.

It is insisted by the plaintiff that this court has no jurisdiction to determine the questions presented by the

record for the reason that the certificate of the clerk of the district court appended to the record does not certify that it contains a true copy of the pleadings, the motion for a new trial and the judgment. In our opinion this contention is not well founded. The certificate of the clerk, omitting formal parts, is as follows: "I, George H. Cleaver, clerk of the district court in and for Harlan county, Nebraska, do hereby certify that the above and foregoing is the original bill of exceptions and also a true and perfect transcript of the record in the above entitled cause, as the same is on file and of record in my office." It is not essential that the certificate of the clerk should describe the separate pleadings, the motion for a new trial and the judgment separately. It is sufficient to give the court jurisdiction if the record shows the pleadings, motion for a new trial and judgment, and the certificate recite that it is a "true and perfect transcript of the record in the above entitled cause." A certificate in this form where the specific parts of the files or journal entries are not enumerated, is approved by Strawn in his work on Supreme Court Practice and Forms of Nebraska, pp. 127, 128. In *Herman v. Kneipp,* 59 Nebr., 208, this court held the following to be a sufficient certificate: "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." In *Hake v. Woolner,* 55 Nebr., 471, the certificate is as follows: "I, M. S. Campbell, clerk of the district court within and for Otoe county, hereby certify the foregoing to be a true transcript of the record in the within entitled cause; petition, amended petition, stipulation, answer, amended reply, instructions asked by plaintiff, refused, instructions asked by the defendant, refused, instructions of the court, journal entries, and bond, as the same appear on file and of record in my office." The court commenting on the certificate said, "This is a proper authentication merely of the matters specifically enumerated in the certificate, of which the motion for a new trial is not one. The authentication would have been complete

and sufficient had it ended with the language, 'hereby certify the foregoing to be a true transcript of the record in the within entitled cause.' But what follows these words limits the force and effect of the certificate to the particular matters therein designated."

The defendant insists that the petition does not state a cause of action and that his objection to the introduction of any evidence should have been sustained. The second paragraph of the petition contains the material allegations presented by the objection and is as follows: "That on or about the 10th day of April, 1897, the defendant set fire to the grass upon land adjoining that of the plaintiff which was used for cemetery purposes in Harlan county, Nebraska, which said fire immediately spread upon and over the said land of plaintiff, and burned the grass thereon, together with numerous shade and ornamental trees, and killing all of said trees, being twenty or more in number, which were then standing and growing upon the said land of the plaintiff, which said fire did damage the plaintiff 'in the destruction of said trees,' and the injury to the cemetery grounds, in the sum of $200." It will be noted that there is no allegation in the petition that the defendant was negligent in setting out the fire or that he was negligent in permitting it to spread to the premises of the plaintiff. The allegation is simply that he set fire to the grass, that it spread to plaintiff's premises and damaged them. The law does not presume negligence; he who relies upon the want of ordinary care as the basis of a cause of action must plead and prove it. A person has the right to set out a fire upon his premises for the purpose of husbandry or for any other lawful purpose, and the mere setting out a fire is not negligence. The circumstances, however, under which he does it may render the act negligence for which liability will follow. So the mere spreading of the fire does not of itself impute negligence. The utmost care and diligence may have been exercised to prevent its spreading, and if so, no liability would attach for resulting damage. In this case the defendant may have been negligent in set-

ting out the fire at an improper or unsuitable time or in not using reasonable care and diligence to prevent its spreading and doing injury, but there is nothing in the pleadings from which such inference can fairly be drawn. The mere fact that an injury did result does not raise the inference of the want of ordinary care. In *Lincoln Street R. Co. v. Cox*, 48 Nebr., 807, 808, it is held, quoting from the syllabus: "In an action by a servant against his master for personal injuries the jury can not be permitted to infer negligence from the mere fact that an accident happened. A want of ordinary care must be pleaded and proved." In our opinion, the petition fails to state a cause of action and the objections of the defendant raising this question should have been sustained.

It is but justice to counsel for both sides to say that neither appeared in the action in the lower court.

It is, therefore, recommended that the judgment be reversed and the cause remanded for further proceedings.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

MODERN WOODMEN OF AMERICA V. MARY KOZAK.

FILED DECEMBER 4, 1901. No. 10,534.

Commissioner's opinion, Department No. 1.

1. **Conflicting Evidence:** PREPONDERANCE. The verdict of a jury in a case properly submitted to them, when based on conflicting evidence, will not be disturbed merely on the ground that the apparent preponderance of the evidence is in favor of the losing party.

2. **Insurance Policy:** PROOF OF LOSS: ADMISSION AGAINST INTEREST. In an action on an insurance policy, proofs of loss made to the company by the beneficiary are admissible in evidence, subject

to explanation or correction, to the extent that they contain admissions against interest.

3. **Weight of Admission Question for Jury.** The weight to be given such admissions is a question for the jury, to be determined by a consideration of all the facts and circumstances showing or tending to show a knowledge of their contents or otherwise.

4. **Evidence:** VERDICT. Evidence examined, and *held* that verdict of the jury is supported by sufficient competent evidence.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

George A. Murphy, J. G. Johnson and *Talbot & Allen,* for plaintiff in error:

The statements made in the death proofs are admissions of the beneficiary. *New York Central Ins. Co. v. Watson,* 23 Mich., 485.

The rule that the proofs are not evidence in favor of the insured, does not preclude them from operating as admissions. *New York Central Ins. Co. v. Watson, supra; Campbell v. Charter Oak Fire & Marine Ins. Co.,* 10 Allen [Mass.], 213.

We do not mean to say that the party may not correct a mistake of fact in his original statement, but such a correction is not to be made known to the insurer, for the first time, on action to recover. *Campbell v. Charter Oak Fire & Marine Ins. Co., supra.*

The theory of murder suggested in the court below, is too improbable and too fanciful to be treated seriously. For the sake of argument, let it be assumed that some evilly disposed person had meditated the murder of young Kozak, and was successful in his unholy design. It was very considerate in the murderer to give ample notice to his unfortunate victim, so that he could arrange his personal affairs in a businesslike manner, causing his relatives and administrator the least possible trouble. It was clever in him to disappear so suddenly from the scene of his villainy, when his mission was performed. He was so careful in his movements as to arouse no suspicion, to leave

no clue to his identity, no motive for his act. He will probably never be discovered, unless the spirit of the murdered man, like the ghost in Hamlet, returns to earth to disclose the identity of the murderer. It may be possible that this is one of those instances that have been heretofore confined to the realm of fiction, where, by the exercise of some occult, hypnotic influence, one mind has successfully dominated another, so that the person under the magic influence acts solely from suggestions made by the superior mental force. If Kozak was murdered, the facts in this case would furnish a basis for a sensational narrative that would make Du Maurier, the author of Trilby, feel that the realism of fact had overshadowed the idealism of fancy or fiction. Under this branch of the argument we refer to *Rens v. Northwestern Mutual Relief Ass'n,* 100 Wis., 266, 75 N. W. Rep., 991.

The bullet was not positively identified by any witness as the one extracted from the brain of the suicide.

Samuel Rinaker, Robert S. Bibb and *Alfred Hazlett, contra:*

The presumption of the law is against suicide. *Travellers' Ins. Co. v. McConkey,* 127 U. S., 661.

The facts were for the jury.

Argued orally by *Murphy,* for plaintiff in error; by *Bibb, contra.*

KIRKPATRICK, C.

This action was brought in the district court of Gage county by defendant in error against plaintiff in error to recover upon a policy of life insurance or benefit certificate issued by plaintiff in error upon the life of John Kozak, in which certificate defendant in error was named as beneficiary. The petition set out a copy of the policy and alleged the death of insured, and full compliance with all the conditions and requirements of the contract on the part of insured and his beneficiary to be performed. The an-

swer admitted the execution of the benefit certificate; that deceased had made payments of all premiums and assessments due; that he was dead; that proofs of loss had been made. The answer further pleaded that the policy contained a condition that if the member should die by his own hands, whether sane or insane, the certificate should be null and void; that the insured, John Kozak, came to his death by his own hands, by shooting himself in the head; and denied any liability on the part of plaintiff in error. A reply was filed, denying all new matter contained in the answer. Trial was had to a jury, which resulted in a verdict and judgment for defendant in error, to reverse which the cause is brought here upon error.

The only controverted issue on the trial was whether John Kozak committed suicide. A number of assignments are made in the motion for a new trial and in the petition in error, but only two are argued in brief of counsel, and the remainder will not be considered. It is contended: First, that the court erred in refusing to instruct the jury to bring in a verdict for plaintiff in error, because there was not sufficient evidence to submit the case; second, that the verdict is not sustained by sufficient evidence. This reduces the controversy to the single question whether or not the verdict is sustained by sufficient competent evidence. The facts in the case are that about 11 o'clock in the evening of August 12, 1896, the insured was found dead in a burning straw stack on his farm near the town of Virginia. His body was pulled out of the stack, his clothes found to be burned off, and his face and body more or less burned. There was a bullet wound in the left side of his head, above and just a little back of the ear. The bullet was found lodged in his brain, and it is apparent from the facts that death was instantaneous. The next morning a thirty-eight calibre revolver, the wooden parts destroyed by fire, was found in the ashes of the straw pile, together with a part of a box of thirty-eight calibre cartridges. Some of the cartridges were exploded, evidently by the heat of the fire,

and some were not. Empty cartridges were in all the chambers of the revolver, three of which bore evidence of having been indented by the hammer of the revolver, the others having probably been discharged by the heat of the fire. Kozak's coat and vest, containing a watch and $11 or $12 in money, were found, together with a pitchfork, at some little distance from the stack. When his body was drawn from the stack by a neighbor a number of the cartridges exploded. Aside from the above facts, very little is known or disclosed by the evidence. The testimony discloses that a hardware merchant, whose place of business does not appear from the record, some time prior to the date of the death had sold a revolver of the same make as that found, with a box of cartridges, and that he described the purchaser as an intelligent young man of about twenty-four years of age. He said if the young man was of foreign extraction, there was nothing in his speech to indicate it. He did not know Kozak, and gave no further description of the man who purchased the revolver. The deceased was about twenty-five years of age; was born in Bohemia. His mother and sister were unable to speak English. A description of the deceased was not given to the jury, and it is not disclosed whether he could talk English fluently or not.

A short time prior to his death he paid a small bill owing to a blacksmith, and took a receipt. He collected several small amounts owing to him, and, when asked at one time whether he was going away, he said he did not know; that he might go to the old country; that this country was too slow for him. He was a member of the band at Virginia, and attended the band practice at that village the evening before his death. The members of the band called as witnesses all testify that they noticed nothing unusual regarding his behavior, as he seemed to be in his usual good spirits, his actions being perfectly natural and consistent with his actions at other times. The leader of the band testified that he noticed nothing unusual at the time of rehearsal, but after hearing of his death he got to

thinking the matter over, and concluded that Kozak's actions were somewhat different from usual on that evening. At band practice deceased was asked if he would go with the band to Crab Orchard to attend a political rally. He said he would if he was there; that is, at Virginia. Earlier in the week one of the band members asked him if he would go with the band to the rally, and he replied that he did not know; that he was going up to Beatrice, and was "coming back and raise h——." Whether or not he went to Beatrice is not disclosed. It was shown by the testimony of the register of deeds that there was recorded in his office a deed for John Kozak's farm, made by him to his brother, on August 8, 1896, four days before his death. The deed provided that his brother, Charles Kozak, was to pay off the mortgage on the farm, and to pay John Kozak's mother $50 yearly during her lifetime for her maintenance, and to pay his sister, Anna Kozak, $100 on May 1, 1898, and to Stella Kozak $400 May 1, 1898. No other testimony concerning this deed was offered to show whether Charles Kozak had made this kind of a contract of purchase with his brother. None of the members of the Kozak family were asked regarding the matter, the only evidence regarding the transaction being the record of the deed. None of the matters hereinbefore mentioned are of any evidential value or possess any probative force on the theory of suicide. They are all equally consistent with the theory of murder, suicide or accidental shooting; and for that reason, standing alone, as they do, in the record, they could not in any manner have assisted the jury in determining how Kozak came to his death.

We now come to an examination of the only material evidence in the case. About 9 o'clock of the evening of August 12th the deceased stopped at the home of Anna Hupka, who resided about a mile from his home. It seems that he had been keeping company with this young woman for several years. His visit lasted about an hour, during which she says his behavior was natural, and he seemed to be in his usual good spirits. However, during the time he

was there, he made some remarks about trouble he had had with his mother, claiming that she did not treat him just right, and that if she had treated him better it would not be necessary for him to go away so much. Before he left, about 10 o'clock, he gave her an unsealed letter, together with his photograph; the letter as translated reading as follows:

"Virginia, Nebraska. [It is without date.] "Dear Anna, Accept my last regards. If I have ever done any wrong to you forgive me. Don't think I had a bad opinion of you. I was willing to live like every well behaved man. I thought I would be happy but things turned out in a different way. You will hear of a curious end of my life. I would go away, but I can not do it, for you may say I made it on purpose. Only death can help me out of all. Goodbye, forget me, ingrate. I will banish myself for everything. What a pity on my young life." The letter was signed "John Kozak," and contained a postscript as follows: "Farewell, my home, farewell, all around my home. Dust and ashes all will be of me. One thought delights me, it is that you have been my best friend. I have been like the ocean wave, tossed from place to place until it disappears. Now I will be contempted by all for my frivolous deed."

After his departure, as soon as she had read this letter, she seems to have started with her sister to inform deceased's mother, or to have him watched, or something of that nature; her intention not clearly appearing from the testimony. It appears that while she and her sister were going to the Kozak farm, they were met by their brother, Joe Hupka, who got into the buggy with them and together they drove to the Kozak place. Hupka went into the house, but finding no one there, and seeing the stack on fire in the field, went to it and discovered the burning body, as already stated. There can be no doubt that the letter strongly indicates a purpose on the part of deceased in some manner to do violence to himself. But it is practically the only material evidence tending to support the suicide theory.

Plaintiff in error introduced a thirty-eight calibre revolver found in the stack, and also identified and offered in evidence the bullet which at the post-mortem examination was taken from the head of deceased. Defendant in error called two witnesses who were hardware merchants, who had dealt in firearms for many years, one of whom was a gunsmith, who, upon examination of the bullet in evidence, positively testified that it was a thirty-two calibre, and that it could not have been fired from the revolver in evidence. An examination of the bullet in question, which with the revolver is an exhibit in the case, shows that the testimony of the two witnesses must be correct. The bullet is clearly of a smaller calibre than the revolver and empty cartridges in evidence. Whether it is a thirty-two calibre is not so certain. There is no testimony in the record showing that Kozak had a revolver. No person saw him with it, and we have then, this situation: The revolver and the thirty-eight calibre cartridges, together with the bullet, are offered in evidence by plaintiff in error tending to support the theory of suicide; on the other hand, the evidence of two qualified witnesses and the bullet itself, that it could not have been fired from the revolver. This evidence regarding the size of the bullet, which is practically undisputed, could well have raised a serious doubt in the minds of the jurors, whether, if the revolver found was really that of Kozak, he came to his death by shooting himself. This evidence alone would seem to be sufficient to take the case out of the rule that, where from the evidence reasonable men can draw but one conclusion, the case resolves itself into one of law for the court. *Shiverick v. Gunning Co.*, 58 Nebr., 29; *Knapp v. Jones*, 50 Nebr., 490. That the bullet found in the head of deceased was too small to be fired from the weapon found in the stack was certainly a circumstance not easily reconciled with the theory that he had shot himself, and a doubt as to the truth thus created by the proof can be resolved only by the verdict of the jury. But there is another fact of which the jury could not have been ignorant, namely, the absence

from the record of all evidence tending to show a motive inciting to self destruction. Self-murder is abhorrent to the mind, and common observation teaches that normal men are not driven to the desperation of suicide without some exciting cause of more than ordinary magnitude. Kozak is shown by the record to have been healthful and prosperous, and the record contains no hint to furnish a motive for seeking his own end. In view of this fact, and in the absence of some uncontradicted evidence from which no other conclusion than that of suicide could be drawn by reasonable men, it is impossible to say that the verdict of the jury is clearly and unmistakably wrong. The letter to Anna Hupka, while it may be very convincing evidence that John Kozak intended to commit violence upon himself, is by no means conclusive evidence that he carried out such intention. The rule is that, when the evidence is uncontradicted, and reasonable men can draw different conclusions therefrom, it is proper to submit it to the jury. *A. & N. R. Co. v. Bailey,* 11 Nebr., 332, 337; *City of Lincoln v. Gillilan,* 18 Nebr., 114. Whether this letter, together with other facts in evidence, proved that Kozak committed suicide, was a question for the determination of the jury. The question here is not whether the verdict follows the preponderance of the evidence. Upon the question of the preponderance of the evidence this court is ordinarily powerless to disturb the jury's verdict. As said in the case of *Home Fire Ins. Co. v. Kuhlman,* 58 Nebr., 488: "A judgment based upon a verdict which is supported by sufficient competent evidence will not be disturbed on the ground that the apparent preponderance of the evidence is on the side of the losing party." Deceased may have been murdered, he may have committed suicide or he may have accidentally killed himself. This was a question for the jury to determine from all the evidence in the case, and their verdict being based upon conflicting evidence, it will not be disturbed. *Morton v. Harvey,* 57 Nebr., 304.

The rule as adhered to in this court is announced as follows in the case of *Sonnenschein v. Bartels,* 37 Nebr., 592:

"When a jury has decided a question of fact properly submitted, and the trial judge has overruled a motion for a new trial, then, if the record discloses competent evidence on which the finding may have been based, such finding can not be disturbed by the supreme court." *Young v. Roberts,* 17 Nebr., 426, 428; *Ross v. Langworthy,* 13 Nebr., 492, 495.

Plaintiff in error, to support its theory, offered in evidence the proofs of loss made by the officer of the lodge and sundry witnesses, and signed and presented by defendant in error in support of the claim in the amount alleged to be due upon the certificate. From these various documents it appears that the cause of death was represented as resulting from a pistol shot in the left temple inflicted by deceased's own hand. It is claimed that defendant in error is estopped by this showing from claiming that Kozak did not die by his own hands. This contention can not be sustained. Proofs of loss of this character, in so far as they are admissions against the interest of the party making them, are manifestly admissible, and, if unexplained, no doubt are entitled to great weight. But they are not conclusive of the fact. *Leman v. Manhattan Life Ins. Co.,* 46 La. Ann., 1189, 15 So. Rep., 388. The testimony in this case shows that Mrs. Kozak, defendant in error, was a Bohemian woman, unable to speak, read or write the English language. The officer of the lodge and the notary public, who prepared the proofs, say that her son was with her, and that they read the proofs to him, he in turn speaking to her in her native language, supposedly explaining the contents of the papers she afterwards signed. Whether he fully explained the contents of the papers to his mother or not, does not appear from the record. He was called as a witness, but was not interrogated regarding the matter. In Mrs. Kozak's examination she testified positively that she had no knowledge of the matters contained in the proofs of loss, and that she was informed that if she signed the papers she would get the money in thirty days, and, relying upon these represen-

tations, she signed them. She denied that the papers were read or explained to her. It was incumbent upon plaintiff in error to show past doubt that Mrs. Kozak clearly understood the import and effect of the papers she was signing. *Selden v. Myers*, 61 U. S., 506, 15 L. Ed., 976. If she signed them in ignorance of their contents, they would not constitute admissions against interest; and whether she signed them in ignorance of what they contained was a question for the jury, and, in view of the evidence on this branch of the case, it seems they were justified in disregarding them. The weight to be given such admissions is a question for the jury. *Paxton v. State,* 59 Nebr., 460, 463. Under the pleadings in this case, the burden was upon plaintiff in error to prove its affirmative defense by a preponderance of the evidence. That the presumption is against suicide in cases of this character, and that the insurer has the burden of proving self-destruction, is recognized by all the authorities. *Travellers' Ins. Co. v. McConkey,* 127 U. S., 661; *Whitlatch v. Fidelity & Casualty Co.,* 24 N. Y. S., 537; *Travelers' Ins. Co. v. Nitterhouse,* 38 N. E. Rep. [Ind.], 1110; *Mutual Life Ins. Co. v. Simpson,* 28 S. W. Rep. [Tex.], 837; *Inghram v. National Union,* 72 N. W. Rep. [Ia.], 559; *Burnham v. Interstate Casualty Co.,* 75 N. W. Rep. [Mich.], 445; and other cases which might be cited. And it would seem that the presumption is not overcome by proof that death resulted from the shot of a pistol found near the person of deceased. In the case of *Leman v. Manhattan Life Ins. Co.,* 46 La. Ann., 1189, it is said: "In such action, when the defense is self-destruction, the burden of proof is on the insurer to establish the suicide, and when circumstantial evidence only is relied on, the defense fails, unless the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another." *Travelers' Ins. Co. v. Nitterhouse, supra; Jones v. United States Mutual Accident Ass'n,* 61 N. W. Rep. [Ia.], 485. In the last cited case it is said: "Where in an action on an accident policy, it appears that the insured was killed by a pistol shot, the bur-

den is on the insurer to show that the shot was not accidental."

From what has been said, and from the authorities cited, it follows that the verdict and judgment are right, and it is therefore recommended that the judgment of the district court be affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NOTE.—Where the policy contains no suicidal clause, and there is no statute governing such a case, but the insured, before entering into the contract, secretly and deliberately formed the purpose of taking his own life, the contract is thereby vitiated. The insurer does not sell the insured an option on his own life. The questions of suicide and insanity are for the jury. *Ritter v. Mutual Life Ins. Co.*, 169 U. S., 139.

THE LOCATION OF THE SUICIDAL WOUND is a matter of a great deal of importance. It is, of course, unlikely that the back would be found to be the site chosen, while writers upon medical jurisprudence generally admit that the suicide very rarely inflicts a wound upon the left side of the body. Self-inflicted injuries are usually upon the front of the body. Allan McLane Hamilton, Medical Jurisprudence, p. 278. —REPORTER.

HENRY M. SWIGART V. NEPOMUK GENTERT.

FILED DECEMBER 4, 1901. No. 10,460.

Commissioner's opinion, Department No. 2.

1. **Statute of Frauds.** In an action to recover for services rendered to a third person the general rule is that, if the person for whose benefit the promise was made is himself liable, the promise of the defendant, although made before the services were rendered, is collateral, and within the statute of frauds.

2. **Request for Instructions.** A party who requests instructions which are given to the jury can not afterwards object that the issue so presented was not raised by the pleadings.

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

Batty, Dungan & Burton and *John C. Stevens,* for plaintiff in error.

Tibbets Bros. & Morey, contra.

SEDGWICK, C.

This action was begun in justice court and afterwards, upon appeal, tried in the district court for Adams county. The plaintiff in error, who was plaintiff below, is a physician and surgeon, and sued to recover from the defendant for services rendered as such physician and surgeon to the defendant's daughter, who was a married woman and was then living with her husband. The answer admitted that the plaintiff was a physician and surgeon, and denied the other allegations of the petition. The trial resulted in a verdict for the defendant, and the plaintiff has brought the case here upon petition in error.

It is insisted that the evidence is not sufficient to support the verdict. The question is, whether the promise of the defendant is within the statute of frauds. We think that the evidence on that point is sufficient to support the verdict of the jury. After the plaintiff had given his testimony the defendant testified as a witness in his own behalf. His evidence is quoted in plaintiff's brief as follows: "That plaintiff called me out; he set in buggy and I walked up to him, then he told me your daughter is pretty sick; I was a little scared you know, so he says I guess I get her through all right. After that he asked me who is going to pay that; I told him I help you see you get it, but I never promised anybody." We think this promise is clearly within the statute of frauds. The general rule is, that if the person for whose benefit the promise is made is himself liable at all, the promise of the defendant must be in writing. Browne, Statute of Frauds [5th ed.], sec. 197. The promise of the defendant is twofold—first, that he would help the plaintiff to collect the bill; and second, that he would see that the plaintiff received his pay. The first part of the promise could not be enforced because of

its indefiniteness; and the second part is, by its very terms, a promise to answer for the default of the parties who would be primarily liable for the services to be rendered. The jury appear to have believed this evidence of the defendant, and we can not say that they were so clearly wrong in so doing as to require a reversal of the judgment. At the time of making this promise a part of the services had been rendered, and as to the claim for the services thereafter rendered the plaintiff in his brief insists that "the promise in the case at bar was not to pay the debt of another, because at the time the promise was made no debt of another existed, and none would have existed had it not been for the promise of the defendant to pay said debt when it should have been created." This contention is that if the promise of the defendant was so far the inducement for plaintiff's services that the services would not have been rendered but for this promise, then the promise is not within the statute of frauds. But this is not the law. The fact that the plaintiff would not render the services upon the responsibility of the daughter and her husband without the additional promise of the defendant to see that the plaintiff received his pay, is not of itself sufficient to take the promise out of the statute. The plaintiff, to support his contention, relies upon *Waters v. Shafer,* 25 Nebr., 225. In that case the defendant agreed absolutely to pay the debt, and the goods were furnished upon the faith of the promise. The language of the promise was: "He said 'let the boys have what goods they wanted, he would pay for them.'" And this was held to be an original promise. The instruction complained of in that case was an incorrect statement of the law, and, as said in the opinion, "ought not to have been given in the language used." But there was no evidence in the case that the defendant therein promised to see the plaintiff paid for the goods. The issue presented was not as to the kind or the character of the promise, but whether or not any promise at all was made; and the jury having found that the promise to pay for the goods was made, the in-

struction complained of, though erroneous, was without prejudice to the defendant. The court said: "If the instruction had been, that if plaintiff in error had told defendant to let his sons have the goods and he would pay him for them, that such a promise, being the basis of the credit given, would be an original one, it would have been correct." And this is undoubtedly a correct statement of the law. But the promise to see the debt of another paid, although it is the basis of extending credit, is still within the statute of frauds. The language of the latter part of the opinion quoted in the plaintiff's brief is not accurate and does not agree with the opinion itself.

The testimony that plaintiff never presented a bill for the services to the defendant was competent and properly admitted. It was proper to be taken into consideration with the other evidence in the case in determining to whom credit was extended.

The plaintiff was asked the question: "How much was due you on account of the treatment of Mrs. Hart?" This was objected to as calling for a conclusion, and the objection was sustained. We think this ruling was correct. It asked the witness to answer the question which was to be submitted to the jury.

The plaintiff offered to prove by himself, while on the witness stand, "that the visits from Roseland to Holstein, and medicine furnished, was of a reasonable value, and worth $128.50." This was objected to for the reason, among others, that it was not admissible under the pleadings. This objection was well taken. There was no allegation in the petition as to the value of the services.

Complaint was made of the modification by the court of the first instruction asked by the plaintiff. But we think the modification correctly stated the law, and is not just cause for complaint. The court may refuse to give an instruction as asked and then modify the instruction so as to properly state the law, and the giving of such instruction so modified will not be error.

It is also complained that the court instructed the jury

that the law would not permit plaintiff to charge for his services an unreasonable amount, unless a specific contract to pay for such services was entered into. If the instruction was erroneous it was not prejudicial in this case, since there was no allegation in the petition of the value of the services, and the plaintiff could recover, if at all, only upon the theory that his petition alleged a specific contract on the part of the defendant to pay the amount stated in the petition. The court having excluded all the evidence as to the value of the services on the ground that there was no allegation of value in the petition, it would seem that the instruction complained of was unnecessary, but we can not say that it was prejudicial to the plaintiff.

It is also complained that the court erred in giving instruction No. 1, asked by the defendant. In this instruction the court told the jury that the plaintiff could not recover if the debt sued for existed at the time the contract was made, unless the contract was reduced to writing. As there was a conflict in the evidence as to whether some of the items of the claim were for services rendered before the making of the contract sued on, this instruction was proper. The court also in this instruction told the jury that the plaintiff must establish by a preponderance of the evidence that the defendant entered into an absolute and unqualified contract to pay for the services. The plaintiff in his brief treats this as an instruction that the plaintiff was required to prove his contract by absolute and unqualified evidence, but it will not bear that construction. It was alleged in the petition that the services were rendered at the defendant's request. There was no allegation that he promised to pay for the services. The court and counsel seem to have wandered somewhat from the issue in the trial of the case, and the plaintiff is not now in a position to complain of this language of the instruction, since no instruction was requested upon the plaintiff's present theory of the case, and the case was submitted to the jury upon the theory, upon the part of the court and both parties, that the issue was, whether the defend-

ant's promise to pay for the services was within the statute of frauds, or was an absolute and original promise. In this condition of the record, we think that the language complained of is not erroneous and prejudicial to the plaintiff, so as to require a reversal of the judgment.

It is also complained that the court in instruction No. 4, referred to in the brief as instruction No. 6, was misleading and conflicting. But we think this instruction was correct. It told the jury the burden of proof was on the plaintiff, and added that if "the evidence in this case is squarely conflicting and the plaintiff does not produce a preponderance of the same, it would be your duty to find for the defendant."

Complaint is also made of instruction No. 5, given by the court. In this instruction the jury was told that if the defendant advanced to the plaintiff $20 for and on behalf of his son-in-law, Mr. Hart, after the services were rendered, such act would not be a confession nor an admission of liability on the part of the defendant for the remainder of the bill. There was evidence upon which to predicate this instruction, and we think it was not erroneous.

The sixth instruction given by the court, in effect, told the jury that in the absence of a specific contract the plaintiff could not recover more than his services were reasonably worth; but as under the issues tried and submitted to the jury in this case the plaintiff could not recover unless there was a specific contract to pay the amount charged, we think this instruction was not prejudicial. We do not find any error in the record requiring a reversal of the judgment.

It is therefore recommended that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

TECUMSEH NATIONAL BANK, APPELLEE, V. CHAMBERLAIN BANKING HOUSE ET AL., APPELLANTS.

FILED DECEMBER 4, 1901. No. 10,165.

Commissioner's opinion, Department No. 2.

1. **National Bank:** BANK EXAMINER NOT ITS AGENT. A bank examiner who takes charge of the assets of a national bank, under the directions of the comptroller, is not the agent for the bank in such negotiation as the bank may be permitted to enter into with a view to the resumption of business.

2. ———: ———: REPRESENTATIONS OF EXAMINER NOT BINDING. When a defaulting officer of such bank, for the purpose of replenishing the assets of the bank to enable it to resume business, is allowed to furnish collateral securities for his indorsements upon paper previously sold by him to the bank, representations made by such examiner as to the liabilities of such officer to the bank and the value and condition of the securities already furnished by him, are not binding upon the bank; and one who furnishes collateral securities to such defaulting officer to be so used by him can not rely upon such representations of the examiner as a defense in an action by the bank to foreclose its lien upon such securities.

3. **Defaulting Officer:** HIS AGENCY: POWER OF DIRECTORS. Such bank, being represented by a majority of its board of directors, who are not in default, may, with the consent of the comptroller, accept such collateral securities from such defaulting officer; and in obtaining securities from a third person to be used by him for that purpose, such defaulting officer will not be regarded as the agent of the bank. His representations as to his liability to the bank, and the value and condition of the securities already furnished by him, will not be binding upon the bank, so as to enable the person furnishing such securities at his request, with knowledge of the purpose for which he intends to use the same, to rely upon such representations as a defense in a subsequent action by the bank to foreclose its lien upon such securities.

4. **Contract by Defaulting Bank Officer:** SECURITIES: CONSIDERATION. The contract of a defaulting bank officer to furnish collateral security for his indorsement upon paper previously sold to the bank by him so as to replenish the assets of the bank and enable it to resume business, is not illegal, and after such securities have been furnished and the bank has resumed business, the person furnishing such securities at the request of such defaulting officer with knowledge of the use to be made thereof by

him, can not be heard to say that there was no consideration for furnishing the same.

5. **Principal and Agent:** REPRESENTATIONS BY THIRD PARTY. When a principal is represented by a duly authorized agent, and some third person who may also be benefited by the transaction, assumes, without the knowledge or consent of the principal or his agent, to make representations and statements to promote the transaction, the principal will not be bound thereby, although he accepts the benefits of the transaction negotiated by his agent.

APPEAL from the district court for Johnson county. Heard below before HALL, J. *Affirmed.*

J. W. Deweese, M. B. C. True, Isham Reavis, Robert Ryan and *Reavis & Reavis,* for appellants.

Samuel P. Davidson, contra.

SEDGWICK, C.

On the 16th day of October, 1891, the comptroller of the currency, through the bank examiner, closed the doors of the Tecumseh National Bank and took possession of its assets. The embarrassment of the bank was caused by excessive loans to Russell & Holmes, and by discounting a large amount of commercial paper upon which they were indorsers. The firm of Russell & Holmes was composed of James D. Russell, who was a director in the bank, and Charles A. Holmes, who was also a director and was president of the bank. They also held a majority of the stock of the bank. After the examiner had taken charge of the bank, an effort was made to reopen the bank for business, and the comptroller proposed to allow such action to be taken if Russell & Holmes would pay in cash their direct indebtedness to the bank so as to reduce it to $5,000, the limit allowed by law, and would also satisfactorily secure their indirect liability as indorsers. Russell & Holmes appear to have still retained the confidence of the people to a considerable extent, and succeeded in obtaining accommodation notes from the farmers and others of their

business acquaintances, sufficient to enable them to pay to the examiner the amount required to be paid upon their direct indebtedness; and also put up various collateral securities for their liability as indorsers, and among such collaterals the banking stock in question in this suit, which is seventy-two shares of $100 each of the capital stock of the Chamberlain Banking House of Tecumseh. Charles M. Chamberlain was at the time cashier of the Chamberlain Banking House, defendant, and the defendant Edith R. Chamberlain is his wife. She is also the daughter of James D. Russell of the firm of Russell & Holmes. Soon after the bank was closed by the examiner she was induced to, and did, assign this stock to the Tecumseh National Bank, and delivered it to her father, who deposited it with the bank as collateral to the indebtedness and liability of Russell & Holmes and the individual members of that firm. The securities being approved by the comptroller, the bank resumed business, but the liabilities of Russell & Holmes to the bank have not been satisfied. This action was brought in the district court of Johnson county to foreclose the lien of the plaintiff bank upon said bank stock so assigned. Upon the trial of the cause in the district court there were findings and a degree in favor of the plaintiff bank, and the defendants Edith R. Chamberlain and the Chamberlain Banking House have brought the case to this court by appeal.

1. It is contended by the plaintiffs in error that the transfer of the stock is voidable because Edith R. Chamberlain was induced to assign the same by the misrepresentations of the officers and directors of the bank and the national bank examiner. The trial court made the following finding of fact:

"To obtain the assignment and transfer of said certificate by his daughter, James D. Russell said to her that everything had been straightened up at the bank; that she would not lose the stock; that they simply wanted it for a short time in order to enable Mr. Griffith to make a better showing to the comptroller at Washington; that the

paper it was to secure had been passed on by the directors, and said to be good, but that in any event, in case the paper was not good, there was other collateral—$30,000 of his and Mr. Holmes's life insurance; also stock in the banks at Sterling, Elk Creek and Johnson, and stock in the stone quarry company—so hers would not be touched. Similar statements were made by the examiner to her husband, to her brother-in-law, and in the presence of the witness, Mr. Rood; each of whom reported to her what the examiner had said. Edith Russell Chamberlain relied on what her father said to her, and on what her husband, her brother-in-law and Mr. Rood reported to her was said by Mr. Griffith, the examiner, and was thereby induced to make said assignment and transfer of said stock."

And the following conclusions of law:

"Although James D. Russell was a director of plaintiff bank at the time he made the statements to his daughter, Edith Russell Chamberlain, on which she relied, and which induced her to assign and transfer her said stock, yet as he was then acting for himself alone and not for or on behalf of the plaintiff, his statements, however false and fraudulent they may have been, were not the statements of the plaintiff, nor made in its behalf, and were not binding on plaintiff.

"John M. Griffith, national bank examiner, had no authority to make representations of any kind which could in law bind the plaintiff bank. His powers are defined by the national statutes. Each person dealing with him is bound to know the extent of his authority. His statement to Charles M. Chamberlain, to Clarence K. Chamberlain and in the presence of Rood, which they reported to defendant, Edith Russell Chamberlain, were not binding upon plaintiff bank, were not such as he had power to make, and were not such as, though false, would give defendant a standing in equity to avoid the said transfer of her said stock to plaintiff."

It is insisted that the finding of fact is not supported by the evidence, and it is argued that because Russell's inter-

est would be subserved by the bank's resumption of business, therefore, in the absence of evidence on that point, it can not be presumed that Russell did not represent his bank interest as well as his individual interest. But we think that this position is not well taken. The evidence shows that Russell had borrowed a large amount of money from the bank, and incurred large obligations to the bank by his indorsements, with Holmes, of commercial paper transferred to the bank. It is true that Russell & Holmes were directors of the bank, and as such officers had, with the other three directors, control of the affairs of the bank; but they also had personal individual business with the bank, and in their personal transactions with the bank they could not represent the bank nor participate in such representation. When they incurred obligations to the bank or furnished further securities for existing obligations, they represented only themselves. Some one else acted for the bank. All of the difficulties of the bank arose out of the inability of Russell & Holmes to square themselves with the bank. This they undertook to do. They did not have sufficient funds of their own. It was necessary to call upon their friends. Mr. Russell, after he had exhausted all other resources, went to his daughter. He asked her to help him, not the bank. She was requested to place her stock so that Mr. Russell could use it as he used his own resources, that is, to regain his standing in the bank, and continue the bank in business. The circumstance that the assignment was direct to the bank, instead of to Russell and by him to the bank, has no significance. She trusted her father with her bank stock, to be used by him as his own, and for his own purposes. Mrs. Chamberlain and her advisers knew that Russell was acting for himself in procuring her stock. No doubt, in obtaining this security, he served his "bank interest" as well as his "individual interest"; but he represented his individual interest, and the bank in this transaction was represented by the other three directors and not by Russell, as the dealing was directly between Russell and the bank.

His position in this transaction is not left in doubt by the evidence. It is, of course, true that after the bank examiner had closed the doors of the bank and taken possession of its assets, the officers of the bank could not transact its ordinary business, and any attempt by them to do so without the consent of the comptroller would be nugatory; but, on the other hand, it is undoubtedly true that under the law the comptroller was clothed with discretionary power to allow the bank to resume business if proper provisions were made to restore its assets, and enable it to comply with the requirements of the national banking law. When the bank, through its three disinterested directors, undertook to do this, the comptroller, through the examiner, consented, and informed the parties that, if they could make such arrangements as to restore the financial condition of the bank, the examiner would return the control of the assets to the bank officers. When the officers of the bank undertook, with that understanding, to make such arrangements, it was understood by all parties that any contracts that they attempted to enter into to that end were subject to the condition that they should succeed in restoring the assets of the bank, and be thereby enabled to receive full control of the affairs and business of the bank from the comptroller; that is, the bank examiner did not undertake to conduct the negotiations, but allowed the parties to go ahead and make their own contracts, bearing in mind that they would be of no force and could not be carried out until the assets of the bank were restored. The contracts and arrangements were thereupon made between the parties upon that condition. It was outside of the duties of the examiner, and outside of the authority conferred upon him, to negotiate for the replenishing of the assets of the bank. From that time, in regard to these negotiations, the comptroller, through the examiner, acted rather as a disinterested arbitrator between the officers of the bank, who were desirous of opening its doors, and the creditors of the bank, for the protection of whose interests he had intervened, than as the agent of either

party. Any information that he might give to either party interested would be entirely voluntary on his part. When the friends of Mrs. Chamberlain went to the examiner for information they did so at their own risk, and can not hold the bank responsible for his statements. It is very clear that Mr. Griffith was not the agent of the bank in the transaction in question. "He had no authority, as such (examiner), to act for the bank in any manner, and could not bind it by any act done or undertaken in its behalf. He represented a department of the government which supervises and controls the banks as to whether in certain cases they shall do business at all or not; but it does none for them, other than to wind up their affairs for their creditors. The examiner makes report to that department to furnish a basis for action with reference to the continuance of the banks in business. His reports might be favorable or otherwise, as any advice he should give might be followed. He doubtless acted for the best interests of the creditors of the bank in giving this advice, but what was done in following it had no more effect than as if it had been done without it." *Witters v. Sowles*, 32 Fed. Rep., 762, 764. The appointment of a receiver does not work a dissolution of the corporation. *Bank of Bethel v. Pahquioque Bank*, 81 U. S., 383, 20 L. Ed., 840. The authority of its officers is not destroyed, but partially suspended, and the result of the proceedings may be that the corporation is dissolved, or its powers fully restored, and this will depend upon conditions as they may be developed, or may be brought about, by prompt action on the part of those interested in the bank. In the meantime the examiner, from the time he takes possession, has certain designated powers and duties. He must take possession of the books, records and assets of every description of the association and may collect the debts due and claims belonging to it, but he is given no general powers to act for the corporation. When he [illegible] l to Mrs. Chamberlain's advisers that he wanted the liabilities of Russell & Holmes provided for, and that arrangements were being made to induce the

comptroller to authorize the bank to resume business, and that he wanted to make as good showing to the comptroller to that end as possible, he was acting in the line of his duty, and no one could possibly be deceived in regard to his position in the matter. And when he further stated to Mrs. Chamberlain's advisers that everything had been straightened up at the bank, that she would not lose the stock, that the paper it was to secure had been passed upon by the directors and said to be good, and other representations in regard to the condition and value of the securities that had been turned over to the bank by Russell & Holmes, Mrs. Chamberlain's advisers must have known the capacity in which he was acting, and that he had no authority to bind the bank by statements of that character, and had no knowledge in regard to the condition and value of the securities, except that they had been passed upon by the directors; and they were bound to know, and must certainly, under the circumstances, in fact have known that Mrs. Chamberlain, if she furnished these securities, was furnishing them to Mr. Russell, that her contract was entirely with him, and that the transactions were had for the purpose of enabling Russell & Holmes to so far make good their default with the bank as to make it proper and safe on the part of the comptroller to authorize the bank to resume business.

2. The suggestion that the contract of Russell & Holmes with the bank was illegal, and therefore the guaranty of Mrs. Chamberlain void, is without merit. The authority of *Banking Co. v. Rautenberg,* 103 Ill., 460, has been questioned, and if it is to be regarded as a correct exposition of the law it is not in point here. In that case, after an officer of the bank had already borrowed beyond the legal limit, the bank made him a further loan. The surety on this loan was held not liable. The court held that the note given by him to the bank for the further loan was illegal and void, and any guaranty of its payment by a third person equally void; but the rule, so far as we are aware, has never been extended to a case like the one at bar. In the

case of *Denison v. Gibson*, 24 Mich., 186, 194, Gibson sold his bank stock to Mrs. Denison's husband and others, and Mrs. Denison pledged her separate property as security upon the deferred payments to Gibson, and it was held that "the agreement of the surety is not binding where the bargain between the primary parties, out of which it springs, is contaminated by positive illegalities." No such condition exists in this case. It was not illegal for Russell & Holmes to restore to the bank what they had unlawfully drawn therefrom, and their agreement with the bank which involved the use of Mrs. Chamberlain's securities did not contemplate that they should withdraw funds from the bank, but rather that they should restore funds already borrowed. No doubt it was in the interest of every stockholder, including Russell & Holmes, to have the liabilities of Russell & Holmes to the bank provided for; and it was also in the line of the examiner's duties to encourage this. The suggestion that these securities were given the bank to secure an existing indebtedness, and that the contract containing the original indebtedness was illegal, is also without foundation. The evidence does not show that the liabilities of Russell & Holmes were incurred in pursuance of an illegal contract between themselves and the bank, but rather that it was created by the misconduct of Russell & Holmes, and without the consent of the bank.

3. It is argued that, as "Russell & Holmes were, both by law and by subsisting contract, bound to make good their obligations expressed in their indorsements, or to secure them, hence a promise to extend the time in which to do it could be no consideration for doing it." But the agreement was that Russell & Holmes should give further securities for their liability to the bank, and upon doing so their relations with the bank should be restored, and they receive the benefits that would obviously accrue through such restored relations. They manifestly would derive advantages, under these arrangements, from furnishing additional security. Their agreement to give such

security was executed, and the assets of the bank passed from the hands of the comptroller, and other changes in the interest of the stockholders and creditors of the bank were made as contemplated in their agreement, and they can not now be heard to say that there was no consideration for furnishing this security.

4. It is also argued that if a principal avails himself of the fruits of the unauthorized acts of his agent, he thereby authorizes those acts and they become binding upon the principal. But this rule of law has no application here. The unauthorized acts relied upon were not the acts of the agent of the bank, nor of any one who assumed to act for the bank in the transaction in question. As we have already seen, the bank was acting through the three directors not personally interested in the transaction, and not through Russell & Holmes or the bank examiner. If an agent is employed to transact the business of his principal and in doing so goes beyond his authority, the principal who employs him and who accepts the results of his employment must accept also the obligations assumed by his unauthorized acts. But where a principal is represented by a duly authorized agent, and some third person, who may also be benefited by the transaction, assumes, without the knowledge or consent of the principal, to make representations and statements, the principal will not be bound by such statements. *Spurgin v. Traub*, 65 Ill., 170. In this case the three disinterested directors were the proper parties to represent the bank, and assumed to do so and acted for the bank in making the arrangements with Russell & Holmes. They made no representation to Mrs. Chamberlain, and they were not aware that either Mr. Russell or the bank examiner had made the representations in question. The bank, through these directors, received these securities from Mr. Russell, and there is no evidence indicating that there was any collusion between the officers who transacted this business on the part of the bank and Russell & Holmes or the bank examiner. The bank, therefore, is not chargeable with the representations made by them.

It is therefore recommended that the decree of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

COMMERCIAL UNION ASSURANCE COMPANY ET AL. V. MARTHA J. SHOEMAKER.

FILED DECEMBER 4, 1901. No. 10,482.

Commissioner's opinion, Department No. 2.

1. **Gist of Conspiracy.** In an action for conspiracy, the damage, and not the wrongful confederation, is the gist of the action.

2. **Statement of Cause of Action for Conspiracy.** To state a cause of action for conspiracy, it is necessary for the pleader to allege, not only the confederation and the conspiracy and the doing of the wrongful act, but also the facts from which damages have resulted.

3. **Misjoinder:** CONTRACT: TORT. The joinder of a cause of action in a contract with a cause of action in tort is a misjoinder of causes of action.

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

Sylvester G. Williams, A. B. Coffroth, Edward C. Wright and *Flower, Peters & Bowersock,* for plaintiffs in error.

Walter J. Lamb and *George A. Adams, contra.*

OLDHAM, C.

This is an action brought by Martha J. Shoemaker against the Commercial Union Assurance Company, Limited, of London, the Concordia Loan & Trust Company and Cornelia J. Longaker, but for what purpose is not clearly stated.

The defendant in error, plaintiff below, in her petition, after various recitals of past events, which, in substance, were that in November, 1889, she had given a mortgage to the Lombard Investment Company on certain property in the city of Lincoln for $1,100, due in five years thereafter, and as further security she had also procured a policy of insurance on the property mortgaged for a like period of five years, and had delivered this policy to the Lombard Investment Company, and that afterwards this mortgage had been sold and assigned to the defendant Longaker; that on or about the maturity of this mortgage she applied to the defendant Concordia Loan & Trust Company, through its agent at Lincoln, Nebraska, for an extension of said mortgage for three years, which was granted on certain conditions, not material to this discussion; after setting out the clause of the mortgage that provides that if the mortgagor fails to keep the mortgaged property insured for the benefit of the mortgagee, then the mortgagee has the right to take out a policy of insurance thereon, and charge the premium to the mortgagor,—proceeds as follows: "Defendants agreed to so insure the said property and charge the same to plaintiff according to the terms of said proviso in said mortgage above set out; that plaintiff was thereafter informed by both defendants, the Commercial Union Assurance Company, Limited, and the Concordia Loan & Trust Company, that such insurance had been so taken out, and, relying upon said information, so received, made no further effort to insure the said property, but all the time believing that the same was insured as by them stated, until after the said buildings were completely destroyed, and burned by fire, as hereinafter stated. 9. That at the time of the maturity of the mortgage above mentioned, to-wit; November 11, 1894, and for some time prior thereto, this plaintiff was negotiating with the defendant, the Concordia Loan & Trust Company, for an extension of said loan, and did finally negotiate said extension; that the plaintiff at the time of taking out said insurance in the Orient Insurance

Company, of Hartford, Connecticut, turned over said policy to the Lombard Investment Company as mortgagee, and the said Lombard Investment Company, as plaintiff is informed and believes, turned the same over to the defendant Cornelia J. Longaker at the time it sold and indorsed said note and mortgage to her, or held the same for her benefit thereafter, and the same was so held either by the said Cornelia J. Longaker or the Lombard Investment Company until its expiration and the maturity of said loan, unless the same was turned over to the Concordia Loan & Trust Company by the Lombard Investment Company; that during the negotiation for the extension of said loan the plaintiff offered to renew said insurance in the Orient Insurance Company, but the defendant, the Concordia Loan & Trust Company, objected to the renewal of said insurance in said company, and notified plaintiff and agreed with plaintiff that it would insure said property in the defendant, the Commercial Union Assurance Company, Limited, and notified and agreed with plaintiff that it would take care of said insurance; that it would insure the property and call on the plaintiff for the premium, and that if plaintiff did not or could not pay the said premium promptly, the amount of the same would, under the provisions of said mortgage and the extension thereof, be added to said mortgage and become a loan against said property; that plaintiff thereupon accepted said proffer and agreement of said defendant, the Concordia Loan & Trust Company, to so insure said property, and abandoned her attempt to renew in said Orient Insurance Company, and relied upon said defendant, the Concordia Loan & Trust Company to so insure the said property in the defendant, the Commercial Union Assurance Company, Limited; that soon thereafter this plaintiff received a notice from the defendant, the Concordia Loan & Trust Company, and also from the defendant, the Commercial Union Assurance Company, by and through its agents Crutcher & Welsh, that said property has been insured and calling on the plaintiff to pay the premium,

to-wit: $14.40; that soon thereafter the plaintiff paid said premium as she was requested to do by the defendant the Concordia Loan and Trust Company and the said Concordia Loan and Trust Company and to its agent H. B. Sawyer by its authority and direction; that said payment of said premium was made on the 19th day of January, 1895, and that no notification was ever served upon this plaintiff that said property had not been insured by either of the defendants, in any way whatever, until after the property had been destroyed by fire without the fault, negligence or procurement of this plaintiff, which fire occurred upon the 24th day of April, 1895, and which fire completely destroyed and burned up the said buildings which were at said time of the value of $1,500; that immediately after said fire this plaintiff notified the resident agent of the Concordia Loan & Trust Company of the fire and he thereupon at once promised to look after it and took it upon himself, as agent of the said Concordia Loan & Trust Company, the matter of looking after and adjusting said loss, and the plaintiff also notified Burr & Beeson, agents of the defendant the Commercial Union Assurance Company, at Lincoln, Nebraska, of the said fire, and they immediately went about the adjustment of the same, having estimates of the loss made and looking after the matter for the purpose of adjusting it, and the said defendant the Commercial Union Assurance Company were also notified of said fire and immediately went to the scene of the fire, and investigated it and examined it and went about the preparation of adjusting the loss thereon. 10. That soon after said fire the defendants, the Commercial Union Assurance Company, Limited, and the Concordia Loan & Trust Company, conceived the idea and plan of defeating the plaintiff out of her insurance, and confederated and conspired together to do so and to prevent the collection by her of any insurance from either of them, because of said fire, and thereupon claimed that no insurance had ever been taken out, and denied any liability on the part of either of them for the loss occasioned to this

plaintiff by said fire, and if in fact said property ever had been insured as the said defendants the Commercial Union Assurance Company, Limited and the Concordia Loan & Trust Company, had represented to plaintiff it had been and for which they had received the premium or charged the same to the plaintiff as in accordance with the stipulation in the mortgage above set out, they thereupon destroyed all evidence of said insurance for the purpose of carrying out their scheme of defeating the collection of said insurance by this plaintiff against them or either of them. The plaintiff therefore alleges that the defendant the Concordia Loan & Trust Company is liable to this plaintiff for the sum and amount of said insurance, and if it did not procure said insurance as it had stipulated and agreed to do, and if it did take out said insurance in the defendant, the Commercial Union Assurance Company as plaintiff believes it did, and afterwards confederated with the defendant, the Commercial Union Assurance Company, Limited, to destroy all evidence of said insurance to prevent the payment of said policy to this plaintiff, then the defendants, the Commercial Union Assurance Company, and the Concordia Loan & Trust Company, are liable to this plaintiff for the amount of said insurance, but that the plaintiff is unable to learn which state of facts exist, because of the fact that she can not obtain the evidence thereof from the defendants or either of them. 11. That the defendant the Concordia Loan & Trust Company acting for itself pursuant to its said arrangement and agreement with the defendant, the Commercial Union Assurance Company, Limited, as well as the agent of and for the defendant Cornelia J. Longaker, agreed with the plaintiff to secure insurance on said property for the sum and amount of $1,200, or rather a renewal of the said former insurance, in the said defendant, the Commercial Union Assurance Company, Limited, and, did thereupon elect to take said insurance in said defendant the Commercial Union Assurance Company, Limited, in said sum of $1,200 for a term of three years from the expiration of the said

former insurance, and having so elected did apply to the defendant the Commercial Union Assurance Company, Limited, for said insurance under and pursuant to said arrangement and agreement with it as above alleged, and the defendant the Commercial Union Assurance Company, Limited, accepted said insurance and notified plaintiff that said insurance had been taken out and said property insured therein, and notified plaintiff that if she did not promptly pay said premium it would be charged against said property under the provisions of said mortgage. And the defendant the Concordia Loan & Trust Company acting for itself and as agent of the defendant, Cornelia J. Longaker, elected to so take out said insurance and charge the same against said property under and pursuant to the term of said mortgage, and so acting notified plaintiff of said insurance and also that if the premium was not promptly paid by plaintiff it would be so charged against said property, and plaintiff relied upon said insurance believing that said property was so insured and having no knowledge or information of any kind that it was not insured or that either or any of the defendants in any way claimed that the same was not insured until after the same had been totally and completely destroyed by fire as heretofore alleged. Plaintiff therefore alleges that the defendants did elect to take said insurance as above alleged and charged said property with the payments of the premium for the same under the terms and conditions of said mortgage, but that whether a policy was issued or not this plaintiff has no knowledge, but avers that the defendants are liable for the same regardless of the issuing or refusing or failing to issue said policy. Plaintiff therefore demands judgment against both of the defendants the Commercial Union Assurance Company, and the Concordia Loan & Trust Company, jointly and severally, or jointly or separately, as the facts may show such liability to exist, for the amount of said insurance policy, to-wit: $1,200, with 7 per cent. interest from the 24th day of April, 1895, costs of suit, reasonable attorney's fee, which plain-

tiff alleges is $300 and all other proper relief; and that the defendant, Cornelia J. Longaker be required to answer to any and all interests she may have in the premises."

To this petition defendants filed separate answers specifically denying the allegations of the petition concerning the agreement to insure and the allegations of conspiracy. A trial was had in the district court of Lancaster county and the jury returned a verdict in favor of Mrs. Shoemaker, and against the insurance company and the loan company jointly, for the sum of $1,339.78, upon which judgment was rendered, from which judgment each of said defendants prosecutes error to this court.

The first question presented is, does the petition state facts sufficient to constitute a cause of action against the said defendants jointly, as the verdict and judgment were rendered? There can be but one theory in this petition upon which the liability of the insurance company and the loan company could be joint, and that is, the conspiracy theory as set forth in paragraph 10 of the petition. This is obvious; for, if the loan company had effected the insurance, it had discharged its alleged obligation. If it had neglected to do this, and there was no insurance obtained, then the insurance company would not be liable in any event.

There is no doubt of the right of a plaintiff to maintain an action against two or more parties for conspiring to do and actually doing some unlawful act to his damage; but the courts, so far as we are aware, are unanimous in holding that confederation and conspiracy are not actionable, unless something in pursuance of the common plan is actually done, and the thing done results in injury to the plaintiff, and the facts constituting this injury, and the damage resulting therefrom, must be alleged. *Kimball v. Harman,* 34 Md., 407; *Stevens v. Rowe,* 59 N. H., 578; *Van Horn v. Van Horn,* 56 N. J. Law, 318; *Booker v. Puyear,* 27 Nebr., 346; *Mapstrick v. Ramge,* 9 Nebr., 390.

There is no allegation in this petition that the plaintiff has sustained any damage by reason of the wrongful acts

of the defendants, nor are there any facts pleaded from which damages may be inferred. The destruction of "all evidence of said insurance" would not extinguish the liability of the insurance company for the loss by fire if the insurance had been actually effected. It can not be consistently contended that by the destruction of the evidence of insurance, that plaintiff thereby lost the insurance on her property for the want of evidence that the contract of insurance had been made, for the reason, that this fact was the basic one to be proved in order to make out the conspiracy. In other words it was incumbent on her to prove, in making out her case of conspiracy, (1) that insurance had been actually effected; (2) that the evidence thereof, by reason of the conspiracy, had been destroyed, and (3) this act had damaged her in some way.

This petition is certainly not a model of good pleading. It undertakes to join causes of action in contract with causes in tort. Its allegations are alternately stated, contradictory, and ambiguous and the observations of the court in *Doan v. Holly,* 25 Mo., 357, are pertinent to this pleading: "It would always be well, if a party before he commences his suit, would determine in his own mind what he is suing for."

But there is another potent reason why this case should be reversed, and that is, there was no evidence whatever offered on the trial of this cause of the conspiracy nor of any acts done by reason of it.

For the reasons above given we conclude that the petition does not state facts sufficient to constitute a cause of action against said defendants jointly, and that the trial court erred in submitting the question of joint liability to the jury. It is therefore recommended that the judgment of the trial court be reversed.

SEDGWICK, C., concurs. POUND, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

REVERSED.

WILLIAM C. BROWN ET AL., APPELLEES, V. HOTEL ASSOCIATION OF OMAHA ET AL., APPELLANTS.

FILED DECEMBER 4, 1901. No. 10,670.

Commissioner's opinion, Department No. 2.

1. **Assignment of Pledge:** ASSIGNEE. A pledger may assign his interest in the thing pledged to a third person, and the assignee, at least where the pledgee has notice of the assignment, succeeds to all the rights of the pledger in the property or against the pledgee.

2. **Certificates of Stock:** PLEDGE BY DELIVERY: TRANSFER ON BOOKS: POWER OF ATTORNEY. Where stock is pledged by delivery of the certificates, without power of attorney authorizing a transfer on the books of the company, the company can be compelled to make such a transfer only by a purchaser who has acquired title to the stock by a valid sale.

3. **Foreclosure:** NECESSARY PARTY. In foreclosure proceedings to obtain judicial sale of pledged stock, a third person, to whom the pledger has assigned all his interest with the knowledge of the pledgee, is a necessary party, and a sale under decree in a suit to which he is not a party passes no title.

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

Wharton & Baird, for appellants.

Gains, Kelby & Storey, contra.

Argued orally by *Wharton* for appellants; by *Kelby, contra.*

POUND, C.

Thomas Swobe, being the owner of 100 shares of stock in the defendant corporation, pledged them to Henry D. Brown, whose administrators are plaintiffs in this suit, by delivering the certificate. It is alleged in the petition and there is a finding that the certificate was "indorsed in blank." But the answer contains a general denial, and no mention is made of such indorsement in the stipulation of facts entered into at the trial. The certificate itself, which is in evidence, discloses no indorsement; and no

power of attorney authorizing transfer to be made on the books of the company appears either upon the certificate itself, or from the stipulation of counsel. We must conclude, therefore, that the "indorsement" referred to in the finding of the court whatever it may have been, was not of that character, and that no such power of attorney was executed. Some time after this pledge, Swobe transferred all his interest in the stock to the appellant, or to defendant Markel, its president, by a written assignment. He testifies, and it is not disputed, that soon afterwards he paid a part of the indebtedness, and at that time explained to the pledgee that he had made such assignment. The remainder of the debt being unpaid, Brown brought a foreclosure suit to which Swobe alone was made a party; and under decree in that suit the shares were sold at sheriff's sale to the plaintiffs, who, in consequence of Brown's death pending suit, had been substituted therein. After the sale, plaintiffs produced the original certificate and demanded the issuance of a new one and the proper transfer on the books of the company, and on refusal brought this suit to compel the company to take such action. The latter and certain of its officers answered, alleging that they were necessary parties to the foreclosure suit by reason of the assignment of the pledger's interest in the stock; that they were not made parties to the suit and had no notice or knowledge of the sale,—and denying plaintiffs' title to the stock, or right to have the transfer on the company's books. The court found the facts substantially as stated, except that there was no finding with reference to the notice to Brown of Swobe's assignment of his interest to Markel, and rendered a decree for plaintiffs, from which the present appeal is taken.

A preliminary question might arise as to the notice which Brown had of the assignment of Swobe's interest, for the reason that it is not pleaded. But it seems to have been taken for granted at the trial that there was such an issue, and the defendants were permitted to and did prove it without objection. In consequence, we think, although

the court made no finding as to notice, so long as the undisputed evidence clearly establishes it, this court may properly supply such finding. Supplying this finding as to notice, it seems clear, upon the facts found by the lower court, that the cause must turn upon the question whether the defendants, or some of them, were necessary parties to the foreclosure proceedings, so that a sale thereunder without their knowledge or notice to them could convey a valid title. The court below seems to have assumed that Swobe could not convey his interest to Markel so long as the shares were pledged to Brown, and the latter, with Markel's knowledge, held the certificate. This position is erroneous. It is the shares, not the certificates, in which the property exists and which are transferred. A pledger may assign and transfer his interest in the thing pledged the same as any other interest which he may have, and the assignee, at least if the pledgee has notice of his claim, succeeds to all the rights in the property and against the pledgee possessed by the pledger. Jones, Pledges & Collateral Securities, secs. 364, 370. In this case there was no power of attorney to make the transfer on the books of the corporation. If there had been, the pledgee could undoubtedly have compelled the corporation to make the transfer. Colebrooke, Collateral Securities, sec. 272; 18 Am. & Eng. Ency. Law, 614. But in the absence of such power of attorney, no one other than the pledger could make or compel a transfer, on the books by the very terms of the certificate, unless there was a valid sale or foreclosure. In order to cast a duty upon the corporation, there must be either a power of attorney authorizing some one to act for the original shareholder, or else a valid sale which gives the person demanding transfer title to the stock. 2 Thompson, Corporations, sec. 2681; *Indiana & I. C. R. Co. v. McKernan,* 24 Ind., 62. The pledgee may pursue either of two courses: He may follow the common-law method of giving reasonable notice to redeem, followed by public sale, or he may proceed in equity by foreclosure suit and judicial sale. 2 Thompson, Corporations, sec. 2656. The proceeding in the

case at bar was of the latter type, and clearly can not be upheld as a common-law sale, because there was no notice to the party entitled to redeem. *Indiana & I. C. R. Co. v. McKernan, supra.* For the same reason, we think the foreclosure was ineffective. If the purpose of the proceeding had been merely to establish the amount due from Swobe to Brown, there would be force in plaintiff's contention that Markel's course, if he held the stock individually, was to intervene in this suit with a claim for redemption, or bring a separate suit for that purpose, or, if the stock belonged to defendant corporation, for the latter to put in a cross-petition offering to redeem. But the purpose of the suit was more than that. Its object was to cut out the outstanding right of redemption and title and pass a title to the purchaser at the sale, and it is only on the theory that such a title passed that this suit may be maintained. Hence, so long as all Swobe's rights had been transferred to and were in Markel or the company, and Brown knew it, we fail to see how the conclusion that Markel, or the company he represented, was a necessary party, can be avoided. Any one who has the right to pay the debt and redeem is a necessary party to the foreclosure proceedings, and a decree in his absence is nugatory. *Denny v. Cole,* 22 Wash., 372, 61 Pac. Rep., 38. The pledge by mere delivery of the certificate, without power of attorney authorizing transfer, was undoubtedly valid as such, and created a lien. Jones, Pledges & Collateral Securities, sec. 168. But it conveyed no title. Title could only be passed by a valid common-law sale or a valid foreclosure, neither of which was had. The corporation can be compelled to make the transfer only by some one who has title, and the plaintiffs, having only a lien as pledgees, are not entitled to the relief awarded. They could require their interest to be noted on the company's books. But they have not asked that, nor has that right been denied them by the defendant.

We recommend that the decree be reversed and the suit dismissed.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is reversed and the suit is dismissed.

REVERSED AND DISMISSED.

JOHN FOX V. STATE OF NEBRASKA, EX REL. JOSIE POWERS.

FILED DECEMBER 4, 1901. No. 10,679.

Commissioner's opinion, Department No. 2.

1. **Satisfaction of Judgment:** FRAUD: MOTION: INDEPENDENT ACTION. Where satisfaction of a judgment has been procured by fraud, the court may set the satisfaction aside on motion, upon notice and proper showing by affidavit, unless rights of others not parties to the action have supervened or would be unduly affected, or the evidence is conflicting on material questions of fact arising upon the motion, in which cases the party seeking relief should be left to an independent action.

2. **Contract Lawful on Face:** GOOD FAITH: INTENTION: FRAUD: THIRD PARTIES. A party who has entered into a contract lawful on its face, in good faith and for an honest purpose, is not precluded from relief because the other party may have intended to make fraudulent use of it as to a third person.

3. **Fraudulent Satisfaction:** RELIEF: SETTLEMENT: RESTORING MONEY. The party applying for relief against a fraudulent satisfaction of a judgment should be required to put the other party *in statu quo* by restoring moneys paid to him under the settlement.

4. **Restitution:** APPLICATION UPON JUDGMENT. If the sum due such party has been finally determined by judgment so that no further judicial ascertainment of liability, or the amount thereof, is necessary, and it does not appear that the sum paid was exempt, or for some other special reason ought to be restored directly, application and credit upon the judgment is a sufficient restitution.

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

George P. Sheesley and *C. H. Aldrich,* for plaintiff in error.

Matt Miller and *Arthur J. Evans, contra.*

POUND, C.

Josie Powers had recovered a judgment against John Fox in bastardy proceedings. After judgment Fox procured a written stipulation of settlement and satisfaction, reciting as a consideration the dismissal of error proceedings brought in the supreme court to review the judgment, and the payment of $250. This stipulation having been filed and of record some six months, a motion was made on behalf of the judgment creditor to set it aside for the reason that it was procured by fraud. An affidavit accompanied the motion, from which it appears that no error proceedings were in fact pending in the supreme court, nor was the sum of money recited in fact paid, but that the real consideration was a false and fraudulent promise to marry the judgment creditor at a time and place stated, which the judgment debtor did not, and did not intend to, carry out. No testimony was adduced to contradict this affidavit. Objections to the jurisdiction of the court to proceed upon motion and affidavit were filed in the form of a motion to dismiss, and overruled, after which the court entered an order setting aside the stipulation and satisfaction, and directing execution. We think the procedure followed and the order of the district court were proper and justified by the showing on file. In general, where satisfaction of a judgment has been procured by fraud or mistake, the proper course is to apply to the court in which is the record of the judgment by motion to set aside such satisfaction. *Chapman v. Blakeman,* 31 Kan., 684, 3 Pac. Rep., 277; *Potter v. Hunt,* 68 Mich., 242, 36 N. W. Rep., 58; *McGregor v. Comstock,* 28 N. Y., 237; *Keogh v. Delany,* 40 N. J. Law, 97; *Haggin v. Clark,* 61 Cal., 1. If rights of others, not parties to the original action, have supervened

or would be unduly affected, or if the evidence is conflicting on material questions of fact arising upon the motion, so that determination upon affidavits procured *ex parte* would be inexpedient and unsatisfactory, the party seeking relief should be left to an independent action. *Chapman v. Blakeman, supra; Parker v. Judge of Circuit Court,* 24 Mich., 407. Many cases of these several sorts have been cited to us by counsel. But they are not pertinent to the case at bar, in which no third persons are shown to have any interests in the judgment, or any rights which would be affected by the order setting aside the stipulation of settlement and satisfaction; nor is the showing that such stipulation was procured by gross fraud contradicted in any respect. Some objection might be taken to the form in which the affidavit is brought before us in the record. But we find that the original record was lost, and the stipulation supplying copies of the record below recites that such copies are to stand in lieu of a lost bill of exceptions. Hence we must assume that a bill of exceptions containing the affidavit was properly settled and before us until the original was lost.

With respect to the point made by counsel that the purpose of the settlement, as disclosed by the affidavit, was to defraud Fox's father, and that the parties, being *in pari delicto,* should have been left where they were, we can not so construe the testimony. She testifies that he said he had conveyed his farm to his father at the time the suit was begun, and desired the stipulation to show the latter, in order to obtain a reconveyance. The strong inference from what he said was that the conveyance to his father was fraudulent and that he was entitled to reconveyance whenever the state of the litigation made it prudent. She did not enter into the settlement with a view to getting or permitting him to get a farm to which he was not entitled, but with the intention of promoting the best interests of all, including her child, by the proposed marriage. The agreement was perfectly lawful on its face, and there is no necessary inference nor do we believe that she intended to

defraud any one or contemplated that the stipulation would be used for such a purpose. If he alone intended so to use it, she would not be affected. *Bartlett v. Smith,* 13 Fed. Rep., 263; *Gregory v. Wendell,* 40 Mich., 432; *Kottwitz v. Alexander,* 34 Tex., 689.

In one respect, however, we think the order should be modified. It appears from the showing on file that $40 was paid and received by the judgment creditor at the date of the fraudulent settlement, which she still retains. It is true, she states in her affidavit that such sum was not paid upon the judgment, nor as part of the consideration for the satisfaction and discharge, but was to be used in the purchase of clothing and for other necessary expenses in preparation for marriage. None the less she obtained the money as a part of and through the settlement she seeks to set aside. The promise of marriage was part of the settlement, and money paid to her in furtherance of that promise was acquired under the settlement. Where a satisfaction of a judgment is set aside, the same rule must apply as in other cases, and the party seeking such relief should be required to place the other *in statu quo.* Counsel contend that the order should be reversed because this was not done. We do not think a reversal is required. It has been judicially determined that Fox should pay $1,200. He has paid $40. It does not appear that the sum paid was exempt from execution or garnishment or that there is any reason why this sum, which he was legally bound to pay, should be returned to him. The cases wherein absolute restitution has been required have all been such that a further judicial ascertainment whether anything was due, and, if so, how much, was necessary. Cases where compromises before suit or settlements pending suit are set aside are of this sort. In the case at bar, every requirement of justice is subserved by applying the sum paid upon the judgment. Accordingly we think the judgment creditor should be required to make such application by a credit as of the date of the settlement, and that execution should issue for the remainder only.

We therefore recommend that in case the defendant in error, within forty days after filing of this opinion, file a proper acknowledgement of the receipt of $40 as a credit upon said judgment of the date of July 12, 1897, the order of the district court be affirmed.

OLDHAM, C., concurs. SEDGWICK, C., having presided in the court below, did not sit.

By the Court: For the reasons set forth in the foregoing opinion it is ordered that in case the defendant in error within forty days from the date hereof file a proper acknowledgment of the receipt of $40 as a credit upon said judgment of the date of July 12, 1897, the order of the district court be affirmed, otherwise to be reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

FELIX CUNNINGHAM ET AL. V. LEROY FINCH ET AL.

FILED DECEMBER 4, 1901. No. 10,587.

Commissioner's opinion, Department No. 3.

1. **Injunction Bond:** RECOVERY: ATTORNEY FEES. Attorney's fees incurred in an unsuccessful attempt to dissolve an injunction, on a motion made therefor before the final trial, are not a proper element of damage in a suit on the injunction bond.

2. **Counsel Fees:** ELEMENT OF DAMAGES: ANCILLARY INJUNCTION. A recovery of counsel fees for the trial of a case will not be allowed as an element of damages for an injunction wrongfully obtained, if the injunction proceedings be only ancillary to the main case.

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

R. Cunningham and *George A. Adams,* for plaintiffs in error.

Frank J. Kelley, contra.

DUFFIE, C.

In the year 1895, LeRoy Finch and Freeman C. Finch, the defendants in error, were tenants in possession of a farm in Lancaster county, Nebraska, owned by the plaintiffs in error, Cunningham and Ledwith. These owners brought an action in the district court of Lancaster county, alleging in their petition that the tenants were committing waste upon the farm by cutting shade and ornamental trees, which, together with fence posts and other improvements upon the premises, they used for fuel; that they were insolvent and that plaintiffs would suffer great injury if defendants were not restrained from such acts. The plaintiffs prayed for a temporary injunction restraining the defendants from committing waste, and that upon the final hearing the right to the property might be found in the plaintiffs, and that plaintiffs recover from defendants $200 damage for the injury sustained. A temporary injunction was issued in said cause, the plaintiffs therein executing a bond in the sum of $100. A motion to dissolve this temporary injunction, made by the defendants, was overruled by the court, and, upon a final trial of the action, judgment was entered finding the defendants entitled to most of the property in controversy, and allowing them to remove certain described property to which they had established title. After the final disposition of that case, the present action was commenced in the district court of Lancaster county, in which LeRoy Finch and Freeman C. Finch, the defendants in the former suit, sought to recover from the plaintiffs in that case and the sureties upon the injunction bond their damages sustained in consequence of the issuing of the injunction. The trial resulted in a judgment for the plaintiffs below in the sum of $75.30, and from this judgment the plaintiffs in error have brought the case to this court for review.

Numerous errors are assigned as having occurred upon the trial and in giving and refusing instructions to the jury, but, as we view the case, it will be unnecessary to

examine the errors assigned in detail, as the case can be disposed of, and the rule of law for the guidance of the district court on another trial established, by the announcement of a few well-established principles which govern in actions of this character. The district court apparently proceeded in the trial of the case upon the theory that the plaintiffs below were entitled to recover all damages and expense, which they had incurred in defending the action in which the injunction was allowed. It will be observed from the statement above given that the plaintiffs in the first action, in addition to seeking an injunction to prevent the defendants from committing waste, also sought to obtain damages for waste already committed, and to establish their title to the corn-cribs and other improvements upon the leased premises. Not only was the title to property involved in that action, but damages for the destruction of other property was sought to be recovered. If an injunction alone had been sought, and was the only relief asked by the plaintiffs in the action, then the necessary expense incurred in resisting the injunction might be recovered in an action upon the bond, but where the injunction is merely ancillary to the main action, then only such expense and damage as were suffered in procuring the dissolution of the injunction can be allowed. Neither can attorneys' fees be allowed for an unsuccessful attempt to dissolve an injunction before the final trial. In *Trester v. Pike,* 60 Nebr., 510, it is said: "It is only where a trial of the principal issues involved is necessary to dispose of an injunction that attorneys' fees for the trial of a case are proper to be allowed as damages caused by an injunction wrongfully issued. A recovery of counsel fees for the trial of a case will not be allowed as an element of damages for an injunction wrongfully obtained, if the injunction proceedings be only auxiliary to the main case." Without attempting to review the instructions given by the court, it is sufficient to say that they do not limit the recovery in this action as announced in the opinion quoted from. As before stated, the court apparently took the view that all damages and

expense incurred by the defendants in the trial of the cause might be recovered in this action on the bond.

We recommend that the judgment of the district court be reversed, and the case remanded for a new trial.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the case remanded for a new trial.

REVERSED AND REMANDED.

WILLIAM J. PHILLIPS V. JOHN HOGUE ET AL.

FILED DECEMBER 4, 1901. No. 10,663.

Commissioner's opinion, Department No. 3.

1. **Payment Out of Particular Fund:** WORDS OF TRANSFER: AUTHORITY OVER FUND: LIEN: EQUITABLE ASSIGNMENT. A mere naked promise to pay an existing debt out of a particular fund, unaccompanied by any words of transfer, or the giving of any power or authority over the fund, does not operate either to create a lien thereon or to work an equitable assignment thereof.

2. **Attorney's Lien:** GARNISHMENT. The attorney for a defendant in an action in which the plaintiff has caused funds in the hands of a third party to be garnished, is not entitled to an attorney's lien on the fund so garnished to secure his fee for services performed in the case.

3. **Intervention After Trial on Merits:** LIEN ON FUND. L. intervened in an action between P. and H., claiming to be entitled to certain moneys attached in said action and paid into court, by reason of a lien thereon, and also because of a claimed equitable assignment thereof to him by the defendant prior to the attachment of the fund. Prior to his intervention judgment on the merits had been entered in the action in favor of the plaintiff therein, but no order had been made disposing of the money attached in the case and then in the hands of the court. *Held*, That, even if L. had a right to intervene after a trial on the merits, he could not, in the absence of a showing that he had a lien on the fund, or that the same had been assigned to him before the service of the attachment, be admitted to question the validity of the judgment or the proceedings leading up to its entry.

ERROR from the district court for Sherman county. Tried below before SULLIVAN, J. *Reversed.*

Long & Mathew, for plaintiff in error.

A. H. Murdock, contra.

DUFFIE, C.

February 4, 1896, plaintiff in error obtained judgment against John Hogue, one of the defendants in error, in the sum of $682.50. The action was aided by attachment, and one John Terhune was garnished. Terhune, at the time the summons in garnishment was served on him, had in his possession the sum of $589.75 belonging to the defendant, Hogue. Previous to the commencement of this action, Hogue had been sued in the district court of Sherman county by the Capital National Bank, and a large amount of real estate belonging to him attached. John Terhune had also been garnished, and had answered in such garnishment proceedings, stating that he had possession of money belonging to Hogue to the amount of $589.75, being the same money that was afterward garnished in his hands by Phillips, the plaintiff in error herein. Although garnished in the suit of the Capital National Bank against Hogue, Terhune continued to hold the money in his hands belonging to Hogue, having been requested by the attorneys of the bank to hold the same until the case was finally disposed of. At the date of the commencement of this action, the case of the Capital National Bank against Hogue was pending on appeal in this court, and April 10, 1896, an opinion was filed in that case reversing the judgment of the district court. That case, upon being remanded to the district court, was finally dismissed, and February 23, 1898, Phillips obtained an order requiring Terhune, the garnishee, to pay the $589.75 held by him into court, and Terhune thereafter paid the same to the clerk of the court. Mr. Lane, the in-

tervener in this action, had been the attorney for Hogue in his litigation with the Capital National Bank, and in other litigations in which Hogue was engaged, and March 28, 1896, he filed a claim for an attorney's lien on "all papers, judgments and property attached" in said cause, and claimed that there was due him, as fees for services rendered, the sum of $1,500. February 24, 1898, Lane filed his petition in intervention in this case, alleging that he had a lien upon the $589.75 garnished in the hands of Hogue, and further alleging that in the fall of 1894 Hogue had assigned this money to him. He further alleged in his petition of intervention that the note upon which Phillips had obtained judgment against Hogue was obtained without consideration, and by undue influence, while Hogue was in a feeble condition of mind and body, and that Phillips procured the appointment of Joseph Pedler, the attorney who appeared in this action for Hogue, and who had waived the issuance and service of summons upon him for the purpose of having judgment entered against Hogue and not to make a defense against the note; that the judgment was void as to Hogue's creditors and asking that the money garnished in the hands of Terhune be awarded to him instead of to Phillips, the plaintiff in error. Other matters were alleged in the petition of intervention which it is not necessary to set forth in detail. An answer was filed by Phillips, and upon the trial of the case the court made a finding of facts and conclusions of law based thereon as follows:

"That, since the object of executing and filing the voluntary appearance by the attorney of defendant Hogue, was, that the judgment might be rendered by default against him, and was not for the purpose of making a defense in said action, but was for the purpose of defrauding the creditors of said Hogue, and that the same was but an effort to do indirectly what he might not do directly—that is, confess judgment—and that said judgment is null and void.

"The court further concludes, that since the giving of said note was without consideration and was for the pur-

pose of defrauding the creditors of the said Hogue, of which the said Lane at that time was one, that as between said association and said Lane, as a matter of equity and good conscience, the said intervener, Lane, should have the fund now in this court, rather than the said plaintiff.

"That the judgment heretofore rendered in this action in favor of the plaintiff and against the said Hogue, be, so far as the same affects the interest of the intervener herein, and the same is hereby annulled and set aside.

"That the money now in the hands of the clerk of this court paid in by the said Terhune, garnishee, be and the same is hereby ordered applied to the payment of the amount herein found due the said intervener from the said Hogue, and the said Terhune, garnishee, is hereby discharged and released from all liability in the premises, and the clerk of this court is hereby ordered and directed to pay to the said Mary C. Lane, administratrix of the estate of Edmond C. Lane, the said sum of money, to-wit: $589.75; and that the plaintiff pay the costs of these proceedings taxed at $———.

"And the intervener is given leave to amend her petition to conform to the evidence and findings of the court."

Lane, in his petition of intervention, alleges that at and before the date of filing the same, John Hogue, the defendant in the action, had deceased, and that James W. Hogue was the administrator of his estate. If Lane had a valid lien upon the money garnished in the hands of Terhune, or if that money had been assigned to him and was his property prior to its garnishment by the plaintiff in error, then he might perhaps sustain this action, although Hogue had deceased prior to the filing of his petition of intervention. The district court found he had a lien upon the fund. We are unable to discover any theory upon which this finding can be sustained. Our statute giving an attorney a lien for services performed is as follows: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; upon money in his hands

belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." Compiled Statutes, 1901, ch. 7, sec. 8. This money was neither in the hands of the attorney nor in the hands of the adverse party. It was money in the hands of a third party, who, it is true, had been garnished in the action in which Lane was employed, but who was still in possession of the fund. It had never been paid into court, but was held by the garnishee at the request of the attorney of the attaching plaintiff. Even if it had been paid into court, it would not fall within the letter of the statute which gives a lien only upon money in the hands of the attorney himself, or in the possession of the adverse party from the time of giving notice to that party. We are clear that Lane had no lien upon this fund, and that the finding of the court that he had a lien is wholly unsupported by the facts disclosed, or the law governing the case. Relating to his ownership of the funds under the claimed assignment from Hogue in 1894, the district court made the following finding: "The court further finds that prior to the bringing of plaintiff's suit an oral agreement was entered into between the said Lane and said Hogue, whereby it was agreed that, in case said money should be released then in the hands of the said garnishee, that the said Lane should have the same to apply on his fees; but further finds that no written assignment of the same was ever made, or any order executed by Hogue in favor of Lane to secure the same, but that all that was done concerning it was simply an oral agreement to that effect." The most that can be claimed for the above finding is that it shows a promise on the part of Hogue to use the money in the hands of Terhune in the payment of fees due him; and that is the full extent to which the testimony goes giving it the most favorable construction in favor of the claim of the intervener. But it is urged that the evidence shows an equitable assignment of this fund to Lane; and several cases, among them *Williams v.*

Ingersoll, 89 N. Y., 508, are cited in support of this view. The difference between an equitable assignment and a promise to pay a debt out of a designated fund is clearly made by all the cases cited, and for that reason it will be necessary to refer only to the facts in *Williams v. Ingersoll* to show the distinction which all the cases make. Williams was an attorney at law, and represented Heath in important litigation with Ingersoll and other parties. One of these actions was brought by Heath against Ingersoll to recover damages for malicious prosecution. During the progress of the litigation, Williams, feeling uneasy about his compensation for services which he was rendering and was expected to render in the various actions pending, made an agreement with Heath that "he should be paid for his said services out of any moneys that the said Heath should obtain or become entitled to from any of the matters, suits and proceedings in which he should be engaged, and that he should have a lien for all sums that might be owing or due him for his said services, to the extent of the worth and value thereof, upon any sum Heath might obtain or become entitled to from the said defendants, Lorin and James H. Ingersoll, or from any other person or party connected with said suits," etc. Heath recovered judgment against Ingersoll in the malicious prosecution action for $10,000, but before the same was paid Ingersoll was garnished at the suit of a judgment creditor of Heath. While in the litigation which ensued the fund was awarded to Williams, it does not clearly appear from the opinion whether the court regarded the agreement between himself and Heath as creating a lien on the fund, or whether it was looked upon as an equitable assignment thereof. At page 523 it is said: "We must, therefore, hold that the plaintiff had an assignment of, or lien upon the award, good and effectual against the assignor Heath, and his attaching creditor." Whether the decision was placed upon the ground of the agreement between Williams and Heath, creating a lien upon the fund, or as working an equitable assignment thereof, is not material, as in either case the court clearly held that in a

case of the character of the one we are now considering the agreement to pay an existing debt out of a particular fund neither gave a lien upon the fund nor operated as an equitable assignment thereof. At page 518 the court, speaking to the point now under consideration, said: "Whatever the law may be elsewhere, it must be regarded as the settled law of this state that an agreement, either by parol or in writing, to pay a debt out of a designated fund, does not give an equitable lien upon the fund, or operate as an equitable assignment thereof. It was so decided in *Rogers v. Hosack,* 18 Wend. [N. Y.], 319. That case was followed and the same rule laid down in *Christmas v. Russell,* 14 Wall. [U. S.], 69, and *Trist v. Child,* 21 Wall. [U.S.], 441." Turning to the case of *Christmas v. Russell, supra,* we find the evidence in support of an equitable assignment much stronger than that offered by the intervener in this case. Christmas had appealed a case to the supreme court of the United States, and procured one Yerger and a certain Anderson to become sureties upon the supersedeas bond. In 1865, he wrote Yerger as follows: "I feel great uneasiness about your liability on the bond in suit of Russell against me. I have ever held the Lyons note as sacred for the payment of this debt, and have it now in New York endeavoring to sell it with the mortgage to pay this debt. I expect to hear from it daily. If not sold, I will send it to you as soon as I return." In 1866 he wrote again to Yerger, saying that he countermanded a sale of the note, and added, "I could not safely send you Lyons's note by mail as it is payable to me or bearer, hence, if lost, might put me to much trouble." Shortly after this he again wrote: "I will hold this note $16,666,—and many years interest,—always subject to this debt, provided the judgment is affirmed, until which time let the matter rest where it is." Within a short period he wrote again as follows: "You may rest assured I will protect you with the Lyons note. * * * This fact should not be known, to enable me to make a good compromise." Shortly afterward he transferred the note to his son. The case in the supreme court was affirmed, and

the sureties became liable to pay the judgment, Christmas having in the meantime become insolvent. In this state of the case the sureties commenced an action against Lyons, the maker of the note, joining Christmas and his son, to whom the note had been transferred, and asking that Lyons be enjoined from paying the note to the defendants, and that, when payment was made, that it be made to them on the ground that they, as sureties, were liable for the payment of the judgment, and that Christmas had made an equitable assignment of the note to them, and that they were in equity entitled to enforce it. The circuit court entered a decree for the complainants as prayed in their bill, but on appeal to the supreme court, the case was reversed; the court, after setting out the letters above referred to, saying: "These letters contain no words of transfer, and nothing which by construction or otherwise, can have any effect in that way. At most, they are only evidence of a promise to pay the judgment, if affirmed, out of the proceeds of one of the notes, and to send the note, if not sold, to Yerger. An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment." A distinction is made by the cases between a promise made to pay an existing debt out of a designated fund and a promise to assign or give a lien upon a fund in consideration of services to be performed for the promisor. In the latter case the agreement will be enforced, as was the case in *Williams v. Ingersoll.* In that case, and in the similar cases, there was more than a mere promise to pay an existing debt; there was an agreement for legal services to be performed by one party and for the giving of a lien or the assignment of a fund in payment of these services by the other party. Such an agreement calling for the expenditure of money or the performance of valuable services by the promisee is very different from a naked promise to pay a present debt out of a particular fund. It has every feature of a contract, and those courts which recognize contracts of that character as creating a lien or working an equitable assignment of the fund, proceed apparently upon

the theory that it is a contract which may be specifically enforced in equity.

The intervener, having failed to establish any right or interest in the fund, is wholly without a standing to question the judgment of the plaintiff in error or the manner of its entry. This view of the case, which has, we confess, been forced upon us contrary to our first impressions, and somewhat against our inclination, renders it unnecessary to discuss such other questions as are presented by the record.

We recommend that the judgment of the district court be reversed and the case remanded with direction to dismiss the intervener's petition.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the case remanded with directions to dismiss the intervener's petition.

REVERSED AND REMANDED.

ALGERNON S. PATRICK ET AL. V. NATIONAL BANK OF COMMERCE.

FILED DECEMBER 4, 1901. No. 10,693.

Commissioner's opinion, Department No. 3.

1. **Deficiency Judgment:** REPEAL OF SECTION: PENDING ACTION. In an action of foreclosure commenced prior to the repeal of section 847 of the Code of Civil Procedure, the court is authorized to enter a deficiency judgment against those personally liable for the debt, when a deficiency exists, notwithstanding the repeal of said section.

2. **Facts in Petition:** JURISDICTION: MOTION. Where facts showing defendant's liability for a deficiency are set out in the petition to foreclose, and judgment for a deficiency against those personally liable for the debt is prayed, the court has jurisdiction, after a sale of the mortgaged premises, to enter a deficiency against the defendants so found liable on a motion therefor by the plaintiff.

3. ———: FINDING OF COURT: SETTING UP NEW FACTS. Where, in a petition filed to obtain the foreclosure of a mortgage, facts are alleged showing a personal liability on the part of the defendants for the payment of the debt, and judgment for deficiency is asked against them, and where the court, in its decree, finds that they are personally liable for the payment of any deficiency that may exist after a sale of the mortgaged premises, they can not, while such decree remains in force and unmodified, be permitted, when judgment for deficiency is sought, to set up facts which existed when the original decree was obtained, to show that they are not liable. *Stover v. Tompkins*, 34 Nebr., 465.

4. **Foreclosure:** STATUTE OF LIMITATIONS: TOLLED BY FORECLOSURE AS TO NOTES NOT OUTLAWED. Where, in a petition to foreclose a mortgage, a deficiency judgment is asked against the defendants who are personally liable on the notes, the running of the statute of limitations is tolled as to such notes as were not outlawed at the commencement of the action.

5. **Ratable Distribution:** DEFICIENCY JUDGMENT: STATUTORY BAR. Where a mortgage is given to secure three notes, and at the date of the commencement of an action to foreclose the mortgage the note first maturing is outlawed, so that no personal action could be maintained thereon, and where the mortgage security does not sell for sufficient to pay the mortgage debt, the court should direct the proceeds of the sale to be applied, first, to the payment of costs, and, second, to be ratably distributed in discharge of all the notes, and should give judgment for deficiency against the defendants only for the amount remaining unpaid on the two not barred when the action was commenced, after such ratable application of the proceeds of sale.

ERROR from the district court for Douglas county. Tried below before SCOTT, J. *Modified.*

John O. Yeiser, E. C. Page and *John H. Grossman,* for plaintiffs in error.

E. J. Cornish, contra.

DUFFIE, C.

By their petition in error, the plaintiffs question the correctness of an order of the district court in entering a deficiency judgment against them in a foreclosure proceeding. On April 1, 1887, John H. Grossman executed and

delivered to Algernon S. Patrick three promissory notes, —two for $883 each, and one for $884. These notes matured in two, three and four years from their date and were secured by a mortgage upon lots seven and eight in block four of A. S. Patrick addition to the city of Omaha.

Prior to the maturity of said notes, Patrick sold and indorsed the same to the defendant in error, which commenced this action to foreclose the mortgage by filing a petition therefor on March 21, 1895, but no summons was issued until April 13, 1895; and service was had upon Grossman April 16, 1895, and on Patrick April 17, 1895. The petition, in addition to a prayer for the foreclosure of the mortgage, also asked that the defendants, Grossman and Patrick, be adjudged to pay any deficiency which shall remain after applying the proceeds of a sale to the payment of the debt. Each of the defendants in that case made the following answer:

First. "That the note dated April 1, 1887, and payable two years after date, for the sum of $883, this defendant executed and delivered to said Algernon S. Patrick; but this defendant alleges the fact to be that more than five years have elapsed since said note became due and payable before the commencement of this suit, and that said note is barred by the statute of limitations in this state, and that this defendant is not liable thereon to the plaintiff, or any person or persons whomsoever, by reason thereof."

Second. "This defendant further says that he denies each and every other allegation in said petition contained, not hereinbefore admitted to be true."

A decree was entered October 16, 1895, foreclosing the mortgage and ordering a sale of the premises in satisfaction of the amount found due. Relating to the plea of the statute of limitations interposed by the defendants to the note first maturing, the court made the following finding:

"The court further finds that the note described in the second paragraph of said petition dated April 1, 1887, for $883 due two years after date thereof, is barred by the

statute of limitations of the state of Nebraska and that the plaintiff is not entitled to a deficiency judgment on said note in case said premises do not sell for sufficient to satisfy the amount owing thereon."

Relating to the liability of the defendants for a deficiency, the court found as follows:

"That on the confirmation of said sale, the said plaintiff shall be entitled to apply for a deficiency judgment against said named defendants and in case said described real estate shall not sell for sufficient to satisfy the note described in the second paragraph of plaintiff's petition, the judgment for deficiency shall be in the sum of the amount found due as aforesaid upon the notes described in the third and fourth paragraphs of plaintiff's petition."

The decree, before being entered, was presented to defendants' attorneys and its form approved. The nine months stay provided by the statute was applied for and taken by the defendants, and after its expiration a motion to confirm the sale and for a deficiency judgment was made by the bank. Upon the filing of said motion the defendants filed objections to the confirmation of the sale, and to the rendition of the deficiency judgment against them:

"First. Because the court is without jurisdiction to enter a deficiency judgment in the absence of a petition duly verified setting forth facts to authorize the court to enter a deficiency judgment if the court had jurisdiction to enter such judgment.

"Second. Because the court has no jurisdiction to enter a deficiency judgment in a foreclosure proceeding.

"Third. Because when said notes and mortgage were taken by said bank, the plaintiff expressly agreed to look only to the property for the payment of the amount due on said notes.

"Fourth. Because plaintiff did not make any demand of payment upon the maker of said notes at maturity, and refusal of payment, and without notice to this defendant.

"Fifth. Because the said notes in controversy were ma-

terially altered without the consent of this defendant after coming into the possession of the plaintiff or the Bank of Commerce.

"Sixth. Because said notes were indorsed by this defendant for the sole purpose of making the same bankable paper, and because no liability did arise against this defendant on account of his said indorsement.

"Seventh. Because all of the said notes at the time of the filing of the motion for confirmation of sale and deficiency judgment were outlawed."

These objections were supported by the affidavits of Frank B. Johnson and Algernon S. Patrick to the effect that at the time the notes were indorsed over to the bank, it was agreed between Patrick and the officers of the bank that no liability should attach to Patrick on account of his indorsement, and that the bank would look solely to the real estate covered by the mortgage for the collection of the amount due thereon; and, second, that the waiver of protest indorsed upon the back of the notes was placed there by some one after the same was indorsed by Patrick and delivered to the bank. The court overruled these objections and entered an order confirming the sale, and giving judgment against Grossman and Patrick for the deficiency. From this order the defendants have taken the record to this court for review.

We will notice the objections made by the plaintiffs in error in the order in which they occur:

It is first insisted that in the absence of a petition, duly verified, setting forth the facts upon which a deficiency judgment is asked, the court is without jurisdiction to enter the same. This objection requires us to examine the statute relating to foreclosure proceedings as it existed at the date of the commencement of this action. Sections 847 and 849 of the Code of Civil Procedure were as follows:

"When a petition shall be filed for the satisfaction of a mortgage, the court shall not only have the power to decree and compel the delivery of the possession of the premises

to the purchaser thereof, but on the coming in of the report of sale, the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law; and for that purpose may issue the necessary execution, as in other cases, against other property of the mortgagor."

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

From these two sections it is apparent that but one action was contemplated by the legislature in the foreclosure of a mortgage to obtain not only a decree of foreclosure, but a judgment for any deficiency existing as well. This appears plain from the reading of section 849. Where the mortgage debt is secured by obligation of any person besides the mortgagor, such party may be made a party to the petition in foreclosure, and the court may decree payment of the balance of such debt remaining unsatisfied after the sale of the premises as well against such other person as the mortgagor. This certainly does not contemplate a separate and independent action for the recovery of a deficiency, even as against a third party; and it as certainly contemplates that the petition shall contain allegations sufficient to warrant the court in giving a judgment for a deficiency in case the plaintiff desires such relief, and the trial of any issue made thereon by the defendant's answer. Regardless of the holding of the courts of other states made under similar statutes, we believe the practice in this state of applying for a deficiency judgment by motion merely has been so long followed that no good purpose would be served by departing from that prac-

tice at this late day. Indeed, if we should go to the extent asked by the plaintiffs in error, and hold that the court had no jurisdiction to enter a deficiency judgment, except upon a petition duly verified, the consequences which might follow would be of the gravest character. The title to valuable real estate might be questioned and unsettled, and that permanency and confidence which it is desirable that all titles based upon a judicial sale should have, would no longer attach to execution sales heretofore made in satisfaction of deficiency judgments. Again, and regardless of the question of public policy involved in the determination of the practice, we think that it has been settled by the former decisions of this court. In *Graves v. Macfarland,* 58 Nebr., 802, the right of the district court to enter a deficiency judgment, without special notice of an application therefor, was before the court, and it was held that "the jurisdiction of the district court to render a deficiency judgment, under the provisions of section 847 of the Code of Civil Procedure, did not depend upon the service of any notice other than the original summons." This is a holding clear, distinct and positive, that a deficiency judgment entered upon the original petition filed in the case, without notice even to the defendant that application would be made therefor, is good; the inference clearly being that the entry of a deficiency judgment is a part of the original case and ancillary thereto, and that when a party is summoned in the original case he must take notice of all steps taken by the court down to the entry of a judgment for a deficiency, if one exists, and is demanded.

The second objection made is that the court has no jurisdiction to enter a deficiency judgment in foreclosure proceedings since the repeal of section 847 of the Code of Civil Procedure. Relating to this, it is sufficient to say that this action had been commenced and was pending when the act repealing section 847 went into effect, and the repeal of that section had no effect upon pending actions. This was determined by this court in *Thompson v. West,* 59 Nebr., 677, where it is said that "the repeal of the

statute permitting the recovery of deficiency judgments did not affect actions then pending."

The third, fourth, fifth and sixth objections may be considered together, as they all relate to matters of defense against the notes existing in favor of the defendant Patrick at the time the action was commenced, and he should, if he desired to urge these defenses, have presented them to the court in his answer made in the foreclosure case. It will hardly do for the plaintiffs in error to say that they tried the case upon the theory that any defense which might exist in their favor to prevent a deficiency judgment could be urged only at the time when a deficiency judgment was sought, because in their answer they recognize the fact that a deficiency judgment was being asked against them if the mortgaged property failed to satisfy the claim, and they set up as a defense to any claim for a deficiency judgment on the note first maturing, the fact that it was barred by the statute of limitations prior to the commencement of the action. We mention this to show that the plaintiffs in error were not misled or in doubt as to the practice in cases of this character, and if they neglected to set up other defenses existing in their favor as against a deficiency judgment, they must suffer the consequences of their neglect. They themselves called upon the court for relief against a deficiency judgment because a part of the claim secured by the mortgage was barred by the statute of limitations, and we can not think that they will now insist that the court should allow them to split their defense, urging such as they thought proper in their answer to the petition, and reserving such other as they might have to be used on the plaintiff's application for a deficiency judgment. Such a course of practice could not be tolerated under any circumstances, and the district court very properly followed the rule announced in *Stover v. Tompkins,* 34 Nebr., 465, to the effect that one who was made a party to an action in foreclosure, and who was found liable in case of a deficiency, would not be permitted, when judgment for the deficiency was sought against him, to set up facts which existed when the original decree was

obtained, and which should have been pleaded to show that he was not liable. This case was cited with approval in *Kloke v. Gardels,* 52 Nebr., 117, and the practice is now too firmly established by the decisions of this court to be questioned or doubted.

The seventh objection urged against a deficiency, namely, that "all of the said notes at the time of the filing of the motion for confirmation of sale and deficiency judgment were outlawed," was properly overruled as to the two notes last maturing. These notes were not barred at the time the action was commenced. That action, as disclosed by the petition, was not only to foreclose the mortgage, but also to obtain a personal judgment upon the notes for any deficiency remaining after the application of the mortgage security. This, undoubtedly, was the commencement of an action upon the notes themselves, and it is needless to cite authorities to the effect that the statute does not run against a cause of action, while a suit thereon is pending.

It is further urged that the judgment is contrary to law, and that it is not sustained by sufficient evidence. Relating to these assignments, we are agreed, after a careful examination, that the court erred in the amount of the deficiency allowed. There is no question that the note first maturing was outlawed at the time the action was commenced. This was found by the court, and it was provided in the decree that "the plaintiff is not entitled to a deficiency judgment on said note in case said premises do not sell for sufficient to satisfy the amount owing thereon." The decree was for $4,023.27, and the mortgaged property sold for $1,200. It is evident from an examination that the proceeds of the sale were used, first, to satisfy the costs, and, secondly, as a credit upon the notes as they matured. Was this a proper application of the proceeds of the sale? We think not. In payments voluntarily made, the debtor has a right to direct the application of such payments; and, if he neglects to direct the application to be made, the creditor may himself make the application. The proceeds of a sale under a judgment of foreclosure

are paid over to the creditor, not as a voluntary payment, but by operation of law; and, in the absence of direction given in the mortgage, their application is to be made by the court in accordance with equitable principles. *Orleans County Nat. Bank v. Moore,* 112 N. Y., 543. In this state the rule has always prevailed that the proceeds of mortgaged property should be distributed pro rata among the several notes secured by such mortgage, where the same are held by different parties. If the outlawed note was held by some third party, he might insist that a pro rata share of the proceeds of the sale should be applied in payment of that note. This would be right and equitable. The fact that it was outlawed could not change the rule. The security was still in force, and the holder would be entitled to the benefit of such security. We can not see why these equitable principles should not be applied, even though the bank was the owner and holder of all the notes. The mortgage was made to secure them all. No one of these notes was entitled to priority in the order of its payment out of the security. The funds derived from the security should be distributed among the three notes, and in not doing this the court erred.

We therefore recommend that the case be remanded to the district court with direction to prorate the proceeds of the sale among the three notes, and to enter judgment for a deficiency in favor of the plaintiff and against the defendants for the balance remaining upon the two notes not barred at the commencement of this action.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the case is remanded to the district court with direction to prorate the proceeds of the sale among the three notes, and to enter judgment for a deficiency in favor of the plaintiff and against the defendants for the balance remaining upon the two notes not barred at the commencement of this action.

JUDGMENT ACCORDINGLY.

BRADFORD SAVINGS BANK & TRUST COMPANY, APPELLANT, V. ADALINE CRIPPEN ET AL., APPELLEES.*

FILED DECEMBER 4, 1901. No. 10,540.

Commissioner's opinion, Department No. 3.

Simulated Decree Without Consent of Party in Interest Ineffectual. A simulated decree of foreclosure and sale upon a mortgage upon real property, without the consent or knowledge of the owner of the debt and instrument which the mortgage was given to secure, and in a name, as plaintiff, that does not appear in the mortgage or upon the records of the register of deeds, and a sale and conveyance pursuant to such simulated decree, are ineffectual upon the rights of the true owner of the debt and mortgage.

APPEAL from the district court for Cass county. Heard below before RAMSEY, J. *Reversed.*

Flansburg & Williams, for appellant.

Frank H. Woods, contra.

AMES, C.

Adaline Crippen, being the owner in fee of a tract of land situate in Cass county, executed a mortgage thereon conditioned to secure the payment to Benjamin A. Gibson or order of a promissory note bearing annual interest and payable, as to principal, five years after date. The mortgage contained a covenant to the effect that upon default of payment of any instalment of interest, the note should become immediately due and payable. Gibson sold and indorsed the note to one Leslie, guaranteeing payment, and Leslie sold and delivered it to the appellant, the Bradford Savings Bank & Trust Company. Gibson was an attorney at law, and, by connivance with or imposition upon his law partner procured the latter, after the sale of the note to the applicant, to begin and prosecute an action for the foreclosure of the mortgage in the name of Leslie as plaintiff, alleging ownership of the note in him, and a de-

*Rehearing allowed. Reversal vacated. Affirmed by stipulation.

fault in payment of interest. There had been no default of an interest payment and the action and its consequences, hereinafter recited, do not appear to have been with the knowledge of Leslie, and were certainly without the knowledge of the appellant. No assignment of the mortgage was ever put upon the records of the county, or presumably was ever made. Service was made upon all the apparent parties to the title, and the action proceeded regularly to decree, sale and confirmation, Gibson becoming the purchaser; and a certificate to that effect was executed by the clerk of the court, and filed with the register of deeds. By this proceeding the lien of the mortgage was apparently merged in the fee, and the latter transferred from Crippen to Gibson. Afterwards, and after recording the sheriff's deed to himself, Gibson obtained a loan of a sum of money, and, to secure the payment of the same, executed and delivered his negotiable note and a mortgage on the premises to one Munson, who still subsequently sold, indorsed and delivered the note and assigned the mortgage for value, before maturity, to the appellee Edward A. Bangs. Bangs purchased his note and mortgage in reliance, in good faith, upon the state of the title as disclosed by the records of Cass county, of which, before purchasing, he caused a search and examination to be made. Five months later the appellant the Bradford Savings Bank & Trust Company began this action to foreclose the first mortgage, making Crippen, Gibson and Bangs, and intermediate assignees of the second mortgage parties. Issues were made up between the appellant and Bangs, the other parties making default, and the case was tried and submitted to the court upon the foregoing state of facts, about which there was and is no dispute. The court adjudged the title to be in Gibson, subject to a first lien thereon in favor of the defendant Bangs for the amount of his mortgage, and to a second lien thereon in favor of the appellant for the amount of its mortgage, and entered a decree of foreclosure and sale for the satisfaction of the liens in the order named.

Counsel for appellant contends that this decree is erroneous because the first action was begun and prosecuted to decree and sale without the authority or knowledge of the then owner of the first mortgage, and in fraud of its rights; that the mortgage having been given to secure the payment of a negotiable note, partook of the negotiable character of the latter instrument, and that therefore the action in foreclosure by the indorser after he had parted with the title and possession of the instrument conferred no jurisdiction of the person of the appellant, or the subject of the action upon the court, and was as ineffectual as respects the lien of the mortgage as would have been a suit or judgment at law on the note upon the title to and right of action upon the latter under like circumstances. This is the sole question in the case. The appellant admits, as under authority of *Whipple v. Fowler,* 41 Nebr., 675, he is obliged to do, that, the facts being otherwise unchanged, if Gibson had executed and made of record a release of the first mortgage, and had then obtained a conveyance of the title and made the Bangs mortgage, the latter instrument would have been the superior lien; and it is not seriously, and can not be successfully, contended, under the authority of *Rumery v. Loy,* 61 Nebr., 755, and *Perry v. Baker,* 61 Nebr., 841, that if the first proceeding in foreclosure had been prosecuted by Gibson in his own name, as plaintiff, the result would have been the same. But counsel for the appellant insists that the same consequences do not flow from a foreclosure by one who was a stranger to the record title, and who had parted with the note which the mortgage was conditioned to secure, because, he says, if that be true, any stranger to the transaction might by the same means have deprived the appellant of his lien. He contends, therefore, that without the production of the note by the plaintiff in the first foreclosure suit, the court was without jurisdiction over the subject-matter, and that in the absence of evidence of such production, apparent upon the record, the decree and sale thereunder are absolutely void, and should be so adjudged even

upon a collateral attack. On the other hand, it is contended that the ownership of the note in the plaintiff was one of the necessary allegations in his petition, and a fact which, whether denied or not, the court was called upon to find and adjudicate; that its production, or even possession, is not in all cases requisite, and that proof might have been made of its loss or destruction, or it might have been surreptitiously produced without the consent or knowledge of the owner; that there is no statute requiring its production or cancelation, and silence of the record in that respect did not render the decree of foreclosure erroneous or reversible by the defendant to the action, and that even if an issue as to ownership had been made, and the fact had been found for the plaintiff from conflicting evidence, the defendants could not, under a well known rule, have obtained a reversal in this court, and finally, that the appellant was negligent in omitting to procure and make of record an assignment of the mortgage, and the principle is invoked that, when one of two innocent parties must suffer, the loss will fall upon him whose fault or neglect rendered the injury possible. It is argued that a bona-fide purchaser or mortgagee for present value of real property, has an absolute right to rely upon the state of the title as disclosed by the records of the county in which the land lies. We are unable to see the applicability of these latter principles to the matter in controversy. We do not think it a matter of importance that the Crippen mortgage was given to secure a negotiable note. However negligent may have been the omission of the appellant to obtain and make of record an assignment of this mortgage, we do not see that such omission contributed in any degree to mislead or injure the second mortgagee or his successors in interest. Under the circumstances, Gibson had the power, but not the lawful right, to release the mortgage as to subsequent purchasers or mortgagees in good faith; and it is because he had that power, being the apparent owner of the mortgage, that he might have effected the same object by foreclosure in his own name as

plaintiff. But Leslie did not have that power. Leslie could have released only by forging Gibson's name, and, if an assignment had been made of record, neither he nor Gibson could have released, except by forging the name of the assignee; and we presume that it will not be contended that a forged release would, in either case, have affected the lien of the first mortgage. Neither would the presence of the assignment upon the record have prevented or hindered Leslie from beginning and prosecuting his fictitious action of foreclosure. This action would have been in no greater or other sense without authority in such a case than it was in fact; nor, in such a case, would any additional allegations in the petition, or proof at the hearing, have been requisite to the obtaining of a decree. The decree and sale have, and in the supposed case would have had, precisely the same rank and importance, so far as respects the lien of the Gibson mortgage, as would have had a forged release. There must be at least two parties to every adversary action, namely, a plaintiff and a defendant. If either is lacking the court acquires no jurisdiction of the other or of the subject-matter. The use of the name of Leslie as plaintiff in the first foreclosure suit, without his consent or knowledge, or that of the owner of the securities, was as purely a fiction as it would have been had no person of that name ever lived. Any other name, real or fictitious, might have been substituted without affecting the validity of the proceeding in any respect or degree. His name did not appear upon the records of the register of deeds, and there was no plaintiff in the action in whose behalf a decree of foreclosure could have been rendered, and consequently the proceeding was a mere nullity. It may be objected that this conclusion leaves titles derived from decrees of mortgage foreclosure and sale resting upon insecure foundations, but, if so, that is an evil for which a remedy, if any, must be provided by the legislature, and not by the court. The court is without lawful right to deprive innocent people of their choses in action and securities for the purpose of protecting the

titles of purchasers at judicial sales and their grantees. It is true that the assignee of the second mortgage and the appellant are equally innocent. The equities are equal, but the law is with the appellant, and it is a maxim that in such cases the law will prevail.

It is recommended that the judgment be reversed and vacated, and the action remanded to the district court for further proceedings not inconsistent with this opinion.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment be reversed and vacated and the action remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

JAMES P. BALL V. CHARLES H. BEAUMONT.*

FILED DECEMBER 4, 1901. No. 12,225.

Commissioner's opinion, Department No. 3.

1. **General Denial:** SPECIAL DEFENSE: EVIDENCE. When a general denial in an answer is qualified by the pleading of special defenses in the nature of confession and avoidance, evidence of other defenses of a like nature is inadmissible, although, in the absence of such pleading, such evidence would have been admissible under the general denial.

2. ———: ———: CONFESSION AND AVOIDANCE: AMENDMENT OF ANSWER. When, in an action in the county court, a general denial in an answer is qualified by the pleading of special defenses in the nature of confession and avoidance, additions to such defenses can not be introduced by amendment of the answer upon appeal to the district court, although, in the absence of such pleading, the same matter might have been given in evidence under the general denial.

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

*Rehearing allowed. Reversal sustained.

John H. Bower, for plaintiff in error.

B. F. Hastings, Stewart & Munger and *Gaines, Kelby, Storey & Martin, contra.*

AMES, C.

This action was begun in the county court of Perkins county by the plaintiff in error, Ball, against the defendant in error, Beaumont, and one Penn, to recover for money alleged to have been paid out and expended by the plaintiff to, and for the use of the defendants, the petition resembling a declaration upon the common counts under the former practice. The separate answer of Beaumont, besides a general and specific denial of the allegations of the petition except those "herein admitted to be true," averred in substance, that the claim of the plaintiff arose out of the following circumstances, namely: that the defendants had executed and delivered to the plaintiff their joint promissory note containing some blank spaces, including one for the name of the payee, and had instructed and empowered the plaintiff to fill the blanks and sell the note for the benefit of the defendants; and that the plaintiff did sell the instrument to a certain Iowa bank, guaranteeing the payment thereof in writing indorsed thereon, and also subscribing his name thereto as joint maker, but that because of such facts and of certain other alleged material alterations in said note made without the knowledge or consent of Beaumont, the instrument was avoided as being his contract, and that the money sued for was the sum paid by the plaintiff upon his guaranty to discharge the alleged obligation at its maturity. In his reply the plaintiff admitted that his demand arose in substantially the manner set forth in the answer, except that he alleged that the scope of his agency for the defendants in the transaction included authority to make all the alterations that were made in the note, and that the defendants had received and retained the proceeds of the sale of the instrument with full knowledge of all the facts and circumstances pleaded in the

answer. The defendant Penn made default, and a trial in the county court resulted in a judgment for the plaintiff against both defendants. Upon an appeal by Beaumont to the district court, he was permitted, over the objection and exception of the plaintiff, to amend his answer in such manner as to deny that the note as executed was the joint obligation of the makers except in form, and to allege that in fact Penn was the principal debtor thereon, and Beaumont surety only, and that the latter signed same in that character only, "and that if any money was so paid by plaintiff, it was for the benefit of George W. Penn personally." Upon the issues thus reformed, the case was tried to a jury, who returned a verdict in favor of the defendant Beaumont, and the plaintiff prosecutes a petition in error to this court.

That the amendment introduced a new and important issue in the case, seems to us entirely clear. The action was not upon the note, and as the answer was originally framed the alterations in the note of which complaint was made did not appear to have occasioned either of the defendants any injury. In the county court the only substantial matter in controversy was whether, as a result of the transaction, the defendants had derived a pecuniary advantage at the expense of the plaintiff, for which in equity and good conscience they ought to reimburse him. There was nothing in issue in that court indicating that the defendants did not stand upon a footing of exact equality in this respect. By the amended answer, it was asserted for the first time that the transaction was not for the benefit or to the advantage of Beaumont, who was alleged to be surety only and entitled to stand upon the strict letter of his contract as such; so that, although as respects his principal, the facts were such as to raise an implied promise by the latter to reimburse the plaintiff, that implication did not arise as to himself. To what extent, if any, this fact, without an allegation of knowledge or notice thereof by or to the plaintiff, should have been available as a defense to Beaumont, it is not necessary now to inquire. It is sufficient to say

that it introduced a new, and as the suit resulted, a controlling element into the litigation. It is unquestionably clear from the record that the defendant in error is indebted to it solely for his victory in the district court.

The amendment was therefore obnoxious to the long established law of this state that the issues can not be changed upon an appeal from the county court to the district court. *Bellamy v. Chambers,* 50 Nebr., 146, and cases cited in the opinion. The defendant in error seeks to avoid the force of this rule by the contention that, the petition being general in its averments, after the manner of a declaration upon the common counts at the common law, it was not incumbent upon the defendant to plead the special matter contained in his answer, and that evidence of the alleged suretyship might have been given under a general denial. Assuming, but not deciding, this proposition to be correct, it does not advantage the defendant in this case. He qualified his general denial by pleading special matters in the nature of confession and avoidance, and thus himself tendered specific issues which were met and raised by the reply. It does not now lie in his mouth to say that these issues are, as a matter of pleading, redundant and unnecessary. Having, by his pleading in the county court, notified the plaintiff of the scope and nature of his defense, the evidence of the parties in that court was, or should have been, confined to the determination of the issues joined thereon; otherwise a special plea qualifying a general denial might easily be made to serve as a trap for the unwary. Consistently with the rule reiterated in the case above cited, it follows that upon an appeal to the district court from the county court, additional special defenses in the nature of confession and avoidance can not be introduced by way of amendment. By obtaining leave to make and making the amendment complained of the defendant in error himself confessed that, in its absence, the defensive matter alleged by it would not have been admissible in evidence.

It is recommended that the judgment be reversed and the

case remanded to the district court with instructions to strike from the answer the matter introduced by the amendment and award a new trial.

DUFFIE and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion it is ordered that the judgment be reversed and the case be remanded to the district court with instructions to strike from the answer the matter introduced by the amendment and award a new trial.

REVERSED AND REMANDED.

JOHN REDELL, APPELLEE, V. FRANK E. MOORES ET AL., APPELLANTS.

FILED DECEMBER 4, 1901. No. 12,124.

Commissioner's opinion, Department No. 3.

1. **Statute:** UNCONSTITUTIONAL PORTION: INDUCEMENT TO ADOPTION. Where portions of a statute are held unconstitutional, if the remainder is not so connected with such portion as to be incapable of separation, and the remainder is a complete act, and not dependent upon the part held invalid, the latter alone will be disregarded and the remainder upheld, except in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder.

2. **Construction of Statute:** JUDICIAL NOTICE: COMMON KNOWLEDGE. In the construction of a statute, courts will take judicial notice of events which are generally known, and matters of common knowledge within the limits of their jurisdiction.

3. **Municipal Corporation:** POWER TO CREATE: POWER TO IMPOSE LIMITATIONS. The power to create a municipal corporation is vested in the legislature, and implies the power to create it with such limitations as that body may see fit to impose, and to impose such limitations at any stage of its existence.

4. **Fire and Police Commission:** LEGISLATURE: GOVERNOR. The legislature may by statute confer upon the governor the power to appoint members of the board of fire and police commissioners of cities of the metropolitan class. *State v. Moores*, 55 Nebr., 480, overruled.

APPEAL from the district court for Douglas county. Heard below before ESTELLE, J. *Reversed.* NORVAL, C. J., dissenting.

W. J. Connell, for appellants.

Frank T. Ransom, William F. Gurley and *Wright & Stout, contra.*

ALBERT, C.

This action was brought in the district court of Douglas county, by John Redell, chief of the fire department of the city of Omaha, against Frank E. Moores and others, constituting the board of fire and police commissioners of that city, to restrain the defendants from hearing and determining certain charges filed with said board against the plaintiff, and from removing or suspending him from his said office. The trial court found for the plaintiff, and entered a decree accordingly. The defendants bring the case here on appeal.

The sole question presented by the appeal is, whether the board of fire and police commissioners have authority to hear and determine the charges filed against the plaintiff, and to remove or suspend him from the office of chief of the fire department in case its findings on said charges should be adverse to him. The determination of that question involves the constitutionality of section 169, chapter 12*a*, of the Compiled Statutes. That section is a part of an act passed by the legislature in 1897, entitled an act incorporating metropolitan cities, and defining, prescribing and regulating their duties, powers and government, and to repeal a similar act passed in 1887. The act is too long to set out at length, so it must suffice to say, taken as a whole, it provides a complete scheme for the government of cities of the metropolitan class. The sections most pertinent to the present inquiry are as follows:

"Sec. 166. In each city of the metropolitan class, there shall be a board of fire and police commissioners, to consist of the mayor, who shall be ex-officio chairman of the board,

and four electors of the city who shall be appointed by the governor.

"Sec. 167. Immediately on the taking effect of this act, the governor shall appoint for each city governed by this act four commissioners, not more than two of whom shall be of the same political faith or party allegiance, one of whom shall be designated to serve until the first Monday of April, 1898, and one to serve until the first Monday of April, 1899, and one to serve until the first Monday of April, 1900, and one to serve until the first Monday of April, 1901, and on the last Tuesday in March in 1898, and on the same day in each year thereafter, the governor shall appoint one commissioner in each city governed by this act, to take the place of the commissioner whose term of office expires on the first Monday in April following such appointment, and those so appointed to succeed others shall serve for the term of four years, following the first Monday in April after their appointment, except where appointments are made to fill vacancies, in which cases those appointed shall serve the remainder of term of the persons whose vacancies they are appointed to fill. Whenever a vacancy shall occur in any board of fire and police commissioners either by death, resignation, removal from the city or any other cause, the governor shall appoint a commissioner to fill such vacancy.

"Sec. 168. No person shall be appointed a police commissioner who is engaged in the sale of malt, spirituous or vinous liquors, or who is engaged in the business of dealing in tobacco or articles manufactured therefrom, or who is agent for any fire insurance company or companies or interested therein, or in the business of soliciting fire insurance, or who shall have been engaged in any such callings or business within one year previous to the date of appointment. No person shall be qualified to hold the office of police commissioner, while he holds any county, city or school district office. The governor may remove any of said commissioners for misconduct in office, or should they, or any of them, become disqualified to act as such commis-

sioner. Any citizen of the city may file with the governor written charges against any commissioner he may deem guilty of misconduct in office, and the governor shall, within a reasonable time, investigate the same upon testimony to be produced before him and shall make such findings as to the truth or falsity of such charges as in his judgment such testimony warrants, and in case such charges are adjudged by him to be sustained by the evidence, he shall at once remove the commissioner so found guilty and appoint another qualified to fill the vacancy thus caused. The governor, when sitting to investigate charges preferred against a commissioner, shall have full power and authority to compel the attendance of witnesses and the production of books and papers, and he may hold such meeting at the most convenient place in the state for the purpose of such investigation. In making all appointments, either to fill vacancies or otherwise, he shall so appoint that not more than two members of the fire and police commissioners shall be of the same political faith or party allegiance.

"Sec. 169. All powers and duties connected with and incident to the appointment, removal, government and discipline of the officers and members of the fire and police departments of the city, under such rules and regulations as may be adopted by the board of fire and police commissioners, shall be vested in and exercised by said board. A majority of said board shall constitute a quorum for the transaction of business. Before entering upon their duties each of said officers shall take and subscribe an oath, to be filed with the city clerk, faithfully, impartially, honestly and to the best of his ability, to discharge his duties as a member of said board, and that in making appointments or considering promotion, or removals, he will not be guided or actuated by political motives or influences, but will consider only the interest of the city, and the success and effectiveness of said department. The board of fire and police commissioners shall have power, and it shall be the duty of said board, to appoint a chief of the fire de-

partment, and such other officers of the fire department, as may be dcemed necessary for its proper direction, management and regulation, all of whom shall be electors of such city, and under such rules and regulations as may be adopted by said board. Said board may remove such officers or any of them, whenever said board shall consider and declare such removal necessary for the proper management or discipline or for the more effective working or service of said department. It shall be the duty of policemen to make a daily report to the chief of police of the time of lighting and extinguishing of all public lights and lamps upon their beats, and also any lamp that may be broken or out of repair. They shall also report to the same officer any defect in any sidewalk, street, alley or other public highway, or the existence of ice or dangerous obstructions on the walks or streets, or break in any sewer, or disagreeable odors emanating from inlets to sewers, or any violations of the health laws or ordinances of the city. Suitable blanks for making such reports shall be furnished to the chief of police by the chief electrician and health commissioner. Such reports shall be by the chief of police transmitted to the city electrician or health commissioner as shall be proper, and in case of violations of law or ordinance the policeman making report shall report the facts to the city prosecutor. The board of fire and police commissioners shall employ such firemen and assistants, as may be proper and necessary for the effective service of this department, to the extent and limit that the funds provided by the mayor and council for that purpose will allow. The board of fire and police commissioners shall have the power, and it shall be the duty of said board, to appoint a chief of police, and such other officers and policemen, all of whom shall be electors of such city, to the extent that funds may be provided by the mayor and council, to pay their salaries, and as may be necessary for the proper protection and efficient policing of the city, and as may be necessary to protect citizens and property, and maintain peace and good order. The board may appoint

such number of police matrons, not to exceed two, whose duty shall be defined by the police board. The chief of police and all other police officers, policemen and police matron, shall be subject to removal by the board of fire and police commissioners, under such rules and regulations as may be adopted by said board, whenever said board shall consider and declare such removal necessary for the proper management or discipline or for the more effective working or service of the police department. No member or officer of the police or fire department shall be discharged for political reasons, nor shall a person be employed or taken into either of said departments for political reasons. Before a member of the police or fire department can be discharged, charges must be filed against him before the board of fire and police commissioners and a hearing had thereon, and an opportunity given such member to defend against such charges, but this provision shall not be construed to prevent peremptory suspension of such member by his superiors in case of misconduct or neglect of duty or disobedience of orders. Whenever any such suspension is made charges shall be at once filed before the board of fire and police commissioners by the person ordering such suspension, and a trial had thereon at the second meeting of the board thereafter. It shall be the duty of said board of fire and police commissioners to adopt such rules and regulations for the guidance of the officers and men of said department, for the appointment, promotion, removal, trial or discipline of said officers, men and matron, as said board shall consider proper and necessary. The board shall have the power to enforce the attendance of witnesses, and the production of books and papers, and to administer oaths to them in the same manner and with like effect and under the same penalties, as in the case of magistrates exercising civil and criminal jurisdiction under the statutes of the state of Nebraska. The board shall have such other powers and perform such other duties as may be authorized or defined by ordinance."

It is clear that the provisions cited are ample, if upheld,

to confer upon the board of fire and police commissioners the power to do the acts sought to be restrained by this action. But in the case of *State v. Moores,* 55 Nebr., 480, this court held (SULLIVAN, J., dissenting) that, so far as the act in question assumes to confer authority upon the governor to appoint members of the board of fire and police commissioners, it is unconstitutional, on the ground that it is an unlawful attempt to deprive the people of cities of the metropolitan class of the right of local self-government.

Assuming that the majority opinion in that case is the settled law of the state, the question arises whether section 169, just quoted, must fall with those provisions placing the appointing power in the hands of the governor, which, we have seen, have been held unconstitutional. That a part of an act, or even a part of the same section of an act, may, under some circumstances, be held unconstitutional, without invalidating the remainder, is elementary. This court has said that "Where a statute contains provisions which are invalid or unconstitutional, if the valid and invalid portions are not so connected as to be incapable of separation, and the valid part is a complete act and not dependent upon the part that is void, the latter alone will be disregarded and the remainder upheld, * * * except in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder." *State v. Moore,* 48 Nebr., 870; *Scott v. Flowers,* 61 Nebr., 620; *State v. Lancaster County,* 6 Nebr., 474; *State v. Hardy,* 7 Nebr., 377; *State v. Lancaster County,* 17 Nebr., 85; *State v. Hurds,* 19 Nebr., 316; *Trumble v. Trumble,* 37 Nebr., 340; *Low v. Rees Printing Co.,* 41 Nebr., 127; *State v. Stuht,* 52 Nebr., 209. In view of the doctrine announced in the cases just cited, we are not called upon to determine the effect of the decision in the case of *State v. Moores, supra,* on the entire act, because it follows irresistibly that the section held invalid drags down with it only such other parts as are inseparably connected with, dependent upon, or incomplete with-

out it, or for the passage of which it served as an inducement. One question, then, that meets us at this point, is whether that portion of the act held invalid, namely, that portion conferring the appointing power on the governor, served as an inducement to the legislature for the passage of the other portions of the sections hereinbefore set forth. Counsel for the defendant insists that this question is to be determined solely by an inspection of the act itself. In this view we are disposed to concur, with this qualification, however: that the persons whose duty it may be to inspect the act with a view to the determination of that question are not required to divest themselves of all knowledge save that to be gleaned from the act alone. For, were it possible for them thus to divest themselves, the act would be unintelligible,—a jumble of words without meaning. So, when we say that the question is to be determined by an inspection of the act itself, we imply that those under whose inspection it is brought will scan it in the light of that knowledge which they possess in common with other men. There is no presumption that courts are ignorant of all matters that transpire outside the court room. On the contrary, there are many matters outside the science of the law of which they are required to take judicial notice. Bishop, in his work on Statutory Crimes [3d ed.], section 77, says, "They [courts] do not close their eyes to what they know of the history of the country and of the law, of the condition of the law at the particular time, of the public necessities felt, and other like things." The supreme court of Michigan, in *Sibley v. Smith,* 2 Mich., 487, say, "Courts are authorized to collect the intention of the legislature from the occasion and necessity of the law,—from the mischief felt, and the objects and remedy in view." The supreme court of the United States, speaking through Davis, J., in the case of *United States v. Union P. R. Co.,* 91 U. S., 72, says, "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary, in order to ascertain the reason, as well as the meaning

of particular provisions in it." In *Stout v. Board of Commissioners,* 107 Ind., 343, 8 N. E. Rep., 222, it is held, that the history of a country, its topography and general conditions, are elements which enter into the construction of laws made to govern it, and are matters of which the courts will take judicial notice. It has been held that the general state of opinion, public, judicial and legislative, at the time of an enactment of a measure may be considered by the courts in construing it. *Keyport Steamboat Co. v. Farmers' Transportation Co.,* 18 N. J. Eq., 13; *Delaplane v. Crenshaw,* 15 Gratt. [Va.], 457. In *State v. Boyd,* 34 Nebr., 435, it was held that courts will take notice, without proof, of events which are generally known within the limits of their jurisdiction. The foregoing, we think, makes it clear, were it ever doubtful, that in the determination of the question before us we are neither required nor permitted to affect ignorance of those things which are matters of common knowledge. The attempt to confer upon the governor the power to appoint members of the board of fire and police commissioners, and the reasons urged in support of such measure, are a part of the legislative history of the state. No other feature of the act under consideration, nor of those it was intended to supersede, attracted so much attention or invited so much discussion as that which placed the power of appointment in the hands of the governor, removing, as it was claimed at the time, the board of fire and police commissioners from the influence of local politics. It is a matter of common knowledge that this feature of the act, so far as the board of fire and police commissioners is concerned, was the chief inducement to its passage. Without that feature, its promoters would have regarded it much as they would have regarded the play of Hamlet with Hamlet left out.

But, aside from those extrinsic facts, in our opinion it is clear that portion which has been held to be invalid served as an inducement for the passage of the other parts relating to the board of fire and police commissioners.

The sections quoted provide a complete scheme for the organization of such board. They provide for the appointment of the members, prescribe their qualifications and define the powers and duties of the board. The central thought in the whole scheme is to make the board answerable to the governor, and to remove it from local influences. Strike out those portions relating to the powers and duties of the governor in the premises, and the scheme is incomplete. With these parts stricken out, it is true, there remains a provision for the appointment of such board, and provisions relating to their qualification, and defining their powers and duties; but by whom would they be appointed? Counsel for the defendants claim that, with those provisions stricken out, the power of appointment would reside in the mayor, under the general power vested in him by virtue of the provisions of section 72 of the act, which is as follows: "The mayor shall have power by and with the consent of a majority of the entire council to appoint all officers that may be deemed necessary for the good government of the city, other than those otherwise provided for in this act." Session Laws, 1897, ch. 10. Nothing, to our minds, shows more clearly that the invalid portion was an inducement to the passage of the other parts of the sections quoted, than the fact that, with such invalid portion omitted, resort must be had to section 72 to carry out the remainder. Section 72 shows clearly an intention on the part of the legislature to limit the appointing power of the mayor to such officers whose appointment has not been otherwise provided for by the act. Members of the board of fire and police commissioners are otherwise provided for by the act, because it provides for their appointment by the governor. To hold, under the circumstances, that it would be carrying out the intention of the legislature to permit the mayor to appoint the members of such board, would do violence to common sense, which, after all, is the final arbiter in matters of doubtful construction. In our opinion, whether the act be viewed in the light of the history

of its enactment, or, apart from such consideration, it shows clearly that that portion conferring the power of appointment on the governor was an inducement to the passage of the other provisions, relative to the fire and police commissioners, and that the former must stand or fall with the latter; and the decree of the district court is right, and should stand, unless the views hereinafter expressed are adopted.

We are fully alive to the confusion in the municipal affairs of the city of Omaha that must result from the adoption of the foregoing views by this court. But for those results we are not responsible. The responsibility of this court ends when it has applied the law as it finds it. It has no constitutional warrant to add to a legislative enactment to meet the exigencies of a particular case. But, in view of those results, we have been led to re-examine the majority opinion in *State v. Moores, supra,* which up to this point we have assumed to be the final expression of this court on the questions therein involved. After a careful examination of that opinion, and with a due appreciation of the learning and ability of the members of the court who concur therein, we beg to say it does not commend itself to our judgment. It holds that the provisions of the statute placing the power to appoint members of the board of fire and police commissioners in the hands of the governor are invalid, not because it is in conflict with any express provision of the state or federal constitution, but because it is repugnant to the inherent right of local self-government, which, it is claimed, was retained by the people at the time of the adoption of the organic law. So far as the individual members of society are concerned, in the nature of things, there can be no such things as an inherent right of local self-government. The right of local self-government is purely a political right, and all political rights, of necessity, have their foundation in human government. For an individual to predicate an inherent right—a right inborn and inbred—on a foundation of human origin involves a contradiction of

terms. So far as a city is concerned, considered in the character of an artificial being, it is a creature of the legislature. It can have no rights save those bestowed upon it by its creator. As it might have been created lacking some right bestowed upon it, it is in no position to complain should the power that bestowed such right see fit to take it away. In other words, the power to create implies the power to impose upon the creature such limitations as the creator may will, and to modify or even destroy what has been created. The power to create a municipal corporation, which is vested in the legislature, implies the power to create it with such limitations as the legislature may see fit to impose, and to impose such limitations at any stage of its existence. That such power may not always be exercised most wisely is among the possibilities, but that does not warrant this court in wresting it from the hands to which the people, by the fundamental law of the state, have confided it. We shall not attempt to review the authorities bearing on this question. The majority opinion leaves nothing to be said on one side, while the minority opinion is equally exhaustive on the other. To those opinions we must refer the court. The majority opinion, to our minds, introduces a new principle in our system of jurisprudence, and one pregnant with mischievous consequences. We have been taught to regard the state and federal constitutions as the sole tests by which the validity of the acts of the legislature are to be determined. If the majority opinion in that case is to stand as the settled law of the state, then in addition to such tests there is another,—an elusive something, elastic and uncertain as an unwritten constitution, which may be invoked to defeat the legislative will. We can not believe that such principle should receive the final sanction of this court.

The case of *City of Newport v. Horton,* 50 L. R. A. [R. I.], 330, adds strength to our convictions on this point. In that case, after a critical review of the authorities, the court arrives at the conclusion that the case of *State v. Moores, supra,* is unsupported by a single authority.

For these reasons, together with those so well expressed in the minority opinion, we believe the majority opinion should be overruled. It would follow, then, that the board of fire and police commissioners having been created by valid statutory enactment, and thereby clothed with full authority to do the acts sought to be restrained herein, and the defendants being at least *de facto* members thereof, the decree of the district court should be reversed and the cause remanded for further proceedings according to law, and we so recommend.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

SULLIVAN, J., concurring.

I dissented from the judgment in *State v. Moores,* 55 Nebr., 480; and in *State v. Kennedy,* 60 Nebr., 300, which was controlled by the doctrine of *res adjudicata,* I said with respect to the decision in the *Moores Case:* "The *Moores Case* lays down the doctrine that whatever the court may conceive to be the spirit of the constitution is to be regarded as part of the paramount law. While the decision, by recognizing and enforcing the asserted right of local self-government, is conceded to rest upon a sound political principle, it was rendered by a divided bench, and, as a judicial pronouncement, has been much criticised. If it is to be acquiesced in and accepted as a rule of construction, the constitution of the state is to be fully known only by studying the theory of the judges who are chosen to expound it; it will expand or contract with every fluctuation of the popular will which produces a change in the personnel of the court, and the limitations upon legislative power will be as unknown and unknowable as were the rules of equity in the days when the chan-

cellor's conscience was the law of the land. It is the opinion of the writer that the decision is thoroughly vicious; that it strikes a lethal blow at a co-ordinate branch of the government and ought to be repudiated and condemned." Still entertaining these views,—still believing that all the governmental powers of municipal corporations come from the legislature and are to be found only in living statutes,—I could not, of course, do otherwise than give my approval to the conclusion reached by the department.

NORVAL, C. J., dissenting.

I dissent for the reasons stated in the majority opinion in *State v. Moores,* 55 Nebr., 480. Furthermore, the correctness of the decision in that case is not questioned or raised in the brief of counsel for either party, in this litigation, and this court has repeatedly ruled that questions not raised in the brief are waived. *Peaks v. Lord,* 42 Nebr., 15; *Madsen v. State,* 44 Nebr., 631; *Erck v. Omaha Nat. Bank,* 43 Nebr., 613; *Johnson v. Gulick,* 46 Nebr., 817; *Wood Mowing & Reaping Machine Co. v. Gerhold,* 47 Nebr., 397. The opinion of the majority establishes a bad precedent in deciding a question not raised or argued by counsel.

NOTE.—*Legislative Control Over Municipal Corporations.*—A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the state for conducting the affairs of government, and as such is subject to the control of the legislature. *Williams v. Eggleston,* 170 U. S., 304.

Cities are auxiliaries of the state in the business of municipal rule, but they can not have the least pretension to sustain their privileges or their existence upon anything like a contract between themselves and the legislature. *Mt. Pleasant v. Beckwith,* 100 U. S., 514.

A municipal corporation is a public institution, created for public purposes, and is a political subdivision or department of the state, governed, regulated and constituted by public law. The original power to control as well as to create them, is in the legislature. *Payne v. Treadwell,* 16 Cal., 220.

Under the township system of New England, a much stronger argument can be advanced for local self-government than in a new state, like Nebraska, admitted since the adoption of the federal

constitution. For example, Rhode Island, when it became a chartered colony, 1647, under the charter of March 14, 1643-4, was formed by the union of the four independent settlements of Providence, Newport, Portsmouth and Warwick. These settlements, at the time of the union under the charter, reserved the right to manage their own local affairs. When Rhode Island ratified the Federal Constitution, May 29, 1790, she did not follow the example of the other states by adopting a state constitution; but operated under the charter of 1663 until 1843, a period of 180 years. When new towns were incorporated, it was with the express statement that each new town had all the powers of the old towns. So local municipal government became a vested right. Encyclopædia Brittanica, vol. XX., p. 539; Harvard Law Review, February, 1900, 447. Note by Amasa M. Eaton, to *City of Newport v. Horton*, 50 L. R. A., 330. See, also, authorities cited in briefs and opinions (majority and minority), *State v. Moores*, 55 Nebr., 480.

The power of the legislature over municipal corporations, in the absence of constitutional restrictions, is unlimited, except so far as they are invested with rights incident to a private corporation. *David v. Portland Water Committee*, 14 Ore., 98.

A city is merely a revocable agency instituted by the state for the purpose of carrying out in detail the objects of government. *Coyle v. McIntire*, 7 Houston [Del.], 44.

The establishment of a board of police commissioners is not unconstitutional on the ground of interference with the right of the city to local self-government, so far as the appointment of a chief of police by said commissioners is concerned, since a police officer does not perform a purely municipal, but a state duty. *City of Newport v. Horton*, 50 L. R. A. [R. I.], 330.

The right of a town to regulate its own finances and affairs superior to all legislative control, is not among the rights and privileges "derived from our ancestors," to "define, secure, and perpetuate" which existed when the constitution of Connecticut was adopted, and to which its preamble refers. *State v. Williams*, 68 Conn., 131. See, also, *People v. Draper*, 15 N. Y., 532.

People v. Hurlbut, 24 Mich., 44, is a construction of an express provision of the state constitution.

The separate opinion of Judge Cooley in the case last cited, seems not to agree with the doctrine laid down in his work, Constitutional Limitations. Compare 24 Mich., *93-*113, and Cooley, Constitutional Limitations [6th ed.], 227.

The reasoning adopted by courts and text-writers, who uphold the doctrine of municipal self-government, would seem to have been derived from Rousseau's *Contra Social* or Lewis Cass's theory of popular sovereignty. See Maine, Ancient Law, pp. 89, 90.—REPORTER.

NATIONAL WALL PAPER COMPANY ET AL., APPELLANTS, V. COLUMBIA NATIONAL BANK ET AL., APPELLEES.

FILED DECEMBER 18, 1901. No. 9,523.

1. **Appeal:** EQUITY: BILL OF EXCEPTIONS. An appeal may be prosecuted from a decree in equity, though no bill of exceptions was settled and allowed.

2. **Insolvent Corporation:** PREFERRING CREDITOR. An insolvent corporation can not make a preference of a debt due from it on which the officers and directors are bound as sureties.

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

Abbott, Selleck & Lane, Ricketts & Wilson, Frank H. Woods, Mockett & Polk, C. S. Rainbolt, Fred K. Shepherd and *John S. Bishop,* for appellants.

E. E. Brown, R. D. Stearns, W. Q. Bell and *Halleck F. Rose, contra.*

NORVAL, C. J.

The Clason & Fletcher Company, a corporation engaged in the mercantile business in the city of Lincoln, became indebted to various creditors, including the Columbia National Bank of Lincoln, to which institution the Clason & Fletcher Company owed over $10,000 on promissory notes given by it as principal, and executed by the officers and directors as sureties. On November 16, 1893, the corporation was insolvent; and on said day, by its officers, it executed a bill of sale to said bank, covering all its stock of goods and practically all its assets, and delivered immediate possession thereof to the bank. At the time there were numerous creditors of the insolvent corporation. The bill of sale was made to give the bank a preference, and resulted in the exclusion of other creditors of said Clason & Fletcher Company from sharing in the assets or the proceeds thereof. This suit was brought by the National Wall Paper Company, a creditor of the insolvent corporation, against Clason & Fletcher Company, the bank, and one

Burlingim, to have declared fraudulent and void the said bill of sale, and that the bank and Burlingim be required to account for the value of the property described therein. Various other creditors of Clason & Fletcher Company intervened, praying for like relief as did the plaintiff. The district court held that the preference given to the bank was valid, sustained the bill of sale, and entered a decree against plaintiff and the interveners, from which this appeal is prosecuted.

It is insisted at the outset that this appeal is of no avail, because no bill of exceptions is contained in the record before us. This objection is untenable. All suits in equity are appealable to the supreme court. Code of Civil Procedure, sec. 675. The transcript for this court should contain only so much of the record as is essential to a correct understanding of the points involved. *Moores v. State,* 54 Nebr., 486. It must include the decree sought to be reviewed. *Bohman v. Chase,* 58 Nebr., 712. But it is not essential to jurisdiction that it should contain the bill of exceptions. *Schuyler v. Hanna,* 28 Nebr., 601; *Arnold v. Baker,* 6 Nebr., 134; *Hines v. Cochran,* 35 Nebr., 828.

The record before us raises the right of an insolvent corporation to prefer a creditor on a debt which the officers and directors were liable as sureties. This court has frequently considered the power of a corporation to prefer creditors, and it is claimed that there is a want of harmony in our decisions upon the subject. An examination of the cases convinces us that the contention is not well founded, although there are expressions in some of the opinions that are somewhat misleading. In our view, the question now before us has been previously passed upon by this court by an unbroken line of decisions to the effect that an insolvent corporation may not give preference to a debt on which an officer or director of the corporation is liable as surety. A brief reference to the cases at this time is pertinent. In *Ingwersen v. Edgecombe,* 42 Nebr., 740, it is disclosed that the Farmers' & Drovers' Bank of Battle Creek, an insolvent corporation, executed

a mortgage to one Teidgen, its vice president, to secure an indebtedness of the bank to him. The court, through POST, J., in the course of the opinion, observed: "The vital question in this record is the character of the relation which the directors and managing officers of an insolvent corporation bears toward its creditors. That such officers are not trustees in the technical sense of the term is apparent, and yet it is well settled, both by authority and on principle, that they are within the rule which guards and regulates dealings between trustee and *cestui que trust.* But the application of that rule has resulted in a diversity of opinion. It is maintained by some courts that, unless prevented by charter or the operation of statute in the nature of bankrupt laws, insolvent corporations possess the same power to make preference among their creditors as natural persons. But the view which may be said to rest upon the soundest reasons and is sanctioned by the decided weight of authority is that, when a corporation becomes insolvent, its property and assets constitute a trust fund for the benefit of its creditors, and that the directors and officers in possession thereof, being trustees for all the creditors, can not take advantage of their position to secure a preference for themselves, but must share ratably with the other creditors." The writer of that opinion cites numerous authorities to sustain the doctrine laid down. In *Tillson v. Downing,* 45 Nebr., 549, the holding of the court is stated in the syllabus thus: "(1.) Directors of an insolvent corporation can not take advantage of their position to obtain a preference of debts owing by the corporation to themselves. *Ingwersen v. Edgecombe,* 42 Nebr., 740, followed. (2.) Neither can they prefer debts to third persons for which they are obligated as sureties. (3.) These rules do not apply to a solvent corporation. On the contrary, such corporations have the same dominion over their property as individuals." These two cases were cited with approval in *Campbell Printing Press & Mfg. Co. v. Marder,* 50 Nebr., 283, 289. The first three paragraphs of the syllabus in *Stough v. Ponca Mill Co.,*

54 Nebr., 500, are as follows: "(1.) The assets of an insolvent corporation constitute a trust fund in the hands of its directors to be used by them in paying corporate debts. (2.) A mortgage executed by an insolvent corporation to secure a debt due from it to one of its officers or directors is illegal and void. (3.) So also is a mortgage executed to a third person to secure a debt for the payment of which one of its officers or directors is personally bound." In *Seeds Dry-Plate Co. v. Heyn Photo-Supply Co.*, 57 Nebr., 214, it was ruled that, in the absence of actual fraud, an insolvent corporation may prefer one or more of its creditors to the exclusion of others, but that it could not prefer a debt owing to its director, secretary and treasurer. In *Reynolds v. Smith*, 60 Nebr., 197, it was ruled that an insolvent corporation which was surety for a debt of one of its officers and stockholders could not prefer such debt. The rule deducible from these several cases is that an insolvent corporation may not lawfully prefer a debt on which one of its officers or directors is bound as surety.

The decisions of this court relied upon as being in conflict with the conclusion we have reached in this case will now be briefly noticed. The first of these is *Gorder v. Plattsmouth Canning Co.*, 36 Nebr., 548. That was a suit to foreclose a mortgage given by the Plattsmouth Canning Company to the plaintiffs, who were its officers and directors, to secure the payment of moneys borrowed by plaintiffs for the corporation to enable it to carry on its business. Certain stockholders of the corporation intervened and assailed the mortgage. It is disclosed that the debts due the plaintiffs, secured by the mortgage, were contracted with the knowledge and approval of the interveners, and that the mortgage was likewise sanctioned by them. It was not shown that the corporation was insolvent when the indebtedness was contracted, and the mortgage securing the same was executed. Under this state of facts, the mortgage was upheld. Of course, the interveners were by their conduct estopped from question-

ing the validity of the mortgage. Moreover, the corporation being solvent prevents that decision from becoming a precedent here. In *Shaw v. Robinson,* 50 Nebr., 403, there was not involved or determined the question whether an insolvent corporation might properly prefer as a creditor one of its officers or directors. A preference made in good faith in favor of a creditor of the corporation other than an officer or director was sustained. *Brown v. Sloan,* 55 Nebr., 28, has no bearing on the question we are considering. In *German Nat. Bank v. First Nat. Bank,* 55 Nebr., 86, it was said that "an insolvent corporation, merely because it is such a corporation, is not prohibited from preferring particular creditors." There the corporation made no preference whatever, but the president, one director and a stockholder, who was not a director, acting without authority of the board of directors, sold all the visible assets of the insolvent corporation, and turned the proceeds over to a single creditor,—a corporation in which two persons so acting were interested, and of which they were directors. The transfer was not sustained. In *Rein v. Kendall,* 55 Nebr., 583, the power of a corporation, solvent or otherwise, to prefer creditors, was not involved or determined, as a mere cursory examination by any one will reveal. And this observation likewise applies to *Gorder v. Connor,* 56 Nebr., 781, and *Penfield v. Dawson Town & Gas Co.,* 57 Nebr., 231. The only remaining case to which our attention has been challenged is *Nebraska Nat. Bank v. Clark,* 58 Nebr., 183. It appears in that case that a director of a corporation loaned it a sum of money, and was to receive a note therefor, but died before it was executed, and his son was appointed administrator of the estate, who also became a director of the corporation. The administrator applied for and received a note of the corporation for the amount of the loan. Subsequently the latter became insolvent, and a judgment was recovered against it on the note. The transaction was upheld.

The conclusion is irresistible, upon a consideration of

all of our cases, that the bill of sale involved in this litigation is illegal and void, since there was thereby created a preference in favor of the bank on an indebtedness for the payment whereof the officers of the insolvent corporation were personally liable. The court below therefore erred in its decision.

There is a controversy between the plaintiff and the interveners as to their respective rights in the premises. The district court not having passed upon that question, the cause is reversed and remanded to that court, with direction to enter a decree against the bank, and determine the rights of plaintiff and interveners.

REVERSED AND REMANDED.

N. MYSENBURG V. T. A. LEISURE.

FILED DECEMBER 18, 1901. No. 10,301.

Summons: SERVICE: PRIVATE PERSON: SHERIFF DEFENDANT. A justice of the peace, in a proper case, may lawfully deputize a private person to serve a summons in replevin issued out of his court, though the defendant in the action may be a sheriff.

ERROR from the district court for Custer county. Tried below before SULLIVAN, J. *Reversed.*

J. B. Smith, for plaintiff in error.

Alpha Morgan and *Talbot & Allen, contra.*

NORVAL, C. J.

This was an action of replevin, brought before a justice of the peace, who indorsed upon the replevin writ the following: "I hereby appoint J. D. Troyer, to act as special constable to serve the within summons. William H. Hill, Justice of the Peace." The process was served by the person so deputed by the justice, and, the property having been appraised at $1,767.36, the cause was certified

to the district court, where, on motion of the defendant, the action was dismissed because the summons in replevin was not directed to a person or officer having authority to serve the same, and that the appointment of the special constable was without authority of law; whereupon the court rendered judgment against the plaintiff for a return of the property taken under the writ, or for its value, assessed at $1,980. Plaintiff prosecutes error.

The sole question presented by this record is whether a justice of the peace has the power to depute a person to serve a summons in replevin issued out of his court. The authority to do so is conferred by section 1094 of the Code of Civil Procedure. It declares that: "A justice, at the request of a party, and on being satisfied that it is expedient, may specially depute any discreet person of suitable age, and not interested in the action, to serve a summons or execution with or without an order to arrest the defendant or to attach property. Such deputation must be in writing on the process." By this section the legislature has empowered justices of the peace to depute private persons to serve a summons. The writ in this case was a summons issued in pursuance of section 1035 of the Code of Civil Procedure, commanding the person to whom it was directed to immediately seize and take into his custody the goods and chattels described in the replevin affidavit. There is no escaping the conclusion that a justice of the peace may lawfully deputize a private person to serve a summons in replevin. But it is urged that the defendant is the sheriff of the county, and the coroner alone could serve process upon him. Section 881 of said Code is sufficient answer to this contention. It provides that: "An order for a provisional remedy or any other process, in an action wherein the sheriff is a party, or is interested, shall be directed to the coroner. If both these officers are interested, the process shall be directed to and executed by a person appointed by the court or judge." The next succeeding section declares that: "The court or judge, for good cause, may appoint a person to serve a particular

process or order, who shall have the same power to execute it which the sheriff has. The person may be appointed on the motion of the party obtaining the process or order, and the return must be verified by affidavit." By these provisions ample authority is conferred upon a court to appoint a person to serve a process issued out of such court. In absence of a contrary showing, it must be presumed that Troyer was lawfully appointed to serve the writ in question.

The judgment is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

GOTTHARDT FISCHER V. THOMAS O. KRAM.

FILED DECEMBER 18, 1901. No. 10,440.

Conflicting Evidence. This court will not weigh conflicting evidence.

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

A. H. Bowen, for plaintiff in error.

Capps & Stevens, contra.

NORVAL, C. J.

Thomas O. Kram sued Gotthardt S. Fischer, Gotthardt Fischer and Anna Fischer on their promissory notes. Gotthardt Fischer answered the petition, setting up that he signed the note as surety for Gotthardt S. Fischer, and that after the execution and delivery thereof the same had been materially altered, without his knowledge or consent, by adding the name of Anna Fischer, as surety, through the procurement of the payee. Plaintiff replied by a general denial, and a trial to a jury resulted in a verdict and judgment in his favor. Error is prosecuted by said answering defendant.

The first point urged for a reversal is that the verdict is contrary to the evidence. This contention would be well founded if the testimony adduced by the plaintiff below should be excluded from consideration. But, unfortunately for the defendant, this is not the rule which obtains in this state. The evidence in the record is quite conflicting. That adduced by the defendant fully sustains his contention, while the evidence on behalf of plaintiff is ample to sustain the finding of the jury. It is not the province of this court to weigh conflicting evidence.

What has been said disposes of the contention that the evidence is contrary to the instructions of the court.

Objections are made to certain questions and answers in the depositions of Thomas Lohner, taken and read on behalf of plaintiff. Some of the questions were leading, but no objection on that ground was made. The evidence called for was competent under the issues. One or two of the questions called for the conclusion of the witness, but other testimony of the same witness covering the point was received without objection. No error prejudicial to the defendant is disclosed by the record, and the judgment is

AFFIRMED.

GEORGE P. GILLIGAN V. TOWN OF GRATTAN.

FILED DECEMBER 18, 1901. No. 10,468.

1. **Township:** PAUPERS. A township is only liable for the support of paupers when made so by statute.

2. ——: ——: NON-RESIDENT: MEDICAL SERVICES. A township is not liable for medical services rendered a non-resident pauper.

ERROR from the district court for Holt county. Tried below before KINKAID, J. *Affirmed.*

R. R. Dickson, for plaintiff in error.

James J. Harrington and *Michael F. Harrington, contra.*

NORVAL, C. J.

In January, 1897, William Postma, a non-resident of Holt county, was injured by a passenger train on the Freemont, Elkhorn & Missouri Valley railroad in Ewing township in said county. He was brought by the railroad company to the city of O'Neill, in Grattan township, where he was taken off the cars. John P. Gilligan, a physician and surgeon, was ordered by a justice of the peace of Grattan township to render professional services to Postma at the expense of the township, which Dr. Gilligan thereupon did. This action was brought against Grattan township to recover $150, the value of the services rendered.

The single question presented is whether Grattan township is liable. Two statutory provisions are relied upon by plaintiff, one of which being section 22, chapter 18, article 4, Compiled Statutes, which declares that "the electors present at the annual town meeting shall have power * * * Eight, to direct the raising the money by taxation for the following purposes: * * * 5th. For the support of the poor within the town; Provided, that when the county board of any county shall have established a poorhouse under any statute law of this state, the support of the poor shall be provided for by the county board, and no taxes for that purpose shall be voted by the electors at town meetings except sufficient to provide temporary relief." This section applies to counties under township organization, under which system Holt county is governed. It requires no argument to show that this case does not fall within the provisions of the section from which the foregoing excerpt is taken. Postma was not a poor person within Grattan township. He was not a resident thereof, nor were his injuries received therein, but in another township. No county, nor any subdivision thereof, is liable for the support of the poor or medical attendance bestowed thereon unless the legislature has so authorized. "Poor within the town" means paupers whose domiciles are in the town. Postma's domicile was not in

Grattan township; hence plaintiff can not invoke the provisions of said section.

Our attention is also called to section 14, chapter 67, Compiled Statutes, which reads: "Whenever any non-resident, or any other person not coming within the definition of a pauper, shall fall sick in any county in this state, not having money or property to pay his or her board, nursing, and medical aid, it shall be the duty of the overseers of the poor of the precinct where such person shall be to furnish such assistance to such person as they shall deem necessary; and if any such person shall die, said overseers shall provide all necessary means for a decent burial of such person." It is plain that there is nothing in the foregoing section that makes the defendant liable. It may be that under other sections of said chapter 67 Holt county is liable, but that question is not before us and no opinion thereon is now expressed.

The judgment is right, and is accordingly

AFFIRMED.

EDWARD FAUST, APPELLEE, V. WILLIAM DEERING & COMPANY ET AL., APPELLANTS.

FILED DECEMBER 18, 1901. No. 10,614.

Unauthenticated Bill of Exceptions. An unauthenticated bill of exceptions will not be considered by this court.

APPEAL from the district court for Boyd county. Heard below before KINCAID, J. *Affirmed.*

Robert Ryan and *O. P. Davis,* for appellants.

T. H. Tingle, contra.

NORVAL, C. J.

Edward Faust brought suit in the district court of Boyd county to enjoin the sale of his lands to satisfy a

certain judgment recovered by the defendant William Deering & Company against one S. P. Jamison in the county court of Holt county. The cause was heard in the court below upon the petition of the plaintiff, the answer of the defendants therein, the reply of the plaintiff, and the evidence. Transcript, page 22. From a decree in favor of plaintiff, the defendants have prosecuted this appeal.

A judgment of affirmance must be entered in this court, since the petition supports the decree, and the reply of the plaintiff is not to be found in the record, and the bill of exceptions attached to the transcript is not authenticated by the clerk of the trial court.

AFFIRMED.

BENJAMIN F. MIZER V. THOMAS EMIGH.

FILED DECEMBER 18, 1901. No. 10,684.

1. **Account:** STATUTE OF LIMITATIONS. An action on an account is barred in four years.

2. ——: ——: JUDGMENT: TOLLING. A payment made on an account by a person other than the debtor, without his authority, knowledge and consent, will not toll the running of the statute of limitations.

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

George R. Chaney, for plaintiff in error.

J. M. Chaffin, contra.

NORVAL, C. J.

This was an action on an account. The statute of limitations was interposed as a defense, which was sustained by the court below, and judgment rendered for the defendant. It is conceded by plaintiff that the action is barred, unless the statute was tolled by the payment of $7, made,

and credit therefor given, on October 28, 1895. The undisputed evidence discloses that the payment was made by one Cutter, who was indebted in that sum to the defendant, and the payment was so made without Emigh's knowledge or consent. After the date of the payment defendant was advised by Cutter of the transaction, and the evidence adduced by Emigh tends to show that he did not ratify the payment made by Cutter. An action on an account is barred in four years. *Reeves v. Nye,* 28 Nebr., 571. A payment made on an account by a person other than a debtor, without the knowledge and consent of the latter, will not toll the running of the statute of limitations. This action being barred, the judgment must be

AFFIRMED.

GERMAN NATIONAL BANK OF BEATRICE V. BEATRICE NATIONAL BANK OF BEATRICE.

FILED DECEMBER 18, 1901. No. 11,216.

1. **Bank Check:** PROTEST. A local bank check, which has been indorsed by the payee, may be formally protested for non-acceptance or non-payment.
2. ———: INLAND BILL. Bank checks are regarded as inland bills of exchange.
3. ———: PROTEST FEES. The fees of a notary public for protesting a bank check are recoverable against the drawer and drawee.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Reversed.*

W. C. LeHane, D. E. Collins and *Ernest O. Kretsinger,* for plaintiff in error.

Griggs, Rinaker & Bibb, contra.

NORVAL, C. J.

The facts are stipulated: W. H. Bowman, a resident of Gage county, drew a check upon the Beatrice National

Bank in favor of James Dougherty, a resident of the same county, who indorsed the check to A. E. Voortman & Co., who were engaged in business in the city of Beatrice. The latter indorsed the check to the German National Bank of Beatrice, and it presented the same to the Beatrice National Bank, which refused payment. The check was thereupon turned over to a notary public, who duly protested the same. The German National Bank thereupon brought this action against the drawer and drawee of the check to recover the amount thereof and protest fees. The district court decided that the defendants were not liable for the protest fees, and refused to render judgment therefor, but entered judgment in favor of plaintiff for the amount of the check.

The sole question we are called upon to decide is whether the fees of the notary for protesting the check are recoverable against the drawer and drawee. Our conclusion, upon a careful consideration of the subject, is that the defendants are liable therefor. Under the common law the formal protest of an inland bill of exchange is not required. But in this state, by section 6, chapter 61, Compiled Statutes, authority is conferred upon a notary public "to demand acceptance, or payment of any foreign, inland, or domestic bill of exchange, promissory note, or other obligation, in writing, and to protest the same for non-acceptance or non-payment, as the case may be, and give notice to indorsers, makers, drawers, or acceptors, of such demand a non-acceptance, or non-payment; * * * and over his signature and official seal certify the performance of such duties, so exercised and performed under the provisions of this act, which certificate shall be received in all courts of this state, as presumptive evidence of the facts therein certified to," etc. This section confers undoubted authority upon a notary public to protest a local check which has been indorsed by the payee. Defendants do not contend for the opposite of this, but insist that a notary public would not have such power were it not that a local check is included in the term "other obligation in writing" as

employed in the statute quoted. To this proposition we are unable to yield assent. In *Wood River Bank v. First Nat. Bank,* 36 Nebr., 744, it was expressly decided that "bank checks, in this country, are regarded as inland bills of exchange for the purpose of presentment and demand, and notice of dishonor." Such checks do not require a formal protest to charge the indorser. A formal protest is, however, entirely proper. The great weight of authority sustains the proposition that a bank check is substantially an inland bill of exchange. 2 Daniel, Negotiable Instruments [2d ed.], secs. 1566, 1567, and note; Boone, Banking, sec. 165; *Moses v. Franklin Bank,* 34 Md., 574; *Bickford v. First Nat. Bank,* 42 Ill., 238; *Rogers v. Durant,* 140 U. S., 298. It will be observed that the section of the statute quoted confers power upon a notary public to protest inland bills of exchange, which, we have seen, embrace local bank checks. The right to recover protest fees is given by section 6, chapter 41, which declares that "it shall be lawful for any person or persons having a right to demand any sum of money upon any protested bond, note, or bill of exchange as aforesaid, to commence and prosecute an action for principal, damages, interest, and charges of protest against the drawers, makers, or indorsers, jointly or severally, or against either of them separately. And judgment shall and may be given for such principal, damages, charges, and interest upon such principal, after the rate aforesaid, to the time of such judgment, together with costs of suit." In view of the statutory provision herein set out, the conclusion is irresistible that plaintiff is entitled to recover from the defendants the cost of protesting the check.

The judgment is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JEREMIAH D. LIKENS V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1901: No. 12,000.

1. **Great Bodily Injury.** The words "great bodily injury," as employed in section 17*b* of the Criminal Code, imply an injury of a graver and more serious character than an ordinary battery.

2. ———: EVIDENCE. A conviction under said section 17*b* of the Criminal Code can not stand where the evidence fails to disclose that the accused making the assault intended to inflict great bodily injury upon the person of the prosecuting witness.

3. **Evidence:** RULINGS. Rulings upon the exclusion of answers propounded to the complaining party's own witness on his examination in chief can not be reviewed where he has not made and preserved in the record an offer of proof.

ERROR from the district court for Rock county. Tried below before HARRINGTON, J. *Reversed.*

R. R. Dickson, for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown, Deputy, and *J. A. Douglas,* for the state.

NORVAL, C. J.

Jeremiah D. Likens was convicted in the court below of an assault upon Alva Likens with intent to inflict great bodily injury, and was sentenced to a term of imprisonment in the state penitentiary. The defendant has brought the record to this court for review.

It is first urged that the verdict is not sustained by sufficient evidence. In *Murphey v. State,* 43 Nebr., 34, it was ruled that the words "great bodily injury," as employed in section 17*b* of the Criminal Code, imply an injury of a graver and more serious character than an ordinary battery. A careful perusal and consideration of the entire testimony contained in the bill of exceptions satisfies us that the offense of which the accused was convicted was not established on the trial beyond a reasonable doubt. It is disclosed that Alva Likens, the prosecuting witness, is a

nephew of the defendant, both residing in the town of Bassett. The former runs a butcher shop, and about the 1st day of January of the present year the accused sent his little grandson to the shop to obtain some oysters, or meat, but gave the lad no money to pay for the same. The prosecuting witness refused to sell to the boy on credit, and the latter returned home and informed his grandparents of the fact; whereupon, on the same day, the defendant went to the butcher shop to see the nephew with reference to refusing to extend credit, and an altercation between them followed, during which defendant struck Alva once or twice with his fist. A butcher's knife at the time was lying upon the block in the shop, and it was and is the contention of the state that the defendant seized it and struck the prosecuting witness. The testimony adduced by the accused, and the circumstances surrounding the transaction, makes it pretty clear that he took the knife from the block merely to prevent the prosecuting witness from getting and using the same upon the defendant; that the latter had no intention of striking his nephew therewith, but that in the scuffle that ensued the latter accidentally received merely a slight cut or wound. The most that can be reasonably claimed from the evidence before us is that the defendant was guilty of an assault and battery. The element of an intent to inflict great bodily injury is lacking.

More than one error is assigned for the exclusion of answers to questions propounded to the defendant by his counsel upon direct examination, but these assignments must be overruled, because the defendant made no offer of proof when the objections were sustained.

The verdict being unsupported by sufficient evidence, the judgment is reversed and a new trial awarded.

REVERSED.

CHARLES F. PETERSON V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1901. No. 12,021.

1. **Intoxicating Liquors:** POSSESSION WITHOUT LICENSE OR PERMIT: LOCUS IN QUO: PRESUMPTION. The possession of intoxicating liquors by a person, without a license or permit, at a place other than a residence, is presumptive evidence that they were kept for sale in violation of law, and casts the burden upon such person to satisfactorily account for and explain the possession thereof.
2. **Whiskey:** BEER: INTOXICATION: PRESUMPTION. Courts will take judicial notice that whiskey and beer are intoxicating.
3. **Instruction:** REQUEST. Error can not be predicated upon the failure to instruct upon a particular feature of a case, when the trial judge has not been requested to do so.
4. **Writing:** BEST EVIDENCE. A writing is the best evidence of what it contains.
5. **Cross-Examination:** JUDICIAL DISCRETION. The scope of the cross-examination of a witness rests largely in the trial court, and its ruling will be upheld, unless an abuse of discretion is shown.

ERROR from the district court for Phelps county. Tried below before ADAMS, J. *Affirmed.*

Hall & Reed and *James I. Rhea,* for plaintiff in error.

Frank N. Prout, Attorney General, and *Norris Brown, Deputy,* for the state.

NORVAL, C. J.

Charles F. Peterson was prosecuted in the court below for the crime of keeping intoxicating liquors with intent to sell the same, without having obtained a license so to do. Upon the trial he was convicted, and the sentence imposed was a fine of $300 and costs of prosecution. By this proceeding it is sought to reverse said judgment.

The first contention is that the instructions to the jury were erroneous, in that they failed to state the issue and the law applicable to the case. The criticisms are against the instructions *en masse,* and particularly that the court

omitted to instruct the jury on the question of residence. This prosecution is under section 20, chapter 50, Compiled Statutes, which provides:

"Hereafter it shall be unlawful for any person to keep for the purpose of sale without license any malt, spirituous, or vinous liquors in the state of Nebraska, and any person or persons who shall be found in possession of any intoxicating liquors in this state, with the intention of disposing of the same without license in violation of this chapter, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined or imprisoned as provided in section eleven of this chapter; *provided,* That this shall not apply to physicians or druggists holding permits for the sale of liquors for medicinal, mechanical, chemical, or sacramental purposes, or persons having liquors for home consumption. If any credible, resident freeholder of any county, in this state shall, before any police judge, county judge, or justice of the peace, make complaint and information in writing and on oath that he has reason to believe and does believe that any intoxicating liquor, describing it as particularly as may be, in said complaint is in said county, in any place described as nearly as may be in said complaint, owned or kept by any person named or described in said information as particularly as may be, and is intended to be, or is being, by the person named or described in said complaint, sold without license in violation of this chapter, said magistrate shall, upon filing said complaint and believing there is probable cause therefor, issue his warrant for the search of the premises described in said complaint, and the arrest of the person therein named or described as the case may be, naming and describing the liquors, person, and premises as in the complaint, which warrant shall be directed to the sheriff, city, or village marshal or constable, as the complainant may request, and said warrant shall further command the officer that after a thorough and diligent search of said premises, he shall seize the said liquor with the vessels containing it and to keep the same securely until final action be had thereon;

and immediately arrest the person named or described in said warrant, or the person in charge of the said liquors and bring him before said magistrate for examination, and the possession of any of said liquors shall be presumptive evidence of a violation of this chapter and subject the person to the fine prescribed in section eleven, unless after examination he shall satisfactorily account for and explain the possession thereof, and that it was not kept for an unlawful purpose. Where any liquors shall have been seized by virtue of any such warrant the same shall not be discharged or returned to any person claiming the same, by reason of any alleged insufficiency of the description in the complaint or warrant of the liquor or places, but the claimant shall be entitled to an early and speedy hearing on the merits of the cause; Provided, That in case the place described in said complaint and to be searched is the residence of the person named or described in said complaint, or any other person, then and in that case the warrant shall not issue unless the complaint shall state that within thirty days, immediately preceding the filing thereof, that liquor describing it has been sold therein in violation of this chapter."

It will be observed that the section makes the possession of any intoxicating liquors presumptive evidence of a violation of the statute, and subjects the person to the penalty prescribed, unless he shall satisfactorily account for and explain the possession of the intoxicating liquors, and that they were not kept for an unlawful purpose. The accused insists that no such presumption can be indulged in this case, and he invokes the last proviso-clause of said section. The court instructed the jury, in effect, that the possession of intoxicating liquors by the defendant was presumptive evidence of his guilt, unless he should satisfactorily explain such possession. The argument of the accused is that under the said last proviso no such presumption from the possession of liquors at a residence obtains, unless the state has proved an unlawful sale of liquors within thirty days of the filing of the complaint, and that the court there-

fore erred in its instructions upon the subject. A short answer to this is that the evidence discloses that the intoxicating liquors were found in the defendant's possession at his place of business, hence the proviso in question is not applicable in this case. Moreover, the information does not charge that liquors were in the possession of the defendant at his residence. Therefore, it was not error for the court to fail to instruct the jury relative to said proviso. The defendant was not entitled to the benefit of the provisions thereof.

Another infirmity imputed to the instructions is that they failed to inform the jury that the liquors must be intoxicating, to justify a conviction. The information charges the defendant with keeping whiskey and beer with intent to sell and dispose of the same contrary to law; and the court instructed the jury, in substance, that it was necessary for the state to establish that the defendant had in his possession the liquors described in the information, or some of them, with the intent to sell the same unlawfully. It was not necessary to charge the jury that the liquors were intoxicating. Whiskey and beer are well-known intoxicants, and require no proof of such fact. *State v. Teissedre,* 30 Kan., 476; *Stout v. State,* 96 Ind., 407; *Briffitt v. State,* 58 Wis., 39; *Kerkow v. Bauer,* 15 Nebr., 150, 155. Two barrels containing bottled beer, labeled "Pabst Export Beer," were found in the possession of the defendant and seized. The defendant introduced evidence tending to show that he ordered a beverage known as "Malt Mead," and that the barrels containing beer were sent him in lieu thereof through a mistake, which fact he had not discovered at the time the liquor was seized. It is urged that this feature of the case was not submitted to the jury by the instructions. No request to charge along that line having been tendered by the accused, error can not be predicated upon the failure of the court to submit that question to the jury. *German Nat. Bank v. Leonard,* 40 Nebr., 676; *Barr v. City of Omaha,* 42 Nebr., 341; *Laing v. Nelson,* 40 Nebr., 252.

Complaint is made upon the ruling of the court upon the introduction of testimony. Defendant testified that the two barrels which contained beer were received the day before the premises were searched by the sheriff; that defendant purchased from the wholesale house of Hund & Eger, St. Joe, Mo., the beverage known as "Pabst Malt Mead." The accused was then asked this question by his counsel: "Q. Mr. Peterson you may state whether or not previous to receiving these two barrels you ordered any beer from Hund & Eger. By Mr. Dailey: Q. Was that order in writing? A. Yes, sir. (State objects to any testimony on this line for the reason the order would be the only competent evidence. Sustained. Exception.)" The defendant then offered to prove by himself that prior to receiving the two barrels of beer he ordered from the firm of Hund & Eger two barrels of Pabst Malt Mead, and that he did not order or purchase at that time from said firm any beer. The objection of the state to this offer was sustained, and an exception to the ruling was noted. The answer to the question was properly excluded, since the order for goods was admitted to be in writing, and the paper itself was the best evidence of its contents. This is a familiar rule. The evidence tendered by the offer had no tendency to establish a defense. It had not then been shown that the barrels containing the beer were received from Hund & Eger. Furthermore, the testimony offered did not tend to establish that the defendant did not purchase the beer from that firm or any one else, only that at the time he ordered the two barrels of Pabst Malt Mead he did not purchase or order from them any beer. This might be all true, and yet it did not go to show that he had not purchased the two barrels containing beer.

It is also urged that the court erred in not permitting certain witnesses to testify that, at the time the goods were received, Peterson believed, and acted upon the belief, that such goods were malt mead, and not intoxicating. It is not pointed out in argument, nor are we able to see, how the witnesses were able to tell what the defendant believed.

They were not shown to be mind readers. The defendant's good faith or intentions, or the want thereof, was for the jury to determine from the evidence, and it was clearly incompetent for persons other than the defendant to testify as to his intent or belief.

Some criticisms are made relative to the cross-examination of the accused. Considerable discretion is vested in a trial court as to the scope of a cross-examination, and this record fails to disclose an abuse of discretion in this case, or that the rights of the defendant were prejudiced thereby.

We have examined the other rulings on the admission of testimony, and have observed no prejudicial error therein.

It is finally urged that the verdict is not supported by sufficient evidence. It was shown that shortly before the filing of the complaint that the defendant sold beer to one O. D. Harris and others. Two barrels containing beer were found in defendant's possession. These facts were sufficient to justify the jury in finding him guilty.

The judgment is accordingly

AFFIRMED.

NOTE.—There is no presumption of law that a liquor described simply as "beer" is a malt liquor. *State v. Beswick*, 13 R. I., 211. There is no presumption that a liquor so described is an intoxicating liquor. *Blatz v. Rohrbach*, 116 N. Y., 450. Whether ale and cider are intoxicating liquors is a question for the jury. *State v. Biddle*, 54 N. H., 379. Ale and strong beer are included in the statutory term "strong and spirituous liquors." *Nevin v. Ladue*, 3 Denio [N. Y.], 437. Lager beer is not included in the statutory term "spirituous and vinous liquors." *State v. Brindle*, 28 Ia., 512. Where the defendant is prosecuted for an unlawful sale of intoxicating liquor, and upon the trial the evidence shows a sale of beer, under circumstances which would make the sale unlawful if the beer were intoxicating, it will be presumed the beer so sold was an intoxicating liquor. *Stout v. State*, 96 Ind., 407, cited in the foregoing opinion. The case of *Nevin v. Ladue, supra*, contains a very learned review of the question by Chancellor Walworth, and the case is followed in *Board of Excise v. Freeoff*, 17 How. Pr. [N. Y.], 442.—REPORTER.

CHARLES H. WEST V. STATE OF NEBRASKA.

FILED DECEMBER 18, 1901. No. 12,069.

1. **False Pretenses in Futuro.** The obtaining of property by representations of what will happen in the future is not a crime.

2. **Information.** The information charges sufficient facts to constitute the crime of obtaining property by means of false pretenses.

3. **Juror:** CHALLENGE: BILL OF EXCEPTIONS. Evidence relating to challenges to jurors for cause and to the array can not be considered, unless settled and allowed by a bill of exceptions.

4. **False Pretenses:** MATERIAL AND IMMATERIAL: INSTRUCTION. In a prosecution for obtaining property by several false pretenses, some of which are immaterial, the court should, by instructions, inform the jury which of the pretenses are material.

ERROR from the district court for Kearney county. Tried below before ADAMS, J. *Reversed.*

E. Frank Brown, Hamer & Hamer, L. W. Hague and *Richard A. Moore,* for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown, Deputy, and *M. D. King,* for the state.

NORVAL, C. J.

Charles H. West was prosecuted in the court below for the crime of obtaining property from John B. McIntyre, the prosecuting witness, by means of certain false pretenses. The jury found him guilty, and from the sentence pronounced against him error is prosecuted.

The information under which the defendant was tried is assailed on the ground that it does not charge a crime. Omitting the formal parts, it is as follows:

"That Charles H. West, late of the county aforesaid, on or about the 28th day of August, A. D. 1900, in the county of Kearney and state of Nebraska aforesaid, intending unlawfully, fraudulently and feloniously to cheat and defraud one John B. McIntyre, then and there did falsely,

knowingly, designedly, fraudulently, feloniously and unlawfully pretend to said John B. McIntyre that one J. M. Craig was a man of wealth and good standing, and a large property owner; also a merchant, and well able to meet all of his obligations; and that he resided in the city of Kearney, Nebraska; and that the said Charles H. West held a promissory note against said J. M. Craig for the sum of $200, and of which the following is a true copy:

'KEARNEY, July 25th, 1900.

'Three months after date I promise to pay to C. H. West or order two hundred dollars with ten per cent. interest from maturity. J. M. CRAIG. [4c Rev. Stamps.]'

"That said Charles H. West aforesaid further falsely, knowingly, designedly, fraudulently, feloniously and unlawfully represented that the said note would be promptly paid by said J. M. Craig when due, and that the said J. M. Craig was absolutely good and responsible for said sum, and the full amount represented by said note would be paid by him, the said J. M. Craig at the maturity thereof.

"That, relying upon the false representations of the said Charles H. West, then and there made as aforesaid, John B. McIntyre then and there sold and delivered to the said Charles H. West four head of horses, of the value of $235, to be paid October 28th, 1900, and, as security for the payment of said sum did then and there, as aforesaid, relying on said representations so made by the said Charles H. West, accept said note of J. M. Craig from said Charles H. West.

"That said representations of the said Charles H. West were wholly false, in that the said J. M. Craig was not a man of wealth, or the owner of large property, and was not able to meet his obligations, and that he was not able to pay his said note when due, and that he was not in good standing, but was wholly insolvent and unable to pay his debts, and possessed of no property whatever, as the said Charles H. West well knew; and said J. M. Craig has wholly failed and refused to pay said note, or any part thereof. That the said Charles H. West then and there as

aforesaid made said false representations with intent then and there as aforesaid to cheat and defraud the said John B. McIntyre, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska."

The criticism made on the information is that it is not therein alleged that the complaining witness was injured or damaged by the false pretenses of the defendant. So it does not in as many words, but it is averred, in substance, that, by means of the false representations of Craig, the prosecuting witness was induced to and did part with property of the value $235. Certainly this amounts to a charge of actual injury and damage, if it were essential that the information should contain such an averment. The obtaining of the property of McIntyre by means of false pretense constituted the offense. It was unnecessary that the information should allege that the defendant did not pay for the horses at the time agreed upon, nor that he did not pay Craig. The crime, if it ever existed, was complete when the property was fraudulently obtained, and no act of the defendant thereafter could wipe it out.

A further suggestion is made that the representations set out in the information are only as to conclusions, matters of opinion and future happenings. This criticism is in part true, so far as the information charges that the defendant "represented that the said note would be promptly paid by said J. M. Craig when due, * * * and the full amount represented by said note would be paid by him, the said J. M. Craig, at the maturity thereof." These averments related to matters in the future, and were wholly immaterial. But aside from these, sufficient material facts are alleged to constitute a crime.

The assignments of error relating to challenges to the jury can not be considered because evidence relating thereto is not embraced within the certificate of the trial judge in allowing the bill of exceptions. *Coil v. State,* 62 Nebr., 15.

Complaint is made of the introduction of evidence of a

note given by West to McIntyre for the horses. The note was part of the *res gesta,* and was properly received in evidence, since it tended to explain and throw light upon the transaction. The Craig note was given as collateral security to the defendant's note.

The fourth instruction follows: "You are further instructed, gentlemen, that it is not necessary, to constitute the crime, that the owner, McIntyre, has been induced to part with his property solely and entirely by the false pretenses claimed, nor that the false pretenses were the paramount cause of the delivery of the property to the accused; for it is sufficient if they are part of the moving cause, and without them McIntyre would not have parted with the property. You are further instructed that the falsity of every pretense is not essential to the crime. It is enough that a material part of the pretenses was false, that it was made to defraud, and that it induced the prosecuting witness to part with his property. And if, from all the evidence, you so find such state of facts, then your verdict should be, 'guilty as charged.'" Exception was taken by the defendant to the foregoing instruction, and we are of the opinion its giving was erroneous. True, as the court said, "It is enough that a material part of the pretenses was false." But neither in this instruction nor elsewhere in the court's charge, were the jury informed which one of the pretenses set forth in the information was material, and which immaterial. The jury were left to determine this for themselves. As we have already seen, at least one of the false pretenses alleged was immaterial, and the jury may have found their verdict upon it alone. The instruction attempted to cover the entire cause, and, having omitted to tell the jury which were the material representations, is erroneous, and for the giving of which there must be a new trial.

Judgment reversed and cause remanded.

REVERSED AND REMANDED.

JOHN E. WILBUR V. WILLIAM WYATT ET AL.

FILED DECEMBER 18, 1901. No.12,346.

1. **County Bonds:** INTERNAL IMPROVEMENT: NOTICE: NEWSPAPER. A proposition to issue county bonds to aid in a work of internal improvement, and the result of the vote thereon, must be entered on the records of the county; and notice of the adoption of such proposition must be published for two weeks in a newspaper in said county, if one be published therein, before such bonds can be legally issued.

2. ——: ——: ——: ——: IRRIGATION DITCH. An election was held on August 16 to vote on a proposition to issue county bonds to aid in the construction of an irrigation ditch. On the 21st day of the same month, notice was ordered published, and the bonds were issued on September 1, following. *Held*, That the bonds were illegally issued.

3. **Municipal Bonds:** PURCHASER: RECITALS: NOTICE. A purchaser of municipal bonds is charged with notice of the recitals contained therein.

ERROR from the district court for Douglas county. Tried below before KEYSOR, J. *Affirmed.*

Henry W. Pennock, for plaintiff in error.

Gaines, Kelby, Storey & Martin, contra.

NORVAL, C. J.

This action is upon an interest coupon for $60 attached to a $1,000 irrigation bond issued by Perkins county to the Equitable Irrigation & Waterpower Company. The county interposed these defenses: (1) A county has no power to issue bonds for the construction of an irrigation ditch, because such improvement is a private, and not a public, enterprise; (2) the proposition submitted to the voters of the county was invalid for the reason it contained an unlawful inducement or bribe to the electors to vote the proposed bond; (3) the statutory requirement of two weeks' publication of the notice of the adoption of the proposition was not complied with prior to the issue of the bond. Upon the

trial the issues were found in favor of the defendants and from a judgment in their favor error is prosecuted by the plaintiff.

As we view the case, the last defense stated need only be considered. The bond in question contained the following recitals, among others: "The issuing of this bond was submitted to the electors of said Perkins county, Nebraska, at a special election held for that purpose, upon due notice given, on the 16th day of August, A. D. 1894. * * * And the board of county commissioners of said Perkins county, being vested by law with authority for that purpose, having found that said election has been had and held in all respects in accordance with law, and that all the requirements and conditions precedent necessary to authorize the execution and delivery of this bond had been fully complied with, did on the 21st day of August, A. D. 1894, while in regular session, by an order duly made, caused a notice to be published that on September 1st, 1894, they would execute said bond, and deliver the same in accordance with the terms of the proposition voted upon, and this bond has been issued in pursuance of said order." If the bond was issued for the promotion of a public enterprise, its issuance is governed and controlled by section 4, chapter 45, Compiled Statutes, which declares that "If two-thirds of the votes cast at any such election for the purpose herein set forth be in favor of the propositions submitted, the county commissioners, in the case of a county, and the city council, in case of a city, shall cause the proposition and result of the vote to be entered upon the records of said county or city, and a notice of its adoption to be published for two successive weeks in any newspaper in said county or city, if there be one, and shall thereupon issue said bonds," etc. Plaintiff is a bona-fide holder of the coupon in suit, and he claims that the county is estopped by the foregoing recital in the bond from which the coupon was detached from asserting that the statute relating to the issuance of the bond had not been complied with. It has been often held that recitals in municipal bonds are conclusive, in favor of a

bona-fide holder, that conditions precedent to their issue required by statute, and subject to the determination of the municipal officers, have been fully complied with. It is a familiar doctrine that recitals in municipal bonds that they were issued pursuant to an order of the board or body having power to issue them is notice to any one purchasing the bond of the terms of such order. *Post v. Pulaski County,* 49 Fed. Rep., 628. In *McClure v. Oxford Township,* 94 U. S., 429, the court say: "If a purchaser may be, as he sometimes is, protected by false recitals in municipal bonds, the municipality ought to have the benefit of those that are true." To the same effect are *Merchants' Nat. Bank v. School District No. 8,* 94 Fed. Rep., 705; *Horton v. Town of Thompson,* 71 N. Y., 513; *Scipio v. Wright,* 101 U. S., 665; *Harshman v. Bates County,* 92 U. S., 569. It will be observed that the section of the statute already quoted requires that notice of the adoption of the proposition to issue bonds in aid of works of internal improvement must be published for two successive weeks in some newspaper in the county, if there be one, before the bonds shall be issued. The recital in the bond from which this coupon was detached conclusively discloses that such notice was not published in a newspaper in Perkins county for two successive weeks before the bond was issued. It was issued September 1, 1894, and the order for the publication of the notice was made August 21, 1894. The notice therefore could not have been published for the statutory two weeks subsequent to such order and prior to the date and issuance of the bond. The bond was therefore issued in violation of the express terms of the statute, of which every purchaser had notice by the recital in the bond. The county board was without power to order the issuance of the bond until after the statutory notice had been given. The bond being invalid, the coupon falls with it, and a recovery thereon can not be had.

The judgment is accordingly

AFFIRMED.

GEORGE BURKE & FRAZIER V. UNIQUE PRINTING COMPANY.

FILED DECEMBER 18, 1901. No. 10,734.

1. **Judgment Entry:** ENTIRE RECORD. To ascertain the meaning of a judgment entry it is always permissible to read it in the light of the entire record.

2. **Caption of Petition:** PARTNERS: INDIVIDUALS. Where the caption of the petition gives the individual names of the members of a copartnership as defendants, and references in the pleadings, findings and judgment to the defendants are generally in the plural, the action will be held to be one against the individuals named, even though the petition charges that the plaintiff contracted with the defendants as partners.

ERROR from the district court for Douglas county. Tried below before DICKINSON, J. *Dismissed.*

Hall & McCulloch, for plaintiffs in error.

John M. Macfarland and *Alex A. Altschuler, contra.*

SULLIVAN, J.

The judgment brought here for review was rendered in an action brought, according to the caption of the petition, by the Unique Printing Company, a corporation, against "George Burke & —— Frazier, his first name unknown," to recover money claimed to be due upon a written contract. The plaintiff in error, a copartnership composed of Burke and Frazier, complains of the judgment on the assumption that it was rendered against the partnership and not against its constituent members. The case presented calls merely for a construction of the record. Was it the intention of the court to pronounce against the firm or against Burke and Frazier as individuals? This is the controlling question. The petition states that the defendants were copartners at the time of giving the instrument sued on and concludes with a prayer for "judgment against the defendants." Upon whom, or in what manner, the summons was served is not shown, but the judgment, which was rendered

by default, after reciting that the defendants, and each of them, failed to appear, etc., proceeds as follows: "On consideration whereof the court, being fully advised in the premises, finds that the allegations in the said petition contained are true, and that there is due and owing to the plaintiff from the said defendants on the cause of action set forth in the petition of the plaintiff filed herein, the sum of $196 and the costs of suit. It is therefore considered by the court that the plaintiff have and recover of and from the said defendant herein, the sum of one hundred ninety-six and no-100 dollars, ($196) and its costs herein expended, taxed at $——, for which execution is hereby awarded." After judgment there was filed a motion for a new trial, which we do not find in the record, but which is described in the order overruling it as the motion of defendants. It also appears that George Burke sought a vacation of the judgment and gave a bond to supersede it on the theory that it had been rendered against him. The partnership made no appearance in the district court; and, upon the whole record, we are disposed to think that it has, technically, no interest in the litigation. The evident intention of the court was to make the judgment respond to the findings and to charge the partners and not the partnership. To ascertain the meaning of a judgment entry it is always permissible to read it in the light of the entire record. "In case of doubt regarding the signification of a judgment, or any part thereof, the whole record," says Mr. Freeman, "may be examined for the purpose of removing the doubt." 1 Freeman, Judgments, sec. 45. Construed in the light of the entire record the word "defendants" in a judgment has frequently been held to refer to only one of several defendants; and likewise the word "defendant" in a judgment entry has been held to include all the defendants named in the caption. The manifest purpose of the court to give judgment against the defendants should not be frustrated by what seems to be an accidental omission of a letter. That the title and averments of the petition in the case make the action one against Burke and Frazier

as individuals can not well be doubted. The fact that plaintiff charged that it contracted with defendants as partners, does not evince a purpose on its part to sue the firm and not the individuals composing it. *King v. Bell,* 13 Nebr., 409; *Herron v. Cole Bros.,* 25 Nebr., 692; Bates, Partnership, 1068.

The plaintiff in error not having been a party to the action in the district court, is not entitled to have the judgment reviewed in this court. The proceeding in error is therefore

DISMISSED.

OMAHA LOAN & TRUST COMPANY, APPELLEE, V. SAMANTHA KECK ET AL., APPELLANTS.

FILED DECEMBER 18, 1901. No. 10,747.

1. **Judicial Sale:** APPRAISEMENT: RETURN: EVIDENCE: RECITALS. The statute on the subject of judicial sales does not require the appraisers to set out in their return the evidence upon which they acted in making the appraisement; and their duty in this respect is the same whether the defendant's interest be a freehold or a fee simple.

2. **Judicial Sale:** NOTICE. The published notice of a judicial sale is not fatally defective because one who is not a party to the decree is named in the notice among a large number of defendants.

3. **Appraisement:** EVIDENCE. Evidence examined, and found to warrant the conclusion that the appraisement was a just one.

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

E. C. Calkins and *H. V. Calkins,* for appellants.

William Gaslin, contra.

SULLIVAN, J.

This is an appeal from an order confirming a sale of real estate made by the sheriff of Buffalo county under a decree of foreclosure. Appellants contend that the valuation of

the mortgaged property was too low, and so manifestly unjust as to warrant the inference that the appraisement was fraudulent. We have examined with care all the evidence in the record, but we are unable to find in it anything indicating that the appraisers did not act in perfect good faith. Indeed, we are disposed to think that there is a very strong preponderance of the proof sustaining the appraisement.

It is next contended that the court should have refused confirmation because the method by which the appraisers ascertained the value of appellants' life estate in part of the property is not disclosed by the record. The statute requires the appraisers to fix the gross value of the lands and tenements levied upon or set apart by the decree under which the sheriff is acting, but it does not require them to make any return to the court showing the evidence upon which they acted in fixing such value. The life estate of appellant in lot 89 having been adjudged to be subject to the lien of plaintiff's mortgage, it became the duty of the appraisers to ascertain the gross value of that estate; but they were not required to make a return to the court showing by what means or upon what evidence their conclusion was reached. The duty of appraisers in fixing and reporting gross valuation is precisely the same whether the estate be a fee simple or a freehold. It is the business of appraisers to ascertain the real value of the property and if this has been done it is not important whether the evidence upon which they acted was the best obtainable.

Another argument against the validity of the sale is that the notice did not accurately describe the decree. There were, it seems, six defendants affected by the decree, namely: "Ella Perin, Mary Keck, Briggs S. Keck, George S. Keck, Lawrence C. Keck, and Clara Keck Hemingway." In the notice of sale the decree is described as having been rendered in an action wherein the Omaha Loan & Trust Company was plaintiff and "Samantha Keck, Josiah L. Keck, Nelson Perin, W. A. Downing et al.," were defendants. The title of the cause was "Omaha Loan & Trust Company, Plaintiff, vs. Samantha Keck, J. L. Keck, Nel-

son Perin, Ella Perin, his wife, W. A. Goodman, and —— Goodman his wife (first name unknown), Kearney Produce Company, George S. Keck, A. Fred Cole, Mark Keck, Lawrence C. Keck, Briggs S. Keck, Clara Keck Hemingway, —— Hemingway, her husband, defendants." The notice was therefore inaccurate, but we can not believe that it was misleading or that the appellant was prejudiced by it. Upon this point *Nebraska Loan & Trust Co. v. Hamer*, 40 Nebr., 281, is a decisive authority.

The order of confirmation is

AFFIRMED.

IOWA LOAN & TRUST COMPANY, APPELLEE, V. CURTIS S. GREENMAN, IMPLEADED WITH S. A. ROE, APPELLANT.

FILED DECEMBER 18, 1901. No. 10,812.

1. **Unlettered Person:** MARK: WITNESS. By the common law the written evidence of the acts, compacts and engagements of unlettered men are properly attested by any mark, symbol or character which they may see fit to employ for that purpose.
2. **Judicial Appraisement:** MARK. A judicial appraisement of land is signed within the meaning of the law (Code of Civil Procedure, sec. 491*a*) when it is attested by the mark of an illiterate person whose name thereto is subscribed by another.
3. **Appraisement:** CERTIFICATE OF SHERIFF: EVIDENCE. The certificate of the sheriff that he returned with the order of sale the appraisement made by himself and the freeholders is presumptive evidence that the fact stated is true.

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

John N. Dryden, for appellant.

Fred A. Nye, contra.

SULLIVAN, J.

The appeal is from a decision rendered by the district court for Buffalo county. A prominent suggestion in the briefs of counsel is that in considering the record we are

brought face to face with a new question—that in all the multitude of precedents with which the books are thronged there can be found no case like this. The action, which was brought by the Iowa Loan & Trust Company against Curtis S. Greenman and others to enforce a real estate mortgage, had, it seems, an eventless career up to the time when the sheriff made return of his proceedings under the order of sale. Defendants then appeared by their attorney and resisted confirmation upon two grounds. Both of these grounds are not now insisted upon. In view of some decisions rendered by this court during the pendency of the appeal counsel has discreetly abandoned one of them and concentrated all his energies on the other. The point where it is thought defendant's rights have been seriously infringed is in the attestation of the appraisement. The way of it was this: One of the appraisers had, in his youth, either neglected or disdained to cultivate the art of writing, and was therefore under the necessity of subscribing the history of the transaction in which he had a part by making a mark in the form of a cross between his Christian name and surname, both of which had been written by some other person. This circumstance is the basis of counsel's claim that the appraisement lacks due authentication and should for that reason be treated as a nullity. It may be that this precise point has never been adjudicated. We do not know that it has, but we are disposed to think that the way to a right conclusion is not beset with appalling difficulties. The sheriff in his return states: "Received this order this 2d day of December, 1898, at ten o'clock A. M., and according to the command thereof, I summoned B. F. Tussing and John F. Brown, two disinterested residents and freeholders of said county, and administered to them an oath impartially to appraise the interest of Curtis S. Greenman, Mary L. Greenman et al., defendants, in said lands and tenements, upon actual view thereof; and I, together with said B. F. Tussing and John F. Brown, made an appraisement in writing of said lands and tenements which appraisement is herewith returned." By the com-

mon law, and probably under every system of jurisprudence, the written evidence of the acts, compacts and engagements of unlettered men are sufficiently attested by any mark, symbol or character which they may see fit to employ for the purpose of signifying their assent. *Baker v. Dening,* 8 Adolph. & E. [Eng.], 94; *Palmer v. Stephens,* 1 Den. [N. Y.], 471; *Jackson v. Van Dusen,* 5 Johns. [N. Y.], 144; *Zacharie v. Franklin,* 12 Pet. [U. S.], 151; 1 Greenleaf, Evidence, sec. 272. Except where the statute otherwise provides the mark of an illiterate person is his signature, and if made for the purpose of attesting his act, or indicating his assent, is legally effective without being witnessed. We have in this state a statute (Criminal Code, sec. 253) declaring that "a mark shall have the same effect as a signature, when the name is written by some other person and the mark is made near thereto by the person unable to write his name"; but there is no requirement either in the written or unwritten law that such a signature shall be witnessed. *Willoughby v. Moulton,* 47 N. H., 205; *State v. Byrd,* 93 N. Car., 624; *Brown v. Butchers' & Drovers' Bank,* 6 Hill [N. Y.], 443, *Finley v. Prescott,* 47 L. R. A. [Wis.], 695. These considerations lead us to the conclusion that the name and mark of Mr. Brown constituted his signature, and that the trial court, being required to deal with it as such, committed no error, venial or vital, in holding out against the persuasions of the defendant's counsel. The sheriff having stated in his certificate that he returned the appraisement made by himself and the freeholders, the plaintiff did not have to take upon itself the burden of proving that the fact certified was true. That should be presumed until the contrary is shown.

The order of confirmation is

AFFIRMED.

WILLIAM SANDERS, APPELLEE, V. M. O. AYRES, APPELLANT.

FILED DECEMBER 18, 1901. No. 10,845.

1. **Deed Absolute:** MORTGAGE: INTENTION OF PARTIES. Whether a deed absolute on its face is a sale or a mortgage depends upon the intention of the parties, and such intention is to be gathered from their declarations and conduct, as well as from the papers which they subscribed.

2. ———: ———: ———: EVIDENCE. In an action to have a deed absolute on its face declared a mortgage, the evidence showed a debt existing between plaintiff and defendant at the date of the deed, a cancelation of the evidence of the debt by defendant, a contract to reconvey the premises to plaintiff within six months for a sum equal to the amount of the debt and six months' interest, retention of the premises by plaintiff without paying rent, and making of improvements thereon by him without objection from defendant and that the premises were worth perhaps double the amount of the debt. *Held*, sufficient to justify the court in declaring the deed merely security for the debt.

3. **Usury:** EVIDENCE. The evidence on the question of usury examined, and *held* to support the finding that the transaction was tainted with usury.

APPEAL from the district court for Dakota county. Heard below before EVANS, J. *Affirmed.*

Mell C. Jay, for appellant.

J. J. McAllister, contra.

SULLIVAN, J.

This record presents no question of serious difficulty. The action was brought by William Sanders against M. O. Ayres on the theory that a conveyance made by the former to the latter, although absolute in form, was intended to be, and was in substance and legal effect, a mortgage. The prayer of the petition is that the deed be adjudged to be a security and that the plaintiff be permitted to redeem. The defendant denied the material averments of the petition, but the court found against him and gave judgment accordingly. The argument advanced here for a reversal of

the judgment is that the evidence does not fairly sustain it. The testimony of the litigants upon the main question is in irreconcilable conflict, but collateral events about which there is little or no dispute give plaintiff's theory a complexion of truth, which, in our opinion, rightly influenced the trial judge in his favor. Whether the transaction was a sale or a mortgage depends upon the intention of the parties, and that intention is to be gathered from their declarations and conduct as well as from the papers which they subscribed. *Rockwell v. Humphrey,* 57 Wis., 410, *Null v. Fries,* 110 Pa. St., 521; *Campbell v. Dearborn,* 109 Mass., 130; *Ferris v. Wilcox,* 51 Mich., 105. Prior to the execution of the deed the plaintiff was indebted to the defendant and the debt, or part of it at least, was secured by a mortgage on the land in controversy. When the deed was delivered the evidence of the debt was canceled and the plaintiff given the following contract:

"DAKOTA CITY, October 17, 1896.

"I, M. O. Ayres, of Dakota City, in the state of Nebraska, hereby agree that in the event of the payment by William Sanders to me at Dakota City, in Dakota county, within six months from October 17, 1896, of the sum of $1,575 in gold of the present standard and fineness to deed by quitclaim to the said William Sanders, the following described lands: lots 3, 4 and 5, in section 12, in township 88 of range 48, Dakota county, Nebraska. M. O. AYRES."

In determining whether this agreement was a defeasance or a contract to resell we must look at the situation of the parties and the circumstances surrounding the transaction. The fact of first importance is that the plaintiff was indebted to the defendant and that the deed took the place of a pre-existing mortgage. It is also quite significant that the selling price mentioned in the agreement to reconvey is the consideration named in the deed plus interest thereon for six months at ten per cent. In some jurisdictions these facts would of themselves be sufficient to make the transaction *prima facie* a conveyance to secure a debt, but whether this is the rule in this state we need not now de-

termine for other circumstances of great weight support the plaintiff's theory and tell decisively in his favor. The defendant claims to have bought the land for $1,500 at a time when it was probably worth $3,000. The expense of recording the deed was charged to the plaintiff, who continued in possession of the property and dealt with it as his own, without any objection from the defendant, from October 17, 1896, the date of the deed, to December 24, 1897, the day upon which this action was commenced. It also appears that the plaintiff made some improvements on the premises in 1897, and that he was never asked either to pay rent or surrender possession. Upon this evidence the trial court was fully warranted in finding, as it did, that the relation of creditor and debtor previously existing between the parties continued to exist after the execution of the deed, and that the transaction in question effected, and was designed to effect, only a change in the form of defendant's security.

Some criticism is made upon the finding of the court in regard to the rate of interest charged by the defendant, but after a careful scrutiny of the evidence we are satisfied that it supports the finding and should be approved.

The judgment is

AFFIRMED.

TRUMAN BUCK, APPELLEE, V. JOHN STUBEN ET AL., APPELLANTS.

FILED DECEMBER 18, 1901. No. 9,649.

1. **Confirmation of Sale:** APPEAL: RECEIVER. After a confirmation of sale of mortgaged premises, and an appeal from such order by the defendant, the trial court may, in a proper case, when necessary to protect the mortgagee's interests, appoint a receiver to collect the rents pending the determination of such appeal. *Philadelphia Mortgage & Trust Co. v. Goos*, 47 Nebr., 804.

2. ———: ———: SUPERSEDEAS: BILL OF EXCEPTIONS: TRANSCRIPT: RECEIVER. Where steps are instituted for the purpose of taking an appeal from a final order of confirmation, the order having been superseded by the execution, approval and filing of a super-

sedeas bond, and a bill of exceptions and transcript was being prepared, it would seem the trial court is authorized in a proper case to appoint a receiver as in a pending action, even though at the time the appeal has not been fully consummated.

3. **Mortgage Foreclosure:** RECEIVER. In an action to foreclose a real estate mortgage, where the property pledged is insufficient to pay the debt, and the party primarily liable therefor is insolvent, the trial court is authorized on an application by the mortgagee to appoint a receiver for the mortgaged property; and in such case it is immaterial that a person who is solvent is liable for the debt as indorser or guarantor.

4. **Receiver:** APPOINTMENT: CONTROVERSY: CONFLICTING EVIDENCE: FINDING OF FACT: REVIEWING COURT. Where in a controversy over an application for the appointment of a receiver a question of fact on conflicting evidence arises, and is determined by the trial court, its finding thereon, when warranted by the evidence, will be followed in reviewing the case on appeal.

APPEAL from the district court for Sarpy county. Heard below before POWELL, J. *Affirmed.*

John P. Breen, for appellants.

F. H. Gaines and *Gaines, Kelby & Storey, contra.*

Argued orally by *Breen,* for appellants; by *Gaines, contra.*

HOLCOMB, J.

Appellants, who were defendants and intervener in the court below, appeal from an order appointing a receiver to take charge of, and collect the rents and profits of, mortgaged property; the order being entered after confirmation of sale of the property made in foreclosure proceedings. The application for the appointment of a receiver was presented in the trial court after the order of confirmation of sale, and during the time an appeal was being perfected to this court, but before the appeal taken was fully consummated.

It is contended by appellants that there was at the time of the application no action actually pending, and, therefore, no authority existed for the appointment of a receiver,

and that the court was without jurisdiction to act in the matter. An appeal from the order of confirmation was in fact taken, and a decision rendered in this court affirming the order which was appealed from. *Buck v. Stuben,* 61 Nebr., 70. Regarding the application for the appointment of a receiver, and the order appointing one, which is now complained of, we find from an inspection of the record that the order of confirmation of sale was granted December 15, 1896. On December 23, an order in the action was entered fixing the amount of a supersedeas bond, which was given on January 2, 1897, and the order of confirmation was thereby superseded during the pendency of the appeal from such order. Time for preparing a bill of exceptions was extended on the application of appellants and the bill prepared and served on opposite counsel on March 8. On March 20, the application was made for the appointment of a receiver, on the ground that the property was insufficient to pay the mortgaged debt, and was being permitted to depreciate and fall into a state of decay for want of proper care and repairs on the improvements on said premises, and that the taxes assessed against the property were unpaid and accumulating and the property was allowed to be sold for unpaid taxes. The appellants appeared and resisted the application, making no objection, however, as to the time of filing the application or that the court was without authority to hear and determine the matter. The six months allowed by statute for perfecting the appeal from the order of confirmation expired June 16, 1897, and the transcript of the record containing the final order appealed from and the bill of exceptions were in fact filed in this court on June 15. On June 26 following, a hearing was had on the application for the appointment of a receiver, and on the issues raised and the evidence introduced by the respective parties the order from which the present appeal is taken was rendered.

Under this state of the record, and without discussing the question of whether for the purpose of appointing a receiver an action would be deemed to be pending during the

interim from the time of the rendition of the order or judgment appealed from to the time of perfecting the appeal in the appellate court, we are of the opinion that the order made comes altogether within the rule announced in *Philadelphia Mortgage & Trust Co. v. Goos,* 47 Nebr., 804; and on the authority of that case it must be held that the court was authorized to act regarding the matter at the time the order was entered. The appellants at the time were resisting the application, and a showing was made to the effect that they were prosecuting an appeal from the final order of confirmation and that the same was being done in good faith. The supersedeas-bond was predicated on the fact that they were appealing from such order, and recited that defendants had appealed therefrom. The bill of exceptions prepared and served, and later filed in this court with the transcript of the record, all evidenced the fact that an appeal was being prosecuted; and the appeal thus taken, it would seem, continued the action, and made it a pending action within the meaning of the law as to the appointment of receivers in actions only that are actually pending. The above views in no manner conflict with *Chadron Banking Co. v. Mahoney,* 43 Nebr., 214, where it is held that the appointment of a receiver ordinarily should not be made at the time of final decree, and, therefore, in an action to foreclose a mortgage the court erred in appointing a receiver, applied for in the petition, upon the final hearing, before the institution of an appeal or an application for a stay. Says the court in the opinion: "But this order was made as a part of the final decree; no appeal had been taken; no steps had been taken towards instituting an appeal. It is possible, though this we do not decide, that in some cases a receiver might be appointed pending a stay of execution, but no stay had been asked for. For all that appeared when this receiver was appointed the mortgagees might have proceeded in twenty days (the time fixed for redemption) to sell the property." The facts in the case at bar, showing that steps had been instituted for the purpose of appealing the action, and that the appeal was being per-

fected in the ordinary method, although not finally consummated, make it clearly distinguishable from the case cited by counsel in support of his contention that there was at the time no pending action. No objection was offered on the ground that the application for a receiver was filed prematurely, or when no action was pending; and at the time the order was entered there can be no question but that the action was pending on appeal, and that the court, under the prior holdings of this court, was empowered to act, and was possessed with jurisdiction over the parties and the subject-matter of the action.

It is also contended that the evidence is insufficient to justify the appointment of a receiver. It is urged in support of this proposition that the evidence does not justify the conclusion that the property was being permitted to deteriorate in value and go to waste, or that it was insufficient to pay the mortgage-debt. It is also urged that it is shown by the evidence the plaintiff, who made the application, in addition to the mortgage security, had recourse to others who were personally liable for the debt, as indorsers or guarantors, who were solvent, and from whom the debt or deficiency after the exhaustion of the security could have been collected in an action at law; and, therefore, having an adequate remedy at law for the collection of the debt, a court of equity was not warranted in appointing a receiver to take possession of the mortgaged property. The evidence, we think, justifies the conclusion that the mortgaged property was being allowed to deteriorate in value and go to waste, and was insufficient in value to satisfy the debt for which it was pledged as security, and that those primarily liable for the debt were insolvent. Conceding that others were secondarily liable for the debt and were solvent, can it be said that this fact precludes a court of equity from appointing a receiver, when otherwise confessedly proper? It is to be borne in mind that this is not an application to impound or sequester property generally by the appointment of a receiver, but only the property of the debtor specifically pledged to the payment of the debt.

What may be the proper rule, and to what extent a creditor must go in the exhaustion of every remedy at law he may be able to resort to before he is entitled to the appointment of a receiver to take possession of property generally belonging to a debtor, need not here be discussed. Our statute, in plain and unambiguous terms, seems to have provided that when mortgaged property is probably insufficient to meet the debt for which it is pledged, that a receiver may be appointed to take charge of such property and collect the rents and profits, to be applied to the satisfaction of the debt. Code of Civil Procedure, sec. 266. And this without compelling the creditor to resort to other remedies he may have. The above is the construction which has been placed on the section of the statute cited by several prior decisions of this court, and we observe no good reason for a departure therefrom. *Jacobs v. Gibson,* 9 Nebr., 380; *Ecklund v. Willis,* 42 Nebr., 737; *Philadelphia Mortgage & Trust Co. v. Goos,* 47 Nebr., 804; *Waldron v. First Nat. Bank,* 60 Nebr., 245; *Philadelphia Mortgage & Trust Co. v. Oyler,* 61 Nebr., 702.

The property sequestered has been specifically pledged to pay the debt, and it would seem that, on the highest considerations of equitable principles, a court of equity would not only permit but willingly lend its aid to a proceeding by which resort should be had to such property for the satisfaction of the debt before recourse could be had against those whose liability is only of a secondary nature. *Philadelphia Mortgage & Trust Co. v. Oyler, supra.* The fact that plaintiff held the obligations of others, not primarily liable for the debt, who were solvent, is not, in our judgment, a good reason for denying the plaintiff's application to have a receiver appointed for the mortgaged property, which was specifically pledged to pay the debt, other proper grounds therefor existing.

It is further contended that the plaintiff, prior to his application for a receiver, had, by unfair methods and fraudulent practices obtained from the defendants possession of the premises for which a receiver was asked, and that the

application was made for the purpose of maintaining and making more secure his possession thus obtained, and that a court of equity ought not, in good conscience, to extend the relief prayed for under the circumstances then existing and which were occasioned by the plaintiff's wrongful acts. It is urged that the maxims "He who seeks equity must do equity," and "A person must come into a court of equity with clean hands and free from fraud regarding the matter about which relief is prayed," apply to the plaintiff in the present instance, and that, because of his alleged misconduct in gaining possession of the land, a receiver ought to have been denied him. Conceding the soundness and wisdom of the rule invoked, and that it should apply with full force in all proper proceedings, in the case at bar, the actions complained of and urged as a bar to the relief prayed for and regarding which there is a controversy were fairly submitted to the trial court, with all the parties before it. On the evidence submitted by both parties to the controversy, and as a question of fact, a conclusion was reached favorable to the plaintiff; and we are not prepared to say, in the light of the evidence as preserved in the bill of exceptions and presented in the record, that the conclusion reached was not justified. The explanations made by the plaintiff as to what was actually and in fact done regarding which complaint is made, and the reasons therefor, are consistent with good motives and fair dealings; and where actions are susceptible of two constructions—one being with a good motive, and the other evil—that construction ordinarily will be given which comports with honesty of purpose and good faith in the transaction had. The trial court having taken this latter view of the controverted question, and the evidence having warranted such conclusion, an appellate court should follow the findings thus made.

From what has been said, it logically follows that the order complained of appointing a receiver was right, and should be, and accordingly is,

AFFIRMED.

PHILADELPHIA MORTGAGE & TRUST COMPANY, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.*

FILED DECEMBER 18, 1901. No. 10,735.

1. **Taxes on Real Estate:** PERSONAL LIABILITY: CHARGE AGAINST PROPERTY. Taxes levied on real estate for general revenue purposes or by way of special assessment for benefits received on account of local improvement, are not a debt, in the ordinary meaning of the word, against the owner of the property, to be enforced as a personal liability, but a charge upon the real estate against which assessed, to be enforced and collected by a sale of the property liable for the taxes so levied and assessed.

2. **Injunction to Restrain the Collection of Taxes.** By reason of the provision of section 144, article 1, chapter 77, Compiled Statutes, an injunction will not be granted to restrain the collection of taxes, unless the assessment is void or levied for an illegal or unauthorized purpose.

3. **Estoppel in Pais:** MUNICIPAL OFFICERS: INJUNCTION. Ordinarily the rule of estoppel *in pais* will not be held applicable to the acts of municipal officers in the exercise of governmental agencies of the municipality of which they are public agents, and where a city treasurer erroneously and by mistake marked on the tax records of his office that certain taxes levied on real estate were "paid," and a third party, relying on and in faith of the record so erroneously made, loaned money and acquired title to the land, believing the taxes assessed thereon were paid, *held*, that the rule of equitable estoppel did not apply as against the municipality, and that it could not by injunction be restrained from enforcing the collection of the taxes actually due and unpaid, which had been lawfully levied and assessed on such property.

APPEAL from the district court for Douglas county. Heard below before FAWCETT, J. *Affirmed.*

Wharton & Baird, for appellant.

E. H. Scott, contra.

HOLCOMB, J.

Plaintiff and appellant instituted this action in the court below in the exercise of its equity jurisdiction, for the pur-

*Rehearing allowed. Reaffirmed.

pose of having the title to certain real estate quieted in it and to compel the defendant city treasurer of Omaha to note on his records the payment of certain taxes appearing against said real estate as being unpaid and an apparent lien thereon, and also to enjoin the defendant treasurer from changing the records after they were made to show and record the fact that the said taxes were paid. The relief sought was based substantially on the following facts which were pleaded in the petition, and the truth of which sufficiently appears from the entire record before us: At the time of the transaction hereinafter narrated one Henry Bolln was city treasurer, and had applied to the plaintiff for a loan of money on the real estate involved in this action, of which he was the owner. The loan was negotiated on the faith of the security offered, and, default having been made in the payment of the loan so made and the interest according to the terms of the agreement, such proceedings were thereafter had as resulted in a sale of the mortgaged property, and the purchase of the same by the plaintiff in satisfaction of its mortgage lien thereon, so that it became the owner of the property in fee simple. At the time the loan was negotiated the taxes for municipal purposes assessed and levied on the real estate offered for security for the years 1892 and 1893, and certain instalments of special paving taxes, in all amounting to $258.62, were marked "Paid" on the tax records of the city. The plaintiff negotiated the loan and advanced the money to the borrower, relying on the correctness of the tax-records as they thus appeared. The taxes were in truth and fact never paid; and subsequent to the transaction resulting in the loan and prior to the bringing of the present action, the records were altered by the erasure of the word "Paid," so that the taxes again appeared as unpaid, and an apparent lien on the property against which assessed and levied. On these facts the trial court found the plaintiff's bill was without equity, that it was not entitled to the relief sought, and dismissed the action. From the degree of dismissal the cause is brought to this court by appeal.

It is agreed by all the parties interested, as we understand the record, that the entry on the tax-records showing payment of the taxes was a mistake, and that the taxes so recorded as being paid were never in fact paid into the city treasury, and that the records ought not to have been so marked. At all events, there is no shadow of claim put forth by appellant to the effect that the taxes have ever been paid. The law provides that whenever taxes are paid the treasurer shall write on the tax lists, opposite the description of the real estate or personal property whereon the same were levied, the word "Paid," together with the date of such payment, and the name of the person paying the same. Compiled Statutes, 1901, ch. 77, art. 1, sec. 108. And it is the contention of appellant that the law presumes that a public officer does his duty, and, the record showing the taxes to have been paid, it will be presumed the entry of payment was rightly made, and that, in any event, the city is estopped from enforcing the taxes so marked "Paid," as against the land on which levied, and afterward purchased by plaintiff, because of its having made the loan mentioned and parted with its money relying on and in faith of the record as it then appeared, showing all of the taxes mentioned to have been paid. The problem thus presented is an interesting one, and, were the transactions such as to affect only private individuals, or corporations acting in their corporate capacity as an individual, we would not regard it as difficult of solution. We are, however, constrained to the view that because of the nature and quality of the act relied on to operate as an estoppel, and a proper application of the statutes relating to the public revenues and the manner of their collection, an altogether different question is presented from that first suggested. The plaintiff asks, in effect, that the tax-records be changed from their present condition so as to show all of the taxes mentioned in the petition to have been paid; that it be decreed that such taxes are not a lien on the real estate against which they were assessed; and that the defendant city and its treasurer be forever restrained from enforcing or at-

tempting to enforce the collection of such taxes as against the real estate, the title to which, free from any lien by reason of such taxes, it is sought to have quieted in the plaintiff. The relief demanded is shocking to a court whose conscience is appealed to, since it is obvious that the record thus made under compulsion would be a false one, and deprive the city of the collection of some of its revenues to which it is lawfully entitled. Let us see what the effect of a decree of the kind prayed for would be. The special assessments and the taxes assessed and levied for municipal general revenue purposes are a charge upon and against the particular tracts of land on which assessed, and, unless the real estate can be made to respond to the charges thus made, the taxes can not be collected, although lawfully levied and justly due, and the city must lose all right thereto. It is suggested in brief of counsel for appellant that the collection of these taxes may be enforced against Bolln, the owner of the real estate at the time they were levied. But this can not be, under the laws of this state. It will hardly be contended by any, we assume, that a special assessment levied solely on the ground of benefits to the property assessed, and on the theory that for the benefits received because of local improvements, special assessments to correspond to the benefits received may rightfully be made a charge against the property, can be converted into a just and legal demand *in personam* against the owner of the fee. The law authorizes the taxation of property specially benefited by reason of local improvements, but not the taxation of the owner of such property. On taxes levied on real estate for general revenue purposes this court has more than once held that the tax was not a debt, in the ordinary meaning of the word, against the owner of the property, to be enforced as a personal liability, but is a charge upon the real estate against which assessed, to be enforced and collected by a sale of the property liable for the taxes so levied and assessed. *Grant v. Bartholomew,* 57 Nebr., 673; *Carman v. Harris,* 61 Nebr., 635.

If our conclusions in respect of the matter last discussed

are correct, then it must follow that the ultimate object and purpose to be accomplished by these proceedings are permanently to restrain the collection of the taxes assessed against the property involved in the controversy, although it is conceded that the taxes are in all respects valid, and legally due to the municipality to which they are owing. By section 144, article 1, chapter 77, of the Compiled Statutes, 1901, it is provided that no injunction shall be granted by any court or judge in this state to restrain the collection of any tax, or any part thereof, except the tax enjoined be levied or assessed for an illegal or an unauthorized purpose. These provisions are to be given the effect the language used, expressive of the legislative intent, fairly warrants; and the uniform holdings of this court have been that unless the assessment is void, or levied for an illegal or unauthorized purpose, injunction can not be resorted to in order to prevent the enforcement of the collection of such taxes. *South Platte Land Co. v. City of Crete,* 11 Nebr., 344; *Wilson v. Auburn,* 27 Nebr., 435; *Thatcher v. Adams County,*19 Nebr.,485; *Spargur v. Romine,* 38 Nebr., 736; *Bellevue Improvement Co. v. Village of Bellevue,* 39 Nebr., 876, 885; *Chicago, B. & Q. R. Co. v. Cass County,* 51 Nebr., 369. In *Bellevue Improvement Co. v. Village of Bellevue, supra,* it is stated in the opinion of the court: "In many states courts of equity interfere to restrain the enforcement of invalid taxes upon real estate upon the ground that they cast a cloud upon plaintiff's title, but an inspection of the decisions of this court shows that this principle has not been here recognized. This feature has existed in each of the cases where relief has been refused upon the general ground that no established rule of equity jurisprudence has been invoked to sustain the suit." The case at bar does not commend itself as coming within any established equitable principle justifying the relief asked, unless it be on the ground of estoppel, which will be noticed hereafter. Counsel for appellant insists that it is not sought to enjoin the collection of the taxes assessed against the property which it is desired to

have released from the lien thereof, but only to have the apparent lien removed, and that the city is yet at liberty to proceed and collect the taxes in any manner it may adopt, except by proceedings against the real property on which assessed. It is obvious, from an inspection of the revenue laws and the decisions heretofore cited, that the assessments must be collected, if at all, from the property alone liable therefor, and that a suit against the person owning the land at the time of the assessment is unauthorized. It then appears that as to the equities in the case in favor of or against the respective parties, the question is whether the municipality shall lose the taxes lawfully assessed against the property described in the plaintiff's petition, or be permitted to enforce the collection of the amount due notwithstanding the error made by one of its officers or agents, and leave the plaintiff to his remedy against those responsible for the mistake which led the plaintiff to take the action it did. The plaintiff answers the question by saying that the doctrine of estoppel *in pais* applies, and the city, because of the erroneous action of one of its agents, on the faith of which plaintiff acted, is prohibited from asserting or enforcing any lien it may have had for the payment of such taxes. Counsel for appellant, in their brief, say: "A municipal corporation may be estopped by the action of its proper officers when acting in its private as contradistinguished from its governmental capacity and has lawful power to do the act." Conceding the proposition thus enunciated to be correct, can it be said that the act of the city treasurer in erroneously noting on the tax records of a municipality that certain taxes were paid, when, as a matter of fact, they were not, is the act of the corporation in its private or individual capacity and not one pertaining to the government of its affairs? It is frequently said that a municipality has a double character—one governmental, legislative or public; and the other, proprietary or private. Dillon, Municipal Corporations [4th ed.], sec. 66. The authority to assess property, collect taxes, and make disbursements thereof is founded solely and exclusively on the theory that

it is essentially a part of the machinery of government, necessary to maintain its existence for the benefit of the public; and it would seem to follow as a natural deduction that the agencies employed in respect of such matters, including the agency authorized to collect the taxes levied for public purposes, is an exercise of powers of a public or governmental character. If correct in the statement just made, then it follows, according to the rule advanced by plaintiff, that the action taken by one of the public officers of the corporation, which is relied on to operate as an estoppel, was not an act of the corporation in its private or proprietary character, and hence the doctrine invoked is not applicable. The reasons for the distinction have been recognized and applied by this court in an action wherein it was sought to establish the liability of a city for the negligent acts of one of its servants and employees, committed while in the performance of his duties as an agent or servant of the municipality. *Gillespie v. City of Lincoln,* 35 Nebr., 34. It is there held, in substance, that the exception to the general rule as to liability is based upon a public policy which subordinates private interests only to the welfare of the public generally, and we apprehend that this is the underlying and distinguishing principle as to the law of estoppel when it is invoked against a city for the erroneous acts of one of its officers engaged in the management of some branch of the governmental affairs of the municipality. For reasons as potent as those relieving a city from liability because of the negligent acts of its officers, it would seem estoppel can not be predicated on or arise from acts of negligence or mistake by an agent of the corporation while in the discharge of the governmental affairs of the municipality. If the rule can be invoked by reason of such errors or mistakes, then, indeed, would the public welfare be seriously menaced, and the ability of the corporation to perform its public functions in many instances dangerously crippled. The correct rule, therefore, is, and should be, that the doctrine can be appealed to effectively, as against a municipal corporation, only when it is acting

in its private as contradistinguished from its public or governmental capacity. There may be and probably are exceptions to the rule stated, as when a municipality has gained a clear and decided advantage by the act relied on to operate as an estoppel, when equity will prevent it from retaining the advantage, and at the same time deny its binding force. In the present case, it is to be borne in mind, nothing of advantage has been gained by the city by the erroneous and mistaken action of its city treasurer, and that the success of the plaintiff can result only in a corresponding loss to the city.

The authorities are, we think, quite uniform in support of the proposition that the doctrine can not ordinarily be invoked to defeat a municipality in the prosecution of its public affairs because of an error or mistake of one of its agents or officers which has been relied upon by a third party to his detriment. In the case of *People v. Brown,* 67 Ill., 435, it is stated in the head-notes: "Public policy, to prevent loss to the state through the negligence of public officers, forbids the application of the doctrine of estoppel to the state, growing out of the conduct and representations of its officers. On the same ground that the government is excused from the consequence of laches, it should not be affected by the negligence or even willfulness of any one of its officers." Says Mr. Justice Breese, who delivered the opinion of the court: "It is a familiar doctrine, that the state is not embraced within the statute of limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at fearful hazard, should this doctrine be applicable to a state. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officers, forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government. The doctrine is well settled that no laches can be imputed to the government, and

by the same reasoning which excuses it from laches, and on the same grounds, it should not be affected by the negligence or even wilfulness of any one of its officials." In *City of Chicago v. Sexton,* 115 Ill., 230, upon the subject of estoppel as to a municipal corporation, the rule is stated in the opinion as follows: "We hold, simply, that a municipal corporation may be estopped by the action of its proper officers, when the corporation is acting in its private, as contradistinguished from its governmental, capacity, and has lawful power to do the act." See, also, authorities bearing generally on the proposition: *Martel v. City of East St. Louis,* 94 Ill., 67; *Axt v. Jackson School,* 90 Ind., 101; *Berry v. Bickford,* 63 N. H., 328; *Sievers v. City of San Francisco,* 115 Cal., 648. A case somewhat related to the one at bar is reported in 23 N. J. Eq., 84 (*Kuhl v. Mayor*), wherein a party purchased land relying on the fact of payment of the taxes levied on the same, to evidence which the proper officer had issued a receipt for the taxes, which it appeared afterward had not been actually paid; and, on an application for an injunction, it was held that the doctrine of estoppel did not apply and the injunction was therefore denied. While the reasoning employed does not commend itself to us, the result reached is in harmony with the general trend of authority. Counsel for appellant cite us some authorities holding that by an injunction a municipality will be restrained from enforcing tax liens on the ground of estoppel, but in each of the two cases cited the sole question considered was that of enforcement of the lien, and not the collection of the taxes, as must be the result in the case at bar if the relief prayed for is granted. The equities of the appellant in the present case are not such as to entitle it to an injunction restraining the collection of the taxes lawfully assessed against the property it now owns, nor can the doctrine of estoppel *in pais* be successfully invoked to accomplish that result.

It follows that the decree of the district court should be affirmed, which is accordingly done.

AFFIRMED.

NEBRASKA LOAN & TRUST COMPANY, APPELLEE, V. JOHANNA KROENER ET AL., IMPLEADED WITH THECLA LINDERMAN, APPELLANT.

FILED DECEMBER 18, 1901. No. 10,817.

1. **Summons:** PLEADING: DEFENDANT: NAME: INITIALS. Where a defendant is sued and summons served on her by her true full name, and she is also mentioned in the pleadings and summons by the initials of her given name, the court does not lose jurisdiction over her by dismissing the action as to the person named and designated by the initial letters of the defendant's given name.

2. **Appraisement:** MOTION TO VACATE: OBJECTIONS TO CONFIRMATION: GENERAL APPEARANCE. A party appearing in a case for the purpose of moving to vacate an appraisement of real estate for judicial sale and to interpose objections to the confirmation of sale on different grounds, not going to the jurisdiction of the court over the party, thereby makes a general appearance for all purposes of the case.

APPEAL from the district court for Dawson county. Heard below before SULLIVAN, J. *Affirmed.*

John H. Linderman and *Warrington & Stewart*, for appellant.

John M. Ragan and *George C. Gillan, contra.*

HOLCOMB, J.

This appeal has in it some of the peculiarities of a Dr. Jekyll and Mr. Hyde. Suit was instituted against appellant by the name of Thecla A. Linderman and in the pleadings and summons she also appears to have been a defendant by the name of T. A. Linderman. No summons having been served on her as T. A. Linderman, the action, as is shown by the transcript, was dismissed as to T. A. Linderman and one other named as defendant. Default was taken as to all defendants served with summons, including the defendant Thecla A. Linderman, and the cause proceeded to final decree. Appellant now in court and before

us by virtue of her appeal from the final order entered in the trial court is insisting that she is a necessary party defendant in the action, and that she, having been dismissed from court, is no longer in court, and the order from which she appeals is therefore without jurisdiction over her person and invalid. The effect of the order dismissing the action as to T. A. Linderman, as we view the record, was to eliminate from the proceedings an improper and unnecessary name given the defendant, and allow the action to proceed against her in her true name. She was duly served with summons by her true name, which gave the court jurisdiction over her. The proceeding taken by which the action was dismissed as to T. A. Linderman appears to us proper under the circumstances, and wholly without prejudice to the party complaining. In any view as to the effect of the dismissal, the defendant now appealing was in court, having not only been legally served with summons, but, having appeared therein to move the court to set aside the appraisement, and for the purpose of objecting to the order of confirmation, she appeared generally, and gave to the court jurisdiction over her for all purposes of the case. *Nelson v. Nebraska Loan & Trust Co.*, 62 Nebr., 549, and authorities there cited.

The defendant Thecla A. Linderman was a proper and necessary party, and, she being in court, that was all that is required, and the ground of objection by which it is attempted to give her a dual character is too occult to entitle it to more extended consideration from a court whose docket is weighted down with matters of a more substantial and materialistic nature.

The judgment of the trial court is

AFFIRMED.

ELEANOR F. YOUNG, APPELLEE, V. ORLANDO S. WOOD ET AL., APPELLANTS.

FILED DECEMBER 18, 1901. No. 10,838.

1. **Taxes**: LIEN: FORECLOSURE: APPRAISEMENT: OFFICIAL CERTIFICATE. Where, for the purpose of appraising real estate to be sold in foreclosure proceedings, an application is made to the county and city treasurers for the amount of taxes which are liens against the property assessed, and it is certified by such officers that there are no unpaid taxes or unredeemed tax sales, except for certain years, naming them and the aggregate amount of taxes, this is equivalent to certifying that such taxes were unpaid and constituted a lien on the land, and was sufficient evidence to authorize the appraisers to deduct the amount thus certified to from the gross appraisement of the land.

2. **Lien**: LEVY: APPRAISEMENT: OFFICIAL CERTIFICATE: SEAL. Section 491*c* of the Code of Civil Procedure requires certain designated officers to certify, under their hands and official seals, the amount and character of all liens appearing of record against real estate levied on, which are prior to the lien of such levy. Some of the officers designated in said statute are by law required to have an official seal; others are not. *Held*, That it was not the intention of the legislature that such officers as are not by law required to have an official seal shall certify to such liens under an official seal, but that a certificate under the hand of such an officer is sufficient. *Orcutt v. Polsley*, 59 Nebr., 575.

3. **Tax Lien**: CERTIFICATE: JUDICIAL SALE: APPRAISEMENT: REVIEW. Harmless irregularities in certifying to tax liens against property appraised for judicial sale, not prejudicial to the rights of the party complaining, are not sufficient ground to set aside a judicial sale.

4. **Deputy Sheriff**: APPRAISEMENT: HAS AUTHORITY OF HIS PRINCIPAL. A deputy sheriff may assist in the appraisement of lands sold under an order of sale issued in pursuance of a decree of foreclosure addressed to the sheriff, conduct the sale, or do any other act thereunder required of or which might be performed by his principal in the execution of the mandate of the court.

5. **Foreclosure**: CONFIRMATION: ORDER OF SALE: RETURN. A foreclosure sale should be confirmed, notwithstanding the order of sale issued by the clerk of the district court to the sheriff or other officer, directing him to execute the decrees, be returned more than sixty days from its date. *Amoskeag Savings Bank v. Robbins*, 53 Nebr., 776.

6. **Foreclosure**: ORDER OF SALE: DECREE: SHERIFF'S AUTHORITY. In

an action to foreclose a real estate mortgage the sheriff's authority to sell the mortgaged property is derived from the decree of foreclosure, and not from the order of sale issued by the clerk of the court. *Passumpsic Savings Bank v. Maulick*, 60 Nebr., 469.

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

Holmes & Morgan, for appellants.

E. G. McGilton, contra.

HOLCOMB, J.

Motion was offered to have set aside an appraisement made for the purpose of a judicial sale of real estate under a decree of foreclosure, as was also an objection to confirmation, and overruled, from which the defendant appeals. The grounds of the motion and the objection will be noticed in the order argued in appellants' brief.

The certificates of the county and the city treasurers as to tax liens are objected to because of the form thereof. Application was made for a certificate showing all existing liens against the property as shown by the records of the office to which addressed. The county treasurer, in response to the application made to him, certified that there were no unpaid taxes or unredeemed tax sales, except—then follows a description of the property, the different years for which taxes were due, and the aggregate of the unpaid taxes. This was equivalent to saying that the taxes levied against the land described in the certificate for the years mentioned were not paid, and was sufficient evidence to authorize the appraisers to deduct the amount thus mentioned from the gross appraisement of the land as a prior incumbrance thereon.

It is also contended that the certificates thus made are invalid and of no force because no seal of the county or city treasurer was attached thereto. But this is not required by an officer who has not been provided by law with a seal of his office. *Orcutt v. Polsley,* 59 Nebr., 575.

Objection is also made because the county treasurer certified to the aggregate sum due for taxes for different years, instead of giving the amounts due for each of the years covered by the certificate. No claim is made of any error or mistake in the amount actually due and we fail to perceive how any of the landowners' substantial rights were affected. The only question that could be involved is whether the amount deducted for taxes was greater than was in fact due. Prejudicial error does not affirmatively appear, and the objection for that reason is without merit. *Tillson v. Benschoter*, 55 Nebr., 443.

It is also contended that the record shows that the sheriff, John McDonald, personally summoned and administered the oath to the appraisers, while the appraisement shows they were summoned and sworn by Geo. Hill, deputy sheriff. The proceedings had, as disclosed by the record when considered together and in connection with the officer's return, reveal that the deputy sheriff mentioned was acting in the place of and for the sheriff, and did all the acts required to be done in the name of the sheriff, by and in virtue of his office as deputy sheriff. What we have said on this point at the present sitting in the case of *Richardson v. Hahn*, 63 Nebr., 294, applies with equal pertinency to the case at bar, and will not further be dilated on. The contention is not well grounded.

Lastly, it is urged that the sale was improperly made and confirmed because the order of sale was not returned within sixty days, as is required when real property is sold under a general execution. But this is not required, as we have repeatedly held, when the authority of the officer to act is grounded on a decree directing the sale of the property found to be subject to a lien established by such decree, and for the satisfaction of which the property is ordered by the court to be sold "as upon execution." The latter words refer to the method of making the sale, and not the time in which the sheriff is to execute the decree of the court. *Amoskeag Savings Bank v. Robbins*, 53 Nebr., 776. The authority to sell is derived from the de-

cree of foreclosure, and not from the order of sale issued by the clerk of the court. *Passumpsic Savings Bank v. Maulick,* 60 Nebr., 469. The sheriff was acting as the agent of the court, and it was unnecessary for the clerk to issue any formal order of sale. *Bristol Savings Bank v. Field,* 57 Nebr., 670; *McKinley-Lanning Loan & Trust Co. v. Hamer,* 52 Nebr., 709.

The rulings made by the trial court of which complaint is made are accordingly

AFFIRMED.

CHARLES J. RICHARDSON, APPELLEE, V. WILLIAM J. HAHN ET AL., APPELLANTS.

FILED DECEMBER 18, 1901. No. 10,855.

1. **Deputy Sheriff:** FORECLOSURE SALE. A deputy sheriff may assist in the appraisement of lands sold under an order of sale addressed to the sheriff, and issued in pursuance of a decree of foreclosure, conduct the sale, or do any other act thereunder required of or which might be performed by his principal in the execution of the mandate of the court.

2. ———: ———: APPRAISEMENT. Where the appraisal shows that it was made by "John McDonald, Sheriff, by Geo. W. Hill, Deputy," and two other appraisers, this is sufficient to show that the appraisement made was the personal act of the deputy in conjunction with the other two appraisers.

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

Will H. Thompson, for appellants.

B. F. Thomas, contra.

HOLCOMB, J.

In this case the order of sale issued by the clerk of the court on a decree of foreclosure of a real estate mortgage was addressed to the sheriff of the county in which the land was situated, commanding him to execute the decree by appraising, advertising and selling the real property

therein described, and make return of his proceedings as required by law. The writ was executed in the name of the sheriff to whom directed, by his deputy, who acted for the sheriff in all the subsequent steps taken after the issuance of the order, including the making of the return to the order of sale. It is argued that the proceedings thus had were irregular and erroneous, because the appraisement and sale of the property were not made by the sheriff to whom the order was directed, and that the sale should have been vacated and set aside on appellant's motion interposed before confirmation. The objection is not well taken. The rule is that a deputy sheriff may assist in the appraisement of lands sold under an order of sale issued in pursuance of a decree of foreclosure addressed to the sheriff, conduct the sale, or do any other act thereunder required of or to be performed by his principal in the execution of the mandate of the court. All the decisions on the subject directly support or logically point to this conclusion. *Nebraska Loan & Building Ass'n v. Marshall,* 51 Nebr., 534, 536; *Johnson v. Colby,* 52 Nebr., 327, 329; *Hamer v. McKinley-Lanning Loan & Trust Co.,* 52 Nebr., 705; *Maginn v. Pickard,* 57 Nebr., 642; *Scottish-American Mortgage Co. v. Nye,* 58 Nebr., 661; *Carstens v. Eller,* 60 Nebr., 460; *Passumpsic Savings Bank v. Maulick,* 60 Nebr., 469.

But it is urged, if the deputy sheriff is permitted to take part in the appraisal of the property, that in the present case it is not shown the appraisement made and returned is his personal act, and for that reason it is invalid. The appraisal shows that it was made by "John McDonald, Sheriff, by Geo. W. Hill, Deputy," and the two other appraisers. The distinction sought to be drawn is hypercritical. It is manifest that Hill, as the deputy sheriff, is acting for and in the place of his principal, and with the other appraisers made the appraisement as his own act, by virtue of his office as deputy sheriff. He may, under the authorities heretofore cited, with the aid of two others called by him for that purpose, appraise the land about to

be sold; and it is altogether clear from the proceedings taken in pursuance of the order of sale, as disclosed by the record, that this is what was done.

The order of confirmation should be, and therefore is,

AFFIRMED.

MARIE BARGE V. GEORGE HASLAM.*

FILED DECEMBER 18, 1901. No. 10,750.

Commissioner's opinion, Department No. 1.

1. **Judgment Non Obstante Veredicto.** Where judgment has been entered notwithstanding the verdict, and the only finding of the trial court is that on the pleadings defendant is entitled to judgment, only the pleadings will be considered in deciding the rightfulness of the judgment.

2. **Promise of Marriage:** STATUTE OF FRAUDS. A petition pleading that mutual oral promises to marry when plaintiff came of age were made in 1891, and that defendant many times between that date and November 25th, 1893, renewed and acknowledged the contract, both orally and in writing, with an answer denying generally, and alleging an oral promise in 1890, and that plaintiff was then only fifteen years old, and the promise void because not in writing, and a reply admitting only that the marriage was not to take place until plaintiff came of age, and denying all other allegations, do not, when taken together, show a contract void under the statute of frauds.

3. **Verdict.** While a verdict can not be taken to supply essential facts which are wanting in the pleadings, it must be taken, where parties go to trial without objection on that ground, to supply any lack of definiteness and precision in the allegation of facts which appear.

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

Thomas M. Franse and *Ole C. Anderson,* for plaintiff in error:

The defendant answered, proceeded to trial and speculated as to a verdict. When the finding was adverse he asked for judgment *non obstante veredicto,* on the ground

*Rehearing allowed. Reversal sustained.

that the petition was open to a general demurrer. A court would hardly look with favor upon such practice.

Mutual promises of marriage do not come within the statute of frauds. *Short v. Stotts,* 58 Ind., 29; *Withers v. Richardson,* 5 T. B. Mon. [Ky.], 94, 17 Am. Dec., 44. They are expressly excepted by the Nebraska statute. Compiled Statutes, 1895, ch. 32, sec. 8. An express promise need not be shown. *Rockafellow v. Newcomb,* 57 Ill., 186; *Wightman v. Coates,* 15 Mass., 1, 8 Am. Dec., 77.

Assuming mutual promises of marriage to be within the statute of frauds, yet letters signed by the party to be charged are sufficient memoranda to take such a promise out of the statute. *Fowler Elevator Co. v. Cottrell,* 38 Nebr., 512.

Even if plaintiff's petition was defective in not pleading a written note or memorandum, this defect was cured by the defendant's answer, which supplied the defect. *Haggard v. Wallen,* 6 Nebr., 271.

J. E. Frick, Clark C. McNish and *Andrew R. Oleson, contra.*

Argued orally by *Fransc,* for plaintiff in error; by *McNish* and *Frick, contra.*

HASTINGS, C.

This is an action for breach of promise of marriage, in which the trial court rendered judgment for defendant and dismissed the action, notwithstanding a verdict for plaintiff in the sum of $700. The final action of the trial court was in terms as follows:

"On this 11th day of May, 1898, this cause came on for hearing upon the motion of the defendant for a judgment upon the pleadings notwithstanding the verdict of the jury, and the court being of opinion that the defendant is entitled to judgment upon the statements in the said pleadings, and being fully advised in the premises, does sustain said motion; to which ruling of the court the plaintiff at

the time duly excepted, and plaintiff is allowed 40 days in which to prepare and serve bill of exceptions.

"It is therefore ordered, considered and adjudged by the court that the defendant, George Haslam, go hence without day, and recover of and from the plaintiff, Marie Barge, his costs herein expended, taxed at $2.10; to which judgment the plaintiff at the time duly excepted."

Counsel for defendant in error make some claim that this action of the court can be supported on the ground that there was no legal evidence submitted at the trial to support plaintiff's cause of action, even if it is found that one was alleged. It does not seem possible that this judgment can be sustained on any such ground. It is true that defendant's motion was to defer judgment on the verdict rendered, as well as to enter judgment for defendant *non obstante veredicto.* It is claimed on defendant's behalf that, when the formal order to defer judgment on this verdict was entered, this, under section 439 of the Code, gave the court authority to pass upon the facts in the case, and render such judgment as was required upon the evidence submitted. A somewhat careful examination of the authorities cited by the defendant fails to uphold this contention. But it is not necessary to decide the point in this case. The learned trial court did not assume to pass on the facts, but only on the pleadings. It would seem that the only circumstances under which the court has authority to enter judgment without a verdict or finding to support it, is when the pleadings on their face disclose a right to such judgment on the part of the successful contestant. The only finding made by the court here is that the defendant is "entitled to judgment upon the statements in the pleadings" and, unless that finding can be upheld, the judgment must be set aside. Only the pleadings, therefore, will be examined, to determine as to whether or not this judgment should be affirmed.

The petition alleges the residence of the defendant, under the name of George Haslam, in Dodge county, for many years; that on or about July 1, 1891, both being then

unmarried, at his request the plaintiff promised to marry him and he to marry her; that the agreement was oral, and the marriage was to take place on plaintiff's reaching 18 years of age; that afterwards the defendant many times orally and in writing between July 1, 1891, and November 25, 1893, renewed and acknowledged said contract; that plaintiff in reliance upon defendant's promises remained single; that defendant, on November 25, 1893, married another; and that plaintiff was damaged in the sum of $20,000. The answer denies every allegation not afterwards expressly admitted; admits an oral mutual agreement on July 1, 1890, instead of 1891, to marry, when plaintiff reached the age of 18 years; says that she was then of the age of 15 years, and neither the agreement nor any memorandum of it was in writing. An allegation of a mutual abandonment of this agreement was made, but no evidence with relation to it seems to have been produced, and it was withdrawn, by the court's instruction, from the jury, with no objection on defendant's part. It is also alleged that plaintiff's cause of action did not accrue within four years next before the commencement of this action. The reply denies all matter in the answer, except such as is afterwards admitted, admits that the marriage was not to take place until plaintiff had reached the age of 18 years, denies the plea of abandonment of the contract, and says that defendant's pleas of the statute of frauds and of the statute of limitations constitute no defense. It seems clear that the finding of the trial court, that from the face of these pleadings the defendant was entitled to a judgment, can not be sustained. It is true that the petition alleges that the contract in question was not to be performed until plaintiff's majority. It is also true that the answer alleges that plaintiff was then only 15 years old, but this allegation is not expressly admitted in the reply, and is therefore included in the general denial with which the reply opens. It would seem clear, therefore, that as to the statute of frauds the pleadings do not show a right of defendant to this judgment of dismissal. The weight

of authority seems in favor of the proposition that mutual promises to marry are within the inhibition of the provision of the statute of frauds, avoiding contracts which by their terms are not to be performed within a year. *Derby v. Phelps,* 2 N. H., 515; *Nichols v. Weaver,* 7 Kan., 373; *Ullman v. Meyer,* 10 Fed. Rep., 241; Bishop, Contracts [2d ed.], sec. 1275; Browne, Statute of Frauds, sec. 272. However, directly against this view are *Lewis v. Tapman,* 90 Md., 294, and *Brick v. Gannar,* 36 Hun [N. Y.], 52. While it is not conceded by plaintiff that the pleadings show plaintiff's age to have been stated with substantial correctness in the answer, on the argument it is not denied that such is the case.

The question remains whether the pleading is sufficient, liberally construed, as it must be after a verdict upholding it, to amount to a declaration of a subsequent and valid agreement within the time. Assuming that the original agreement of 1890 or 1891 was void in fact for the reason claimed by the defendant, does it sufficiently appear from plaintiff's petition that a subsequent agreement in writing or orally to a similar effect, or a similar purpose, and in the same terms, was made, which was not within the statute? In our opinion, while the petition would be entirely unavailing to sustain an assault by way of motion that it be made more specific, it would not be amenable to a general demurrer on the ground that it discloses only a contract void under the statute of frauds. Doubtless, if the pleader intended to rely on any subsequent agreements as the basis of his action, he could and would, on an application for that purpose, be compelled to state them more specifically than merely to say that they were the same as a void one previously alleged; but where the defendant has gone to trial upon such allegations, and a jury has not only found in favor of the plaintiff, but has found specifically, and on defendant's application, the facts which take the case out of the statute, it would seem that the judgment should not go in favor of the defendant merely because those facts are defectively stated in the petition. Of

course, it must be allowed that, if those facts are totally wanting in the pleadings, no amount of evidence can supply them; but where the objection is merely that they are defectively alleged, and by way of a reference and an allegation of a renewal in the same terms of a previously existing void agreement, judgment should not be rendered *non obstante verdicto.* The statute of limitations does not appear, from the record, as a bar. A new promise, sufficient, when supported by a verdict, to prevent the statute from running is pleaded. Code of Civil Procedure, sec. 22.

The conclusion of the learned trial court that the pleadings disclose a right on defendant's part to a judgment, being unsupported, it must be reversed. There appears to be in the record a motion for a new trial, which has never been acted upon. This became unimportant on the sustaining of defendant's motion for a judgment. Defendant seems entitled to have this acted upon by the trial court, and it seems, therefore, impossible to direct the entry of any final judgment at this time. It is therefore recommended that the judgment of the trial court be reversed, and the cause be remanded for further proceedings.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. HERMAN GIESEKE ET AL., V. FRANK E. MOORES, MAYOR, ET AL.

FILED DECEMBER 18, 1901. No. 12,246.

Commissioner's opinion, Department No. 1.

1. **Police:** FIRE DEPARTMENT. "The membership of either the police or fire department may be reduced by the board on economic grounds, and in such case men may be dismissed from the service

without a hearing and without an opportunity being given them to show cause against the order of dismissal." *Moores v. State*, 54 Nebr., 486.

2. **Evidence:** REVIEW. Judgment of the trial court will not be disturbed because contrary to the evidence, unless clearly wrong.

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

John O. Yeiser, for plaintiffs in error.

W. J. Connell, contra.

Argued orally by counsel for both parties.

HASTINGS, C.

Error from a denial of a writ of mandamus and judgment for costs against the relators. The only error urged is that the judgment of the trial court is contrary to the evidence. The relators, six in number, procured from the district court of Douglas county, on their affidavits, an alternative writ of mandamus which required respondents, as mayor and chairman and members of the board of fire and police commissioners of the city of Omaha, to answer and show cause why a peremptory writ of mandamus should not issue commanding them to convene said board and restore and reinstate each of the relators to the position of members of the fire department of the city of Omaha, with all its rights, privileges and emoluments. The respondents answered, admitting that they were the mayor and members of the board; admitting that on February 27 the board adopted a resolution providing for a reduction of the force in the fire department for lack of funds; admitting that the chief of the fire department submitted a list of names of members of that department to be dropped, which included those of relators, and recommended that they, with others, be dismissed from the service, and one fire company disbanded, and admitted that this recommendation was adopted and the relators so dismissed. They allege that this action was taken in good faith; was necessitated for lack of funds, and done in conformity with the rules and

regulations of the board; admit that the dismissals were made without charges against the relators and without a hearing; deny that the board at the time knew that the fire department would not really be reduced during the year 1899; deny that it was not the purpose of respondents to reduce it; deny that the resolutions were a subterfuge for political purposes or any others; deny any intention of giving men of other political belief positions; but allege that the action was wholly without political purpose of any kind, and without any intention other than that set forth in the resolution. The affidavits on which the alternative writ was issued alleged that the action of the board in dismissing the relators was contrary to law, in contravention of relators' rights, and entirely void; but that relators, in consequence, were deprived of their positions and refused reinstatement; that the maintenance of the fire department at its full previous membership was necessary to the city of Omaha; that this fact was well known to the members of the board of fire and police commissioners; that the board had no intention at the time that the affiants were discharged to actually and permanently reduce the number of men employed; that the action of the board was a mere subterfuge to dispense with the services of capable men to the end that persons of the same political faith as the members of the board might be employed; that less than 30 days after relators' discharge their places were filled by other men, who have since been continued as members of the fire department; that the right to discharge relators depended upon the lack of funds; that upon a restoration within 30 days of said department to its full force, as it was before January 27, 1899, relators became entitled to reinstatement under the law, and that relators were, when discharged, receiving a salary of $70 per month, which has since then been wholly refused them. December 21, 1900, trial was had in the court, and January 19, 1901, a general finding for respondents was made, and that relators were not entitled to a peremptory writ, and the action was adjudged to be dismissed and the costs taxed to relators.

It is conceded that if the action of the board was in good faith, for the accomplishment of a necessary reduction of expenses, and was carried out without partiality, under the decision of *Moores v. State,* 54 Nebr., 486, it would be lawful. The question, therefore, is simply whether relators have produced enough evidence to impeach the good faith of the council. On the face of the record, as we have it, it would seem that the action of the trial court must be affirmed. The only evidence given here tending to indicate bad faith is the fact that the relator McGreal swears that as the result of his inquiries he had learned that the appointees of the board, for some time prior and subsequent to relators' discharge, were practically all Republican and that the politics of the men discharged were "supposed" to be all Fusionist. It also appears that a number of men were appointed during the five or six months following the relators' discharge; but whether to keep up the force to the number at which it was prior to relators' discharge, or whether it was in place of other employees resigned or dismissed, does not appear. The deposition of P. W. Birkhauser is cited by plaintiff's brief as showing directly that political reasons dictated the action taken in relators' discharge. This deposition is referred to in the bill of exceptions, but is not incorporated in it, does not appear there, and we can not find it anywhere in the record. The respondents, on their part, positively assert that the adoption of the resolution reducing the force was in good faith, was rendered necessary by the financial condition of the city, and that politics had nothing to do with either the discharge of relators or the previous or subsequent appointments by the board, and that the subsequent appointments became necessary because of resignations and dismissals. It is impossible to say, upon this testimony, that the trial court was wrong in dismissing the action of relators.

It is recommended that the judgment be affirmed.

DAY and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NORVAL, C. J.

I concur in the judgment just rendered solely on the ground that the question was determined by the majority of the court in *Moores v. State*, 54 Nebr., 486.

GEORGE B. DARR, APPELLEE, V. JOHN WISNER ET AL., APPELLANTS.

FILED DECEMBER 18, 1901. No. 10,681.

Commissioner's opinion, Department No. 1.

1. **Tax Foreclosure:** EVIDENCE: CERTIFICATE: BURDEN. Where a lien is sought to be foreclosed for general taxes, the tax sale certificate is *prima facie* evidence that the statutes in reference to the levy and assessment of the taxes and the sale for their non-payment have been complied with, and the burden of showing irregularities is upon the party asserting such fact. *Merrill v. Wright*, 41 Nebr., 351, overruled.

2. **Issue:** LEVY: ASSESSMENT: PRESUMPTION. Where the levy and assessment are disputed by the pleadings, the presentation of a tax receipt alone does not raise any presumption in favor of the regularity of the assessment or levy of the taxes for which it calls.

3. **Tax Lien:** FORECLOSURE: LIMITATION. An action to foreclose a tax lien is barred within five years after the time to redeem from the tax sale has expired. *Alexander v. Thacker*, 43 Nebr., 494, followed.

APPEAL from the district court for Dawson county Heard below before SULLIVAN, J. *Affirmed in part.*

E. A. Cook, for appellants.

Henry D. Rhea, contra.

Argued orally by *Cook*, for appellants.

DAY, C.

On April 15, 1898, George B. Darr commenced this suit in the district court of Dawson county against John Wisner and others to foreclose a lien claimed by virtue of a tax-sale certificate issued to him by the county treasurer of Dawson county. The trial resulted in a finding and decree in favor of the plaintiff, to review which the defendants have brought the case to this court by appeal. In substance, the petition alleged the purchase of the premises at public tax sale held November 7, 1892, from the county treasurer; the ownership of the property by the defendants; the assessment and levy of the taxes; that the same were due, delinquent and unpaid; the delivery of the tax-sale certificate to the plaintiff; and the subsequent payment by plaintiff of the taxes assessed and levied upon the property for the years 1892 and 1893. The answer admitted the ownership of the premises, and denied each and every other allegation of the petition. The only evidence to support the finding and decree of the court was the introduction of the original tax-sale certificate issued by the county treasurer to plaintiff, and the tax receipts for the payment of taxes for the years 1892 and 1893. These were received over the objection of the defendants. From the remarks of the court upon the trial, it is evident that the court received the evidence upon the theory that the original tax-sale certificate, as well as the tax receipts for the subsequent years, were sufficient proof, until contradicted, of the facts put in issue by the answer. In this the court erred as to the tax receipts. The taxes for which the premises were sold were general taxes, and the introduction of the tax-sale certificate was presumptive evidence of the regularity of all prior proceedings leading up to the issuance of the certificate. Section 116 of chapter 77 of article 1 of the Compiled Statutes of 1901 provides as follows: "The purchaser of any tract of land sold by the county treasurer for taxes, will be entitled to a certificate in writing, describing the land so purchased, the sum paid, and

the time when the purchaser will be entitled to a deed, which certificate shall be signed by the treasurer, in his official capacity, and shall be presumptive evidence of the regularity of all prior proceedings," etc. In *Leavitt v. Bell,* 55 Nebr., 58, it is said, quoting from syllabus: "Where a lien is sought to be enforced for general taxes, the presumption is that the statute in reference to the levy and assessment of the taxes and to the sale of the real estate for their non-payment has been complied with; and the burden of showing irregularities, or that the tax is void, is upon the party asserting such fact." The presentation of the tax receipts for the taxes for 1892 and 1893 did not raise any presumption of the regularity of the assessment or levy of taxes called for by the receipts. This being one of the issues raised by the pleadings, proof of all the steps showing a valid assessment and levy should have been made. This precise question has been before this court in *Adams v. Osgood,* 55 Nebr., 766, wherein it is said: "A tax receipt is not sufficient to establish the fact of the levy or assessment of taxes when such levy or assessment is disputed in the pleadings." *Miller v. Hurford,* 13 Nebr., 13; *Merrill v. Wright,* 41 Nebr., 351.

It is urged by the appellant that the action can not be maintained because it was not brought within five years from the date of the issuance of the tax-sale certificate, and section 180 of chapter 77 of the Compiled Statutes is cited in support of this contention. That section provides as follows: "If the owner of any such certificate shall fail or neglect either to demand a deed thereon, or to commence an action for the foreclosure of the same, as provided in the preceding sections, within five years from the date thereof, the same shall cease to be valid or of any force whatever, either as against the person holding or owning the title adverse thereto, and all other persons, and as against the state, county, and all other municipal subdivisions thereof." The terms of the statute appear to the mind of the writer to support appellant's contention, and were the question a new one, we would hold that the action

should be brought within five years from the date of the certificate; but by repeated decisions of this court the rule is well established, and is so recognized by the profession, that an action to foreclose a tax lien is barred within five years after the time to redeem from the tax sale has expired. *Alexander v. Thacker,* 43 Nebr., 494; *Alexander v. Wilcox,* 30 Nebr., 793; *Alexander v. Shaffer,* 38 Nebr., 812; *Black v. Leonard,* 33 Nebr., 745.

It follows from what has been said that the plaintiff was entitled to a decree of foreclosure for the amount of the tax certificate, $5.16, together with the interest thereon, but was not entitled to a decree, under the proofs made, for the amount represented by the tax receipts for the years 1892 and 1893. The record shows that plaintiff's counsel was proceeding upon the correct method of proving his case, but the testimony was rejected by the trial court as unnecessary. In view of this, we think that plaintiff should not be burdened with the costs.

We therefore recommend that unless the plaintiff file with this court within thirty days an election to take a new trial, a decree of foreclosure be entered in favor of the plaintiff for $10.86, with costs, and an attorney's fee of $1.08.

HASTINGS and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, a decree of foreclosure will be entered in favor of the plaintiff for $10.86 and costs, and attorney's fee taxed at $1.08, unless the plaintiff within thirty days file with the clerk of this court his election to take a new trial. This opinion is in conflict with the views expressed on the same point in *Merrill v. Wright,* 41 Nebr., 351, and the latter case, being regarded as erroneous, is overruled.

JUDGMENT ACCORDINGLY.

NEBRASKA NATIONAL BANK ET AL., APPELLEES, V. F. M. HALLOWELL ET AL., APPELLEES, AND KEARNEY OPERA HOUSE COMPANY ET AL., APPELLANTS.

FILED DECEMBER 18, 1901. No. 9,689.

Commissioner's opinion, Department No. 1.

1. **Appeal:** ERROR IN PROCEDURE. In a case brought to this court on appeal, alleged errors of the trial court in its rulings on questions of procedure arising during the progress of the trial will not be examined.

2. **Creditors' Suit:** ALLEGATION. In a creditors' suit, where no receiver has been appointed or asked for, it is not necessary to allege that the suit is brought on behalf of all creditors who desire to join and contribute to the expense.

3. ———: FRAUDULENT CONVEYANCE: In a creditors' suit brought to set aside a fraudulent conveyance, a petition wherein it is alleged that the grantor fraudulently conveyed the property with the intent to place it beyond the reach of his creditors, and that the conveyance was made without consideration, states a cause of action, without alleging that the grantee had knowledge of or participated in the fraud.

4. ———: ———. In a creditors' suit brought to set aside a fraudulent conveyance, return of execution *nulla bona* is conclusive of the question that the creditor has exhausted his legal remedy, and an answer which alleges that the debtor had property subject to levy upon execution, in the absence of an allegation of fraud or collusion on the part of the sheriff, does not state a defense.

5. **Judgment Creditors:** CONSOLIDATION: PRIORITIES: PRORATING. Certain judgment creditors consented to a consolidation of their various bills, no order being at the time made or requested determining their respective priorities, and thereafter all shared in the prosecution and expense of such consolidated suit. *Held*, That it does not affirmatively appear that the trial court erred in requiring such creditors to prorate in the proceeds of the suit.

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

Action by the Nebraska National Bank and others against Florentius M. Hallowell and others, with which

other actions against the same defendants were consolidated, and in which certain creditors of such defendants intervened to set aside certain fraudulent conveyances and for other relief.

Marston & Marston, Francis G. Hamer, E. C. and *H. V. Calkins, William Gaslin, Willis L. Hand* and *Richard A. Moore,* for appellants.

Dryden & Main, Willis D. Oldham, B. O. Hostetler, Bartlett & Baldrige and *Wharton & Baird, contra.*

KIRKPATRICK, C.

On the 26th day of November, 1895, the Rock Island National Bank recovered a judgment against the Kearney Opera House Company and Rollin L. Downing et al., in the district court for Buffalo county, for $5,236.66. On the same day the First National Bank of Negaunee recovered a judgment against the same defendants for $3,051. Executions were issued upon each of these judgments and returned unsatisfied, and on January 10, 1896, the Rock Island National Bank and the First National Bank of Negaunee filed a creditors' bill in the district court for Buffalo county against the Kearney Opera House Company and others, and joined as defendants a large number of persons who were charged to be fraudulent grantees of the principal defendants. On January 11, 1896, the First National Bank of Elm Creek, Nebraska, recovered a judgment against R. L. Downing by confession, and on January 14, 1896, a transcript of this judgment was filed in the district court, and an execution thereon returned unsatisfied; and on January 17, 1896, the bank filed a creditors' bill against R. L. Downing and his wife, Nancy Downing, to set aside certain conveyances made by R. L. Downing and his wife. On March 31, 1896, the Nebraska National Bank of Omaha recovered a judgment against Florentius M. Hallowell, R. L. Downing and others, in the district court for Douglas county, for $10,000, and on April 2, 1896, a tran-

script of this judgment was filed in the office of the clerk of the district court for Buffalo county, and on the same day an execution was issued, which was subsequently returned unsatisfied for want of property on which to levy. On April 6, 1896, the Nebraska National Bank filed a creditors' bill in the district court for Buffalo county against Florentius M. Hallowell and the other defendants, joining with them a large number of defendants who were charged to be fraudulent grantees of the principal defendants. On March 30, 1896, Lyman Cary, treasurer of Buffalo county, Nebraska, filed in the district court his application for permission to intervene in the creditors' suit of the Rock Island National Bank et al., against the Kearney Opera House Company et al., and on the same day filed his answer and cross-petition, setting up that on March 10, 1896, he obtained a judgment in the district court for Buffalo county against the Kearney National Bank, R. L. Downing et al., for $14,342.04; that on March 16, 1896, he issued an execution thereon, which was subsequently returned unsatisfied for want of property to levy on. Subsequently, and on May 24, 1897, Lyman Cary, treasurer, intervened, and filed a cross-petition in the case of the Nebraska National Bank of Omaha against Hallowell et al., setting up the recovery of the same judgment. On June 17, 1896, the National Bank of the Republic, of New York, filed its cross-petition of intervention in the case of the Rock Island National Bank and the First National Bank of Negaunee, against the Kearney Opera House Company et al., setting up the recovery of a judgment in the circuit court of the United States for the district of Nebraska in the sum of $23,946.35, against R. L. Downing et al., the date on which the judgment was entered not appearing from the record. On May 15, 1896, an execution was duly issued on this judgment out of the circuit court of the United States, which was subsequently, by the marshal, returned unsatisfied for want of property on which to levy. Subsequently to that date a transcript of said judgment was filed in the district court for Buffalo county, and an

execution issued thereon returned unsatisfied. On February 25, 1896, the First National Bank of Waupun recovered a judgment against the Kearney Opera House Company, Florentius M. Hallowell et al., in the district court for Buffalo county, for $1,070, and on January 16, 1896, it recovered a judgment against the same defendants for $3,248.21. A transcript of this last mentioned judgment was duly filed in the district court for Buffalo county; executions were issued on said judgments and returned unsatisfied; and on June 17, 1896, said First National Bank of Waupun filed its petition of intervention in the case of the Rock Island National Bank and the First National Bank of Negaunee et al., against the Kearney Opera House Company et al. On July 17, 1896, the National Bank of the Republic, of New York, also filed its petition of intervention in the case of the Nebraska National Bank of Omaha against Florentius M. Hallowell et al., setting up the same facts as in its petition in the case of the Rock Island National Bank et al., against the Kearney Opera House Company et al. The petitions and cross-petitions of the various parties mentioned alleged many fraudulent conveyances made by the judgment debtors, which were asked to be set aside. Demurrers to the various petitions and cross-petitions were filed by defendants Maren D. and Frank H. Morrison, and Nancy Downing and R. L. Downing Lumber Company, setting up misjoinder, failure to state facts sufficient to constitute a cause of action, and, as to Lyman Cary, treasurer, that court had no jurisdiction, and that no order had been made by the court permitting the treasurer to intervene. These demurrers were all subsequently overruled by the court; answers were filed by the defendants, and replies were filed by the plaintiffs and the various cross-petitioners. On May 24, 1897, by order of the district court, made by agreement of all parties, the cases were consolidated under the title of "Nebraska National Bank of Omaha v. Florentius M. Hallowell et al."

Numerous errors are alleged by counsel for the various parties, but they may be summarized as follows: (1) That

there was a misjoinder of parties; (2) that no order was made by the court permitting Lyman Cary to intervene; (3) the refusal of the court to impanel a jury at the request of certain of the defendants; (4) the refusal of the court to make special findings; (5) that the court erred in refusing to grant a continuance at the request of certain of the defendants; (6) that the various petitions and cross-petitions fail to state facts sufficient to constitute a cause of action, in this, that the petitions did not allege that the actions were brought for all the creditors, and that there was no allegation that certain of the grantees participated in the fraud of their grantors; (7) that the court erred in sustaining demurrers to that portion of defendants' answers which pleaded that the Kearney Opera House Company had sufficient property out of which the judgment could have been made; (8) that there was not sufficient evidence to sustain the judgment and findings of the trial court; (9) that the court erred in allowing the various plaintiffs and cross-petitioners liens of equal priority on whatsoever proceeds might be realized from a sale of the property uncovered.

Of the first five errors complained of, it may be said that they relate to rulings of the trial court on questions of procedure arising during the progress of the trial, and can only be regarded as errors of law occurring at the trial, and as such can not be presented to or considered by this court on appeal. It is the established rule of this court that rulings of the trial court purely interlocutory in their nature can only be reviewed by proceedings in error. In the case of *Lowe v. Riley,* 57 Nebr., 252, this court said: "Again, if the district court erred in denying appellants a jury for a trial of the issues in this proceeding, that was an error of law which occurred at the trial, and can not be reviewed on appeal, but only on petition in error." The same principle is announced in *Ainsworth v. Taylor,* 53 Nebr., 484; *Alling v. Nelson,* 55 Nebr., 161; *Village of Syracuse v. Mapes,* 55 Nebr., 738; and *Frenzer v. Phillips,* 57 Nebr., 229. The case at bar having been brought to this

court by appeal, does not present these questions, and they will not be considered. The remaining assignments will be considered in the order named.

It is contended that the various petitions and cross-petitions fail to state facts sufficient to constitute a cause of action, because they do not allege that the actions were brought in behalf of all the creditors, and because there are no allegations that certain of the grantees participated in the fraud of their grantors. We are unable to find reasons in support of the contention that the petitions must allege that the suits were brought for the benefit of all the creditors, and our attention has not been called by counsel to any authority holding, in a case such as the case at bar, where no receiver has been asked for or appointed, that such an allegation is necessary. As regards the second contention, it must be regarded as the settled rule in this state that, where the petition alleges that the grantor fraudulently made the conveyance for the purpose of hindering and delaying his creditors in the collection of their debts, and that the conveyance was made without consideration, the pleading states a cause of action, notwithstanding it fails to allege that the grantee had knowledge of or participated in the fraud. Wait, Fraudulent Conveyances [3d ed.], sec. 200; *Farrington v. Stone,* 35 Nebr., 456. Measured by this rule, it will be found that each of the petitions and cross-petitions states a cause of action.

Some of the petitions, regarding certain conveyances made, failed to state that the grantee had knowledge of or participated in the fraud of the grantor. But each of such petitions contained an allegation that the conveyances were made by the grantors for the purpose of hindering, delaying and defrauding their creditors in the collection of their debts, and that the conveyances were made without consideration. Regarding the conveyance to the R. L. Downing Lumber Company, it is alleged that the R. L. Downing Lumber Company was organized for the purpose of taking and holding property of R. L. Downing, and for the purpose of permitting the said R. L. Downing to continue in

business as a lumber merchant without subjecting his property to the payment of his debts, and that none of the stockholders had any interest in the corporation except R. L. Downing; and, in addition to this, it was alleged that each of the conveyances was made wholly without consideration, and for the purpose of hindering and delaying his creditors in the collection of their debts, and that this fraudulent purpose was well known to said grantees, and that the "said grantees hold the title to said premises in trust for said grantors as aforesaid, who are the real and true owners of the said premises." The effect of these allegations is, among other things, to charge that the property is still the property of the debtor R. L. Downing, and that it has been so conveyed as to place it beyond the reach of an ordiary execution on a judgment at law, and for that reason states a ground for equitable relief. Regarding the conveyance to George H. Downing, it is alleged that the conveyance was unlawfully and fraudulently made on the part of the grantors, and that said George H. Downing well knew of the fraudulent purpose of said conveyance, and that the same was made without any consideration. It is a statutory rule of construction in this state that, where a pleading is assailed upon the ground that it does not state facts sufficient to constitute a cause of action, it shall be liberally construed. Code of Civil Procedure, sec. 121; *Hartzell v. McClurg*, 54 Nebr., 313.

It is contended on the part of appellants that executions issued on the various judgments and placed in the hands of the sheriff of Buffalo county were returned by the direction of the judgment creditors, and that at the time the Kearney Opera House Company had property subject to execution out of which the judgment could have been made. The rule seems to be founded in reason that in a judgment creditors' bill to set aside a fraudulent conveyance, the return of the sheriff to the execution upon the judgment *nulla bona* is conclusive of the fact that the creditor has exhausted his legal remedies. It would be of no avail to ask him to do more than this. He has no means of satisfying

his judgment except by an execution at law; and if he has procured an execution to be issued, and placed it in the hands of the proper officer, and the same has been returned by the officer *nulla bona,* the creditor has done all that he can be asked to do. The rule seems to be settled by the great weight of authority that to sustain a creditors' bill to set aside a fraudulent conveyance it is only necessary to show that the execution has been issued on the judgment, and returned by the proper officer *nulla bona;* and that the return of the officer can not be inquired into in the creditors' suit, but that the remedy is by a direct proceeding in the court out of which the execution issued, or by an action against the officer. *Weil v. Lankins,* 3 Nebr., 384; *Jones v. Green,* 1 Wall. [U. S.], 330; *William Wright Co. v. Frazer,* 66 N. W. Rep. [Mich.], 954. Waite, Fraudulent Conveyances [3d ed.], section 74, says: "In cases where fraud is established, the creditor does not claim through the debtor, but adversely to him, and by a paramount title, which overreaches and annuls the fraudulent conveyance or judgment by which the debtor himself would be estopped. It follows, from the principles suggested, that a judgment obtained without fraud or collusion, and which concludes the debtor, whether rendered upon default, by confession or after contestation, is, upon all questions affecting the title to his property, conclusive evidence against his creditors, to establish, first, the relation of creditor and debtor between the parties to the record, and secondly, the amount of the indebtedness. This principle is assumed in the New York statute in relation to creditors' bills, and is so decided in *Rogers v. Rogers* [3 Pai. Ch., N. Y., 379]. The execution issued upon the judgment shows that the remedy afforded at law has been pursued, and of course is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not, and, because of the embarrassments which would attend any other rule, the return is generally considered to be conclusive. The court will not ordinarily entertain inquiries as to the diligence of the officer in endeavoring to find property upon which

to levy,"—citing *Jones v. Green, supra.* In the case of *Illinois Malleable Iron Co. v. Graham,* 55 Ill. App., 266, decided in 1894, the third paragraph of the syllabus is as follows: "A return made by the sheriff which recites that a personal demand has been made and no property turned out or found, is the highest evidence the law affords of the fact that the legal remedies of the plaintiff have been exhausted, and is a sufficient return to confer jurisdiction in equity to maintain a creditors' bill." Appellants complain that the return is not sufficient, on the ground that it appears that the return was made at the request of plaintiffs' attorney. This alone is not sufficient to invalidate the return, if the sheriff has made a bona-fide attempt to ascertain if there is any property upon which to levy, and the attempt has failed. It appears that he did this. In *Illinois Malleable Iron Co. v. Graham, supra,* it is said: "There must be a bona-fide effort on the part of the sheriff to satisfy the execution, and after a demand upon the execution debtor for, and a refusal by him to turn out property to satisfy the debt, the superadded fact that the return was hastened by the direction of the plaintiff does not affect the force or validity of the sheriff's official return." In *Platt v. Cadwell,* 9 Pai. Ch. [N. Y.], 386, it is said: "If the return of the sheriff in such a case [creditors' bill] is irregular, the remedy of the defendant is to apply to the court of law to set aside the return for irregularity," and further, that a chancery court would stay the proceedings upon the creditors' bill for a reasonable time, to enable the defendant to apply to the court of law to set aside the sheriff's return upon the execution, where there is a reasonable probability that the court of law will grant such application. It follows, therefore, that the court did not err in sustaining the demurrers to that portion of the answers of appellants which pleaded that the Kearney Opera House Company had property subject to execution.

It is contended that there is not sufficient evidence to sustain the findings and judgment of the trial court. An extended discussion of the evidence heard by the trial court

would be of no material advantage. We have read all the evidence preserved in the bill of exceptions, and conclude that the findings are supported by sufficient competent evidence. Under the rule in this state the question on appeal is not whether the preponderance of the evidence is in favor of or against the findings of the lower court, but simply whether there is sufficient competent evidence to sustain the findings. While the evidence is not of as satisfying a character as it might be, yet we are unable to say that it does not support the findings made by the trial court.

This leaves for consideration the correctness of the ruling of the trial court in directing that the proceeds resulting from the sale of the property uncovered should be prorated among the various creditors in proportion to the amount of their judgments. It is contended with much earnestness and ability by counsel for certain of the appellees that the court erred in its order requiring the various petitioners and cross-petitioners to prorate in whatever proceeds might be realized from the sale of the property uncovered. In answer to this contention, counsel for the other appellees say that this question is not before this court; that no bill of exceptions has been settled or allowed upon that question; that no cross-appeal has been filed; and that the appellees complaining can not accept the decree of the trial court in part and reject it in part, and appeal. These objections seem not to be well taken. An examination of the record discloses that the Nebraska National Bank of Omaha, the Rock Island National Bank, and the First National Bank of Negaunee filed in this court, within proper time, a notice of cross-appeal, and a brief in support of their appeal from that part of the judgment requiring the various creditors to prorate. This is sufficient to present the question to this court for consideration.

As to judgment creditors who bring individual suits, and prosecute them to judgment on their own account and solely at their own expense, the rule may be regarded as settled that the creditor first in point of time in the com-

mencement of his suit is entitled to priority. The reason of this rule seems to be that creditors who, by superior diligence, prosecute creditors' bills and uncover property fraudulently conveyed, should be first paid. With this rule, so far as applicable, we find no fault. But the rule ought not to be extended beyond the reason for its existence. A creditor, in addition to filing his bill, must prosecute his action. Indeed, if he proceeds no further than filing his bill, there would be no proceeds to divide. He must do more. He must uncover property; he must procure fraudulent conveyances to be set aside to entitle him to reward and priority. There can be no doubt that the rule in question has no application in cases where a receiver has been appointed, who has taken possession of the property; or where the property, for other reasons, is in the hands of the court for distribution. *In re Howard,* 9 Wall. [U. S.], 175. Again, the rule has no application in a general creditors' bill, where suit is brought by one creditor on behalf of himself and all others who wish to join and contribute to the expenses of the litigation. Beach, in his Modern Equity Practice, section 576, says: "Where a bill is filed by judgment creditors in behalf of all judgment creditors to reach property which could not be effectively reached at law, and no order is made requiring others to intervene by a certain time or be barred of their rights, all judgment creditors who choose to intervene, even though not until after an interlocutory decree ordering a sale, are entitled to share ratably with the complainants in the proceedings." In this case separate bills were filed by the three creditors who complain of the action of the court. Long before the trial of the cause, and, so far as disclosed by the record, before any other action was taken by such creditors, all of the petitions and cross-petitions of various other creditors were, by agreement of all, and by order of the court, consolidated into one action. To this order no exceptions were taken by any of the creditors. The court made no order respecting priorities, nor was such order requested by the creditors complaining. If the latter, or any of them, had, at the time, objected to the order of con-

solidation, or had then requested the court to determine their respective priorities, it would undoubtedly have been the duty of the court to fix the priorities or decline to consolidate the cases. Such was the ruling in the case of *Monroe v. Lewald,* 12 S. E. Rep. [N. Car.], 287, where it is said: "In a general creditors' bill, all of the creditors should be permitted to come in and be made parties. In a judgment creditors' bill this is not required, and it may be instituted by one or any number of creditors who may choose to unite. They may invite others to come in and join them in the prosecution of the suit, but unless they do so the court can not, by compelling in proper cases the joinder of new parties, or by consolidating the action with other proceedings, deprive the original suitors, or those who have with their consent united with them, of any priorities they may have acquired by their superior vigilance." Upon principle it seems clear to us that these creditors complaining, by permitting the consolidation without objection, and without having the question of their priorities determined, are in exactly the same position as if each, in filing his bill, had extended a general invitation to all creditors to come and join with him in the suit, each paying his proportionate share of the expenses of the litigation. Suppose, as illustration, that the Nebraska National Bank of Omaha, which was the first creditor to file its bill, had, after doing so, taken no other or further steps in the prosecution of its case, and after the cases were consolidated preparations were begun to take testimony and prepare for trial. Suppose, then, it had rested on its oars, not called a single witness, made no effort to uncover fraud in the conveyances mentioned in the petition, will any one contend that, when the result was reached, it would be entitled to have its claim first paid to the exclusion of the other creditors who, by diligence, had secured results? So far as this record discloses, we may presume that such was the fact. We are unable to point out from the record the name of a single witness called by the Nebraska National Bank of Omaha. We are unable to determine what, if any, depositions were taken by its au-

thority or at its expense. There is nothing in the record to disclose what was done by this particular creditor, if anything, to accomplish the result for which all were striving. This is a very important and a very expensive suit. A large amount of testimony was taken, some of it in distant parts of the country; and many days were consumed in the actual trial of the cause. It was of very material benefit and advantage to the three complaining creditors, as well as to all others, to have the various petitions and cross-petitions consolidated, and tried as one action. If there had been no consolidation, the costs and expenses of each of the complaining creditors might have amounted to as much as the costs of the consolidated suit. The county treasurer and many other of the creditors, aside from those complaining, contributed to the result by employing able counsel, and by payment of costs and expenses of the litigation. If the contention of the complainants is to be sustained, then none of the other creditors is to receive anything. It is not difficult to conceive that the intervening creditors consented to the consolidation believing that they were to share pro rata in the proceeds, and that the complaining creditors consented to the consolidation believing that the interveners, joining with them, would contribute materially to a successful termination of the suit; otherwise there would have been nothing to gain by any of the parties, and each would have preferred severally to prosecute his own action. Is it reasonable to suppose that the other creditors would have come in and furnished money and counsel to secure results, knowing that, if the suit was successful, they would receive nothing? If the complaining creditors, at the time the suggestion to consolidate was made, had secured an order that by such consolidation they should not lose their priorities, the intervening creditors would then have been in a position to decide whether they would submit to the consolidation or remain aloof, and adopt other legitimate means to secure the satisfaction of their claims, assuming an attitude of hostility to, instead of co-operation with, the creditors com-

plaining; and it is not possible to foretell but that this would have resulted in defeat to the complaining creditors. When the order to consolidate was made, these creditors should have spoken. They said nothing, but maintained what to them doubtless seemed a discreet silence. Many times actions or silence may speak louder than words. By remaining silent, and accepting the aid and benefit of money and counsel of other creditors, they, in effect, extended an invitation to such creditors to come in and share in the expenses and proceeds. Having kept silent when they should have spoken, equity will not permit them to speak now. They have, by their own acts, lost their right to any priority to which they might otherwise have been entitled. The trial court, upon this branch of the case, found as follows: "Upon the question of the respective rights of the plaintiff and cross-petitioners to the proceeds of the sale of the property herein mentioned, the court finds that the plaintiff and cross-petitioners had been acting together in the prosecution of this suit; that some of said parties have paid and incurred much greater expense than others in the prosecution of this action, and that the work of some has not only been for the benefit of themselves, but for the benefit of others; that the court can not ascertain and repay the expenses so expended, and for that reason finds that the said parties first beginning action to set aside the transfers are not entitled to have their debts paid first; and it is therefore considered, adjudged and decreed that from the proceeds of the sale of the property the parties shall be paid pro rata, according to the amount herein found to be due each of them from each defendant, and that the cost heretofore advanced in this case for the taking of depositions and witness fees expended in taking such depositions shall not be taxed." This judgment of the trial court is presumed to be correct, and the burden is upon appellees complaining to point out wherein it could have been otherwise rendered, and justice and equity done. This they have failed to do. In such proceedings as this it is the duty of the trial court to render a decision which

is fair, just and equitable between the parties. Beach, in his valuable work on Modern Equity Practice, section 576, says: "The practice of permitting judgment creditors to come in and make themselves parties to a creditors' bill, and thereby obtain the benefit of the suit, assuming at the same time their portion of the costs and expenses of the litigation, is well settled." This doctrine has been recognized in the case of *Johnston v. Markle Paper Co.*, 25 Atl. Rep. [Pa.], 885, and is put in apt language by the court as follows: "In an action by a creditors' bill, where other creditors are permitted to intervene and become parties to the bill, all are entitled to share pro rata in the fund available for payment of debts." There is no question that in principle the authority cited is as applicable to a case where the suits of the creditors are consolidated, as in cases where creditors are permitted to intervene. The same principle is recognized in the case of *Craig v. California Vineyard Co.*, 46 Pac. Rep. [Ore.], 421, wherein it is said: "Where an attachment is held void as to subsequent attaching creditors, who have pooled their claims and joined in a common suit for their mutual benefit, the court may distribute the fund among them pro rata, instead of in the order of the lien of their respective attachments." It would be manifestly inequitable to permit the appellees complaining to absorb the entire proceeds of the suit, leaving the other creditors, who contributed as much to the general result, without anything. In this case the maxim that equity means equality is the better rule, and will be followed.

From an examination of the entire record, we find no error, and it is therefore recommended that the judgment of the trial court be in all respects affirmed.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GERMAN NATIONAL BANK OF BEATRICE V. AULTMAN, MILLER & COMPANY ET AL.

FILED DECEMBER 18, 1901. No. 10,492.

Commissioner's opinion, Department No. 1.

1. **Replevin:** AFFIDAVIT: APPEAL. One who files an affidavit in replevin in justice court, upon which the writ is issued, need not, on appeal in district court, file a second affidavit, unless by way of amendment.

2. ———: ———: CHANGE OF CAUSE OF ACTION: ORDER TO STRIKE. Affidavit filed by leave of district court examined, and *held* not to change cause of action, and the order of trial court striking it from the files *held* erroneous. SULLIVAN, J., dissenting.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Reversed.*

George A. Murphy, for plaintiff in error.

Charles E. Bush, contra.

Argued orally by *Murphy,* for plaintiff in error.

KIRKPATRICK, C.

This is a replevin action, brought in justice court of Gage county, which resulted in a judgment from which an appeal was taken to the district court, where the following proceedings were had: On May 19, 1897, plaintiff in error, plaintiff below, hereinafter styled "plaintiff," by leave of court filed its petition in the district court, to which defendant in error, defendant below, hereinafter styled "defendant," filed for answer a general denial. On December 2, 1897, plaintiff was given leave to file an affidavit in replevin, which was done. On the same day defendant filed a motion to strike the affidavit in replevin from the files for the following reasons: "First, because said affidavit is superfluous, there being already an affidavit filed before this one in this court; second, because

said affidavit is different than the affidavit filed in the justice court, and upon which the action was tried in the court below, and changes the issues in this court from what they were in the court below." On December 3, 1897, this motion was sustained, and the affidavit stricken from the files. Plaintiff excepted to this ruling, and, refusing further to prosecute, a jury was impaneled at the request of defendant, and defendant was permitted to prove ownership and right of possession to the property, and the jury was by the court instructed to find for defendant. A motion for a new trial having been made and overruled, plaintiff brings the cause to this court for review upon error.

Several errors are assigned and argued by plaintiff, only one of which will be considered. The affidavit of replevin filed in justice court set out that the plaintiff had a special interest and right of possession in the property involved in suit by virtue of a chattel mortgage executed by Henry Ottoe to plaintiff thereon, which was duly filed, and that the plaintiff was entitled to the immediate possession thereof; but failed to allege that the mortgage was due by its terms, or that there had been any default authorizing plaintiff to take possession of the property. The affidavit in replevin filed in the district court pleaded the same matters contained in the affidavit in justice court, and in addition stated that the mortgage contained a provision that, when the mortgagee felt unsafe or insecure, or in case of an attempt to remove or dispose of the property, the mortgagee might take possession, and that the defendant had taken possession and was removing said property and converting it to its own use, and that the mortgagee felt unsafe and insecure. It seems clear that the trial court regarded the affidavit filed in the district court as such an amendment as changed the cause of action, and that, under the rule that a cause must be tried in the appellate court upon the same issues upon which it was tried in the lower court, the amendment was not permissible. This view was erroneous. An affidavit having been filed in justice court, there was no necessity for filing another in the district court, unless it

was filed as an amendment to the one filed when the action was instituted. The record is silent upon this question, but the only reasonable view that can be taken in the premises is that when the court gave plaintiff permission to file the affidavit in the district court, it was understood to be an amendment. The affidavit in replevin has been held by this court to be a "proceeding," and has always been held to be amendable. *Commercial State Bank v. Ketcham,* 46 Nebr., 568. Plaintiff had a right, upon such terms as the court might prescribe, to amend the affidavit of replevin by setting out more particularly the cause of action already stated in the affidavit filed in the justice court, upon which the writ had been issued. This it did by filing, with leave of court, a new affidavit, and it was error for the trial court to strike such affidavit from the files.

It follows from what has been said that the action of the trial court was erroneous, and it is therefore recommended that the judgment be reversed, and the cause remanded for further proceedings in accordance with law.

HASTINGS and DAY, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

SULLIVAN, J., dissenting.

It seems to me perfectly plain that the judgment should be affirmed. The plaintiff voluntarily abandoned his case. He was not forced out of it by an erroneous decision. The commissioner's opinion proceeds on the assumption that the original affidavit was capable of being amended, and that the court erred in refusing to permit an amendment to be made. If the affidavit was void, the ruling complained of was right. *Commercial State Bank v. Ketcham,* 46 Nebr., 568; *Bolin v. Fines,* 51 Nebr., 650. If it was not void the ruling was, at most, harmless error. If the proceeding by

which plaintiff obtained the property was irregular it would, nevertheless, entitle him to retain possession until quashed by an order of the court. At the time plaintiff withdrew from the case the proceeding had not been assailed; in fact it never has been questioned, and, after a trial on the merits before the justice of the peace and the filing of pleadings in the district court, it was probably too late to question it. *Hudelson v. First Nat. Bank,* 51 Nebr., 557; *Furrow v. Chapin,* 13 Kan., 107; *McKee v. Metraw,* 31 Minn., 429; 18 Ency. Pl. & Pr., 517. The issue to be tried in the district court was formed by the pleadings and could not have been in any way affected by the matters stated in the affidavit stricken from the files. Had the plaintiff proceeded to trial, as he might have done notwithstanding the order sustaining defendant's motion to strike, a judgment in his favor would have confirmed his possession and forever ended the controversy. I do not see any propriety in sending the case back to the district court so that plaintiff may fortify a position which has been neither menaced nor assailed, and which is probably impregnable.

ALFRED D. DE LONG, RECEIVER OF THE EAST OMAHA LAND COMPANY, APPELLEE, V. ALFRED OLSEN ET AL., APPELLANTS.

FILED DECEMBER 18, 1901. No. 10,474.

Commissioner's opinion, Department No. 2.

1. **Equity:** EJECTMENT: JURY. The objection that an action which is begun in equity should have been in ejectment and tried by jury, must be made before trial. It is too late to raise that question for the first time after the cause has been appealed to this court.

2. **Deed:** DESCRIPTION: ACCRETIONS: MEANDER-LINE. A deed which describes land conveyed as "all accretions of lands and parcels of lands belonging to government lot number ten (10) in section number one (1) in township number fifteen (15) north, range number thirteen (13) east; said accretions lying south of the meander-line of the state of Nebraska, according to the government survey," is not void for uncertainty of description.

3. **Accretion:** MISSOURI RIVER. The law of accretion applies to the Missouri river, notwithstanding that, owing to the swiftness of its current and the softness of its banks, the changes are more rapid and extensive than in most other rivers. *Nebraska v. Iowa*, 143 U. S., 359, 12 Sup. Ct. Rep., 396.

4. **Official Plat:** GOVERNMENT SURVEY: RIVER-BOUNDARY: PATENT: DEEDS. Where the official plat of the survey of government lands shows a river as one boundary of a certain lot, a subsequent patent for the lot, describing it by number, and referring to the plat on which it is marked as containing a certain amount, and deeds, describing the lot by number, passes all accretion to the lot up to their respective dates. *Jefferis v. East Omaha Land Co.*, 134 U. S., 178, 10 Sup. Ct. Rep., 518.

APPEAL from the district court for Douglas county. Heard below before FAWCETT, J. *Affirmed.*

Silas Cobb, for appellants.

Charles J. Greene, Ralph W. Breckenridge and *J. C. Kinsler, contra.*

SEDGWICK, C.

This action was begun by this plaintiff in the district court for Douglas county to determine its title and right of possession of certain lands in Douglas county which it alleges are accretions of land and parcels of land to government lots 10 and 11 in section 1, and government lot 1 in section 12, township 15, range 13 east of the sixth P. M., and to quiet plaintiff's title in the lands, and cancel certain deeds which the defendants have obtained, purporting to convey the same. The petition alleges that on July 5, 1859, the government of the United States patented lots 10 and 11 to one Francis Smith, and in 1863 patented lot 1 to one Byron Reed; that in 1856 the government made a survey and established a meander-line of the west bank of the Missouri river across said sections 1 and 12, and that the said meander-line formed a boundary on one side of the said lots 10, 11, 1, and that the bank of the river at that place remained substantially the same until the lots were patented by the government as before stated, and that after-

wards, by washings of the river, large accretions were formed to the said lots from year to year, and afterwards, in 1886, this plaintiff, through mesne conveyances from the said Francis Smith and Byron Reed, became the owner of all accretions to the said lots, and that plaintiff, upon obtaining the title to the said accretions, took possession of the same, and has made valuable improvements thereon at an expense of a million dollars, and has held possession uninterruptedly until these defendants wrongfully and forcibly took possession on the 23d day of August, 1889; and that in 1889 one Maddocks took possession of a part of the lands upon said accretions, and afterwards abandoned such possession, and in July, 1889, quitclaimed the land in dispute to the defendant Olsen, who subsequently conveyed certain interests in the land to his codefendants herein, and the defendants are claiming and occupying the lands. The defendants admit the alleged patent from the government and the conveyances alleged in the petition, but deny that the lands claimed and occupied by the defendants are accretions to the said lots 10, 11 and 1, and deny that any accretions passed with the lots by said conveyances. The district court entered a decree in favor of the plaintiff, confirming and quieting its title, and enjoining the defendants from interfering with the land. From this decree the defendants have appealed to this court.

1. The defendants insist that the plaintiff can not maintain this action in equity, but its proper remedy, if it has any, would be by suit in ejectment. There is no merit in this contention. Accretions to real estate are not within the record description of the land to which they accrued. The owner must establish his title by evidence outside of the public records. He must show the changes of the river by which the accretions were formed, and establish the description and limits of the land claimed, and equity affords his only adequate remedy. Moreover, the defendants did not raise this question in their answer, and they can not raise it for the first time in this court. *Snowden v. Tyler*, 21 Nebr., 199.

2. It is insisted that two of the deeds under which the plaintiff claims are void for uncertainty. The description in one of the deeds is as follows: "All accretions of lands and parcels of lands belonging to government lot number ten (10) in section number one (1) in township number fifteen (15) north, range number thirteen (13) east; said accretions lying south of the meander-line of the state of Nebraska, according to the government survey." When this lot was surveyed and platted by the United States government, the Missouri river constituted its southern boundary, and after that time a body of land had been formed against its southern boundary by the action of the river. The accretions to lot 10 then would lie between the south line of said lot and the river, and would be bounded on the east by the accretions to the lot lying east of it on the meander-line, and on the west by the accretions to the lot lying west of it on the meander-line. These lines, then, from the meander-line to the river, dividing the accretions to the several lots, could be definitely located by established rules of apportionment. So that from the description in the deed the lines bounding the accretions to lot 10 could be readily located. If there would be difficulty in determining the boundaries of the accretions to lot 10 as they existed at some proposed prior period, the difficulty would arise from the uncertainty as to the line of the river bank at the given time; but, if the line of the bank of the river at the proposed time was given, this difficulty would disappear. So that at the time that the deeds were executed, the line of the river bank being then apparent, the boundaries of the accretions as they then existed could be readily located from the description in the deed. At that time there had been but one government meander-line of the Nebraska bank of the river, and, of course, that part of the description, "the meander-line of the state of Nebraska according to government survey," must refer to the only meander-line of such survey in existence. The other description criticised is similar to this one, and we think that these deeds are not void for uncertainty.

3. It is contended that the lands in controversy are not accretions; that the changes in the Missouri river are "too perceptible and too rapid to allow the land formed thereby to be called 'accretions.'" This question was fully considered by the supreme court of the United States in *Nebraska v. Iowa,* 143 U. S., 359, 12 Sup. Ct. Rep., 396. In the opinion by Mr. Justice Brewer the conditions causing the changes in the banks of the river are fully stated. The same conditions are established by the evidence in this case, and this case is controlled by the conclusion there announced: "The law of accretion applies to the Missouri river, notwithstanding that owing to the swiftness of its current and the softness of its banks, the changes are more rapid and extensive than in most other rivers."

4. The defendants insist that the accretions after the date of the government patents are not part of lots 10, 11 and 1, because the accretions after the meander-line was established in 1856, and prior to the patents by the government, did not pass with the lots. It is urged that these accretions formed a strip of land between the lots and the river, title to which remained in the government, and the title to subsequent accretions to these lands remained also in the government. We think that it must be found from the pleadings and evidence that there were considerable accretions to the lots between the time they were platted by the government, in 1856, and the entry for patent for lots 10 and 11 from the government to Smith, July 5, 1859, and for lot 1 by Reed in 1863. Did these accretions go with the lots by the government patents, or did the title thereto remain in the government? The original plat, a certified copy of which was in evidence, shows that the meander-line of 1856 formed the south boundaries of lots 10 and 1, and a part of lot 11. While this evidence is not conclusive, it is *prima facie* evidence of the fact. *Lammers v. Nissen,* 4 Nebr., 245. When the government patented these lots the accretions thereto formed a strip of land lying between these lots and the river, but the defendants are mistaken in supposing that this fact would prevent

these accretions passing by the patent. In the case of *Lammers v. Nissen, supra,* in the syllabus it is said: "An entry of government land, bounded by a meandered line, does not include land lying at the time between such meandered line and the bank of the river." But the words "at the time" relate to the establishing of the meander-line, and not to the entry of the government land, as will clearly appear from the opinion, and will also appear from *Bissell v. Fletcher,* 19 Nebr., 725, and *Harrison v. Stipes,* 34 Nebr., 431. When the meander-line, which is the boundary of the land, coincided with the bank of the river, subsequent accretions to the land belong to the land so bounded; and if the title was in the government when the land was so platted, and was afterwards patented, the accretions go with the land by the patent. *Jefferis v. East Omaha Land Co.,* 134 U. S., 178, 10 Sup. Ct. Rep., 518. And the same principle is recognized by this court in the cases above cited. In both *Lammers v. Nissen* and *Bissell v. Fletcher* it appears from the respective statements of fact that at the time of the survey there was a tract of land between the land platted and the river. This land was not included in the plat, but was reserved by the government. And, although some of the language used may be indefinite, it must not be supposed that this court intended to hold that an entry of government land bounded by a meander-line does not include land lying at the time of the entry between such meandered line and the bank of the river, notwithstanding that the bank of the river was coincident with the meandered line at the time of establishing such line. The rule applied in *Harrison v. Stipes, supra,* can not be misunderstood.

5. The defendants complain that their exhibit 6 was excluded from the evidence by the court; but this exhibit, if admitted, could not have affected the result. The defendants also complain of the ruling of the court in admitting evidence offered by the plaintiff; but it is the established rule of this court that the decree of the trial court will not be reversed because of receiving incompetent evidence when

the decree is supported by evidence which is competent and was properly admitted.

It is recommended that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CITY OF OMAHA V. FANNIE BOWMAN, ADMINISTRATRIX.

FILED DECEMBER 18, 1901. No. 11,958.

Commissioner's opinion, Department No. 2.

1. **Law of the Case.** When this court determines a question of law in a case and remands the case for trial, the rule so determined is the law of the case, and will not ordinarily be reviewed upon a subsequent appeal.

2. ———. Where it has been held on error proceedings in this court that a petition states a good cause of action, evidence sustaining the allegations of such petition is sufficient to support a verdict and judgment in favor of the plaintiff in the action.

3. **Directing Verdict:** INSTRUCTIONS: MEASURE OF DAMAGES. When the trial court instructs the jury to find a verdict for the plaintiff, it is improper to give any further instructions, except as to the measure of damages; but the giving of additional instructions which are not misleading as to the measure of damages will not be held prejudicial to the defendant.

4. **Death of Intestate:** ACTION BY ADMINISTRATRIX: AMOUNT OF RECOVERY. In this action brought by an administratrix for causing the death of her intestate, being her son, seven years of age, a verdict for $1,525 is *held* not excessive so as to require a reversal.

ERROR from the district court for Douglas county. Heard below before BAXTER, J. *Affirmed.*

W. J. Connell, for plaintiff in error.

Silas Cobb, contra.

Argued orally by counsel for both parties.

SEDGWICK, C.

This action was brought by this plaintiff as administratrix of the estate of Albert D. Bowman, deceased, in the district court for Douglas county, to recover damages from the city of Omaha on account of the death of the said Albert D. Bowman by drowning in a pond of water in said city. This is the third time this case has been before this court. When the case was first here (*City of Omaha v. Bowman,* 52 Nebr., 293), the judgment was reversed because the instruction of the trial court "assumed that evidence of such overflow of lots by the massing thereon by a city of the water of a running stream as would entitle the lot owners to damages would be proper proof in support of a claim for compensation for personal injury to one who had no interest in the lot itself." Under the pleadings and evidence, as the case then stood, it appeared that the pond in which the child was drowned was on private property within the limits of the city, but it did not appear that this pond was on, or in dangerous proximity to, a public highway, street or alley; and it was held that in such case the city did not owe any duty to the general public (aside from that of a sanitary character) other than such as devolves on private owners of property similarly situated, even though the city may have created the pond of which the plaintiff complained. After the case had been remanded to the district court, the plaintiff filed an amended petition in which she alleged: "That the city was negligent in allowing the water to accumulate, and be and remain by the side of Davenport street, near Twenty-Eighth street, within the limits of the city, * * * 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 said Davenport street * * * said water being, at the time of said death, over public property of the city, to wit, over a 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"; and that the pond was caused 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 vicinity 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. To the petition so amended the district court sustained a general demurrer, and the case was brought a second time to this court, and is reported in 59 Nebr., 84. The chief justice, who wrote the opinion of this court, after quoting the above stated amendments to the petition, said: "These averments take the case out of the doctrine announced by this court on the former hearing of the cause." The judgment of the district court was reversed and the cause remanded for a new trial. The third trial in the district court was upon the same pleadings, and at the conclusion of the evidence the court instructed the jury to find a verdict for the plaintiff, and assess such damages as they believed she had suffered, not exceeding $5,000. The jury returned a verdict for $1,525, upon which judgment was entered, and the city brings the case here for review.

1. It is insisted that the evidence does not support the allegations brought into the petition by the amendments referred to. But in this we can not agree with the learned counsel for the city. There is very little substantial

conflict in the evidence. It is not clearly shown how long before the accident occurred the grading on Davenport street was done by the city, but it was not less than two years, and by that grading the accumulation of the water in this pond was caused. The pond of water did not exist before the grading was done. There is no attempt to show that there was any necessity on the part of the city to cause this pond of water, by a proper grading of the street. The boys had been playing at a small pond located in a street which intersects with Davenport street, and went along the walk on Davenport street until they came opposite the pond in question, and then crossing over to the south side of the street to a place where considerable grading had been done by the city to bring the street to the proper level. It does not clearly appear how high this grade was made at this point, but it was at least three or four feet above the level of the water of the pond; and the water extended up on the slope, which was a part of the grade made by the city. That is, the grade of the street was from street line to street line, and the necessary slope to the lower ground was from the top of the grade at the street line to the former level of the ground, so that the water which the city, by its grading of the street, caused to accumulate there, extended up a considerable part of the slope. This slope the city must have put there in making its grade. There was no fence or barrier of any kind between this walk and the pond. It appears from the evidence that the boys went down this slope directly from the sidewalk to the edge of the pond, and, with the help of a pole which they found there, succeeded in reaching a raft which was floating on the water, and, after venturing several times upon this raft, were finally thrown into the water, and the Bowman boy was drowned. It also appears from the evidence that this pond of water at one place extended over the sidewalk not far from the point where the boys crossed the same, and was at that time three or four inches deep over the sidewalk. It also appears that the outlet of the pond was over the street in question, at least,

so that in case of a freshet the water escaped over the street. If it can be said that there was a strip of private land between the street and the pond at the point where the boys went upon the pond, this strip was not more than from four to twelve and one-half feet wide. Several witnesses who saw it at the time of the accident, testified that its width was four feet, and opposed to this testimony we have only the testimony of the engineers, who show, by measurements made several years after the accident took place, that the slope from the top of the grade to the level of the water at that point was about twelve and one-half feet when the water was as high as the level of the street over which it might escape, but do not show any knowledge of the depth of the water in the pond at the time of the accident, nor the portion of this slope that was then covered by the water. This slope, then, between the edge of the grade of the street and the water, which was placed there by the city in making the grade, and which was very steep, is now relied upon by the city as private property separating the pond from the street. There certainly is no ground for such contention. The grade, the slope and the pond were all the work of the city in making the improvement; and the city manifestly can not urge that the pond was on private lands and was not on, or in dangerous proximity to, the street as constructed by the city. We think that all of the allegations brought into the petition by the amendments referred to are fully substantiated by the evidence.

2. It is contended by counsel for the city, in an able argument and an exhaustive review of the authorities, that the holding in this case when it was the second time before this court (*Bowman v. City of Omaha,* 59 Nebr., 84), as well as the rule announced in *City of Omaha v. Richards,* 49 Nebr., 244, is unsound; and counsel urges that we review these cases and the authorities cited, and state "the law applicable to actions of this nature." But this we can not do in this case. The law of this case, upon the question discussed by the learned counsel, has been established by the former holdings

of this court herein. When the case was the second time before this court, the sole question was upon the sufficiency of the petition. As before stated, a general demurrer to the petition had been sustained in the district court, and the question determined by this court was that the allegations of the petition, if sustained by sufficient proof, entitled the plaintiff in this case to recover from the defendant. The defendant's objections to the sufficiency of the petition were then fully investigated; the lower court, applying the law of the case as determined by this court, reached a conclusion in conformity therewith, and without re-examining the grounds upon which the former ruling of this court was based, we are constrained to say that the district court did right in so applying the law of the case as ascertained by this court. When this court determines a question of law in a case, and remands the case for trial, the rule so determined is the law of the case, and will not ordinarily be reversed upon a subsequent appeal. *Barker v. Wheeler,* 60 Nebr., 470; *Wittenberg v. Mollyneaux,* 60 Nebr., 583; *Chicago, B. & Q. R. Co. v. Yost,* 61 Nebr., 530; *Motley v. Motley,* 60 Nebr., 593. "Where it has been held on an error proceeding in this court that a petition states a good cause of action, evidence sustaining the allegations of such petition is sufficient to support a verdict and judgment in favor of the plaintiffs in the action." *Garneau v. Kendall,* 61 Nebr., 396; *Smith v. Neufeld,* 61 Nebr., 699. For the same reason objections to the petition on the ground that it does not contain sufficient allegations of damage to next of kin, nor any allegation that notice of the accident was given, can not now be considered.

3. The trial court, upon directing a verdict for the plaintiff, should have given no other instructions except as to the measure of damages. A statement of the allegations of the pleadings was read to the jury, and a number of instructions upon the law bearing upon defendant's liability were given, some at the request of plaintiff and some at the request of defendant; but we do not see how the defendant was prejudiced thereby, since the jury was told to find a

verdict for plaintiff, which was done, and these instructions contained nothing erroneous or misleading as to the measure of damages.

4. It is complained that the verdict of the jury is excessive. This court in a similar case refused to reverse a judgment for $2,850 as excessive. We think that what was there said is applicable to the case. *City of Omaha v. Richards*, 49 Nebr., 244.

It is therefore recommended that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

KATE GALLAHER V. CITY OF LINCOLN.

FILED DECEMBER 18, 1901. No. 10,743.

Commissioner's opinion, Department No. 2.

1. **City Council:** COUNTY BOARD: OFFICER'S SALARY: AUDITING AND ADJUSTING: MINISTERIAL ACT. When a city council or a board of county commissioners audit and adjust the claim of an officer whose salary is prescribed by statute, they act ministerially and not judicially.

2. **Officer:** COMPENSATION: LAW: STATE: COUNTY: SERVICES: BENEFIT: ESTOPPEL. As between a citizen who has performed service as a public officer, for a compensation fixed by law, and a state or a county or a city which has received the benefit of the services so performed, no question of estoppel, as to compensation, can arise.

3. **Contract:** PUBLIC POLICY. A contract between an appointive officer of a city, whose salary is fixed by statute or ordinance, and a city council, by which such appointive city officer agrees to perform the duties of his office for a sum less than that prescribed by law, is against public policy and absolutely void.

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

Halleck F. Rose and *Wellington H. England,* for plaintiff in error:

It is against public policy to permit the appointing officer or board to exact of an appointee, as a condition of appointment to office, surrender of any right, privilege or emolument appertaining thereto. The appointee is not bound by any agreement so exacted, but is entitled to collect the full salary notwithstanding. Such a contract amounts to bribery in its largest sense. Mechem, Public Officers, secs. 372, 373; Throop, Public Officers, sec. 456; *People v. Board of Police,* 75 N. Y., 38; *Purdy v. City of Independence,* 75 Ia., 356; *Kehn v. New York,* 93 N. Y., 291; *Goldsborough v. United States,* Taney [U. S. C. C.], 80.

Between a citizen and a state owing him money for services rendered, no question of estoppel can arise. *Montague v. Massey,* 76 Va., 307, 317.

A salary that is established by statute can not be increased or diminished by executive officers. *Dyer v. United States,* 20 Ct. Cl., 171; *Adams v. United States,* 20 Ct. Cl., 117.

John P. Maule, E. C. Strode and *D. J. Flaherty, contra.*

Argued orally by *Rose,* for plaintiff in error.

OLDHAM, C.

This is a suit in which the plaintiff sued the defendant, city of Lincoln, in the district court for Lancaster county, Nebraska, for $450, alleged to have been a balance due her as salary for services rendered as police matron of said city. There was no contest over the facts in the case, which were all either admitted by the pleadings and stipulation or testified to without contradiction. The undisputed facts are that the city of Lincoln is organized as a city of the first class, having more than 25,000 inhabitants; that the office of police matron in cities having more than 25,000 inhabi-

tants is created by statute (Compiled Statutes, 1899, ch. 13*a*, sec. 14*a*); that said statute provides a salary of $50 per month for the office of police matron; that the plaintiff was duly appointed police matron of said city, and served in said capacity for seventeen months; that she had received $400 from said city for her services; that at the time of her appointment as police matron she agreed with the mayor and excise board of Lincoln that she would serve in said office for the sum of $25 per month; that this amount was paid her at the end of each month for sixteen months of her service; that she afterwards filed an account with the city council of Lincoln for the full amount of her salary as provided by statute; that this account was disallowed by the city council, and that no appeal was taken from their action. On these undisputed facts the case was tried to the court without the intervention of a jury, and the court found for the defendant, and plaintiff brings error to this court.

Plaintiff in error has filed a most able and exhaustive brief in which the judgment of the district court is strongly assailed as being contrary to law, contrary to public policy, and entirely unsupported by the undisputed facts of the record in the case. The defendant city has not seen fit to favor us with a brief attempting to set forth any theory on which the judgment of the district court might be sustained. We think that a case involving so important a question of public policy as the one at issue in the case at bar was deserving of some attention on the part of the city of Lincoln. In the absence of a brief on the part of the defendant, we turn to the answer filed in the court below to gather the theory on which the city seeks to avoid this obligation. We find from the answer that three defenses appear to be relied upon. One was that the account having been filed with the city council, and disallowed by that body, and no appeal having been taken from such action, this constituted a judicial determination of the claim by which the plaintiff is bound. It must have been on this theory that the learned trial judge determined the contro-

versy in favor of the defendant, for under the undisputed testimony plaintiff, even on the city's theory of the amount she was to receive per month, would have been entitled to a judgment of $25. If the district court determined the controversy on this ground, its judgment was clearly erroneous; for when a city council or a board of county commissioners audit and adjust the claim of an officer whose salary is prescribed by statute or by ordinance, they act ministerially, and not judicially. *Kemerer v. State,* 7 Nebr., 130; *State v. Roderick,* 25 Nebr., 629; *Hazelet v. Holt County,* 51 Nebr., 716.

The next defense set up in the answer of the defendant was an estoppel, based on the theory that, plaintiff having received and accepted $25 per month for sixteen months of her services, she is now estopped from claiming any other compensation. This, then, presents the question: Can a public officer, whose salary is fixed by law, estop himself, as between himself and the government, from claiming full compensation by accepting an amount less than that prescribed by statute for such services? A careful examination of many authorities on this subject leads us to the conclusion that he can not. Among the well-digested opinions on this question is the case of *Montague v. Massey,* 76 Va., 307. The question arose in this case in this manner: The decedent, Judge Montague, had served for over a year as circuit judge of the state of Virginia. The legislature of that state had illegally attempted to reduce the compensation of his office from $2,000 to $1,600 per annum. Judge Montague accepted the compensation of $1,600 for over a year. After his death the administrator of his estate brought this action against the auditor of the state of Virginia to compel the auditor to issue a warrant for the full amount of compensation at the rate of $2,000 per year for the term for which the judge had served. The auditor defended on the theory of waiver and estoppel. In determining the case the court said: "The claim of Judge Montague's administrator can only be defeated upon one of two grounds,—either of estoppel or waiver. The doctrine of

estoppel can not be applied to this case. Estoppel must be reciprocal and mutual, and is founded upon the idea that the acts of the party estopped must result in injury to the other party, and generally that it would be a fraud if the right asserted be maintained. No such question can arise between the state and a citizen claiming money due from the state for services rendered." The doctrine herein announced has been quoted with approval by the text writers and by the courts of other states. In the case of *People v. Board of Police,* 75 N. Y., 38, this question was determined by the court of appeals of the state of New York under the following state of facts: Satterlee, the relator, had been appointed police surgeon of the city of New York. The salary of his office was fixed by statute at $2,250 per annum. At the time of Satterlee's appointment the board of police, by resolution, attempted to reduce the salary to $1,500 per annum. Under this resolution the relator accepted the office, and discharged his duties for over two years, and drew the salary of $1,500, and then brought this action for the balance due at the rate of $2,250 per annum, the rate fixed by statute. The court of appeals sustained his claim, and held that his act in accepting a lesser compensation was neither a waiver nor an estoppel of his right to the full amount of the salary prescribed by statute. The doctrine of this case, and also of *Montague v. Massey, supra,* were each adhered to and quoted with approval in the case of *Kehn v. State,* 93 N. Y., 291. We therefore conclude that as between a citizen, who has performed service as a public officer, for a compensation fixed by law, and a state or a county or a city, which has received the benefit of the services so performed, no question of estoppel, as to compensation, can arise.

The only other question on which the defendant city seems to have relied is as to the validity of the contract entered into between the plaintiff and the excise board of the city for the performance of the services of her office for a less sum than that provided by statute. Contracts of this nature, when brought to the attention of courts, both in

this country and in England, have been universally held to be against public policy and absolutely void. A city council has no more authority to let out its appointive positions, where salaries are fixed by statute, or by ordinance, to the lowest bidder, than it has to receive a direct and overt bribe from an applicant as the condition for such an appointment. While the entering into such an illegal agreement as that which is admitted to have been made in the case at bar would have been a good cause for the removal of the plaintiff from the position which she procured by such means, yet this was a contract that went to her compensation only; and, as she was permitted to fulfill the duties of her office, her own wrong in entering into this agreement can not excuse the city from paying the salary fixed by statute, which is attached to, and one of the emoluments of, the office which she held. *Purdy v. City of Independence,* 75 Ia., 356. The injury to the public from contracts of this nature, both with reference to appointive and elective offices, is fully discussed, and most righteously denounced, in the case of *State v. Collier,* 72 Mo., 13, and *State v. Purdy,* 36 Wis., 213.

It is therefore recommended that the judgment of the district court be reversed, and that this case be remanded to the district court with directions to render judgment for the plaintiff for $450, with interest thereon at the rate of 7 per cent. from May 10, 1897.

SEDGWICK and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded with directions to render judgment for plaintiff for $450, with interest thereon at the rate of 7 per cent. from May 10, 1897.

REVERSED AND REMANDED.

FRANK E. MOORES, MAYOR, ET AL. V. STATE OF NEBRASKA, EX REL. SAMUEL I. GORDON.

FILED DECEMBER 18, 1901. No. 12,247.

Commissioner's opinion, Department No. 2.

1. **Constitutional Rule of Uniformity.** The constitutional rule of uniformity is not violated if all courts of the same grade have jurisdiction of the same matters and equal authority in dealing with them. *State v. Magney*, 52 Nebr., 508, followed.

2. **Constitutional Law:** STATUTORY PROVISIONS: SEPARABLE AND INSEPARABLE SECTION: SUBSTANCE. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. *State v. Stuht*, 52 Nebr., 209, 217, followed.

3. **Police Magistrate: Constitution.** *Held*, That the various provisions of the statutes conferring jurisdiction on police magistrates are not in violation of the provisions of section 19, article 6 of the constitution, and are valid.

ERROR from the district court for Douglas county. Tried below before BAKER, J. *Affirmed.*

W. J. Connell, for plaintiffs in error.

J. W. Eller, contra.

Argued orally by counsel for both parties.

OLDHAM, C.

This was an action for a writ of mandamus instituted by the relator against the mayor and city council of the city of Omaha to compel the allowance of his salary as police judge of said city for the year 1900 at the rate of $2,500 per annum. The cause was tried below on substantially the same issues as those joined in the earlier case of *State v. Moores*, 61 Nebr., 9. The relator had judgment below and respondents bring error to this court.

In the court below, respondents, by their answer and return, tendered the issue that the relator was the acting police judge of the city of Omaha for the year 1900, and that he was entitled to a salary at the rate of $1,200 per annum; but in this court counsel for the respondents has abandoned that issue, and now contends that the statute conferring jurisdiction on police judges of cities of the metropolitan class, and by inference the statutes conferring jurisdiction on all police judges in all cities in the state of Nebraska, are unconstitutional, and that the statutes conferring jurisdiction were the inducement for the enactment prescribing salaries for such officers; and hence all must fall together. Respondents' theory is that there is a want of uniformity in the jurisdiction conferred on police judges in the cities of the different classes provided for in the statutes governing cities of such various classes, and therefore they are all in violation of section 19, article 6, of the constitution of Nebraska. Without going into a discussion in detail of the various enactments conferring jurisdiction on police magistrates, it is sufficient to say that the jurisdiction conferred on these magistrates in the enforcement of the criminal laws of the state applies uniformally to police judges in cities of all classes, and that there are a large number of these provisions. In addition to these provisions, the different sections of the statutes governing cities of the different classes confer on the police judges a jurisdiction to impose fines and penalties for violation of the ordinances of the city of the class in which each one holds his office.

The office of police magistrate or police judge is called into existence by the constitution, and, as we have already seen, there is an absolutely uniform jurisdiction prescribed by statute for these officers in the enforcement of the criminal laws of the state; and, even if we should conclude that the various provisions of the statute governing cities of the different classes had violated constitutional restrictions in not conferring a uniform jurisdiction in the enforcement of ordinances, we would not even then feel jus-

tified in saying that this was the only inducement that could have moved the legislature to provide compensation for this class of officers. Counsel for the respondents cites the case of *Gordon v. Moores,* 61 Nebr., 345, as an authority tending to support his position, but an examination of that case leads us to a different conclusion. In that case this court held that section 103, chapter 10, Session Laws, 1897, which attempted to confer upon district courts in metropolitan cities authority to remove police magistrates for misconduct in office, was unconstitutional, because it sought to confer a jurisdiction on the district courts in such cities which was not conferred on the other district courts of the state, and this court therefore held this enactment bad; but it did not hold that, because of a legislative attempt to confer an unauthorized jurisdiction on district courts in metropolitan cities, that the entire jurisdiction of such courts was nullified and that such unauthorized attempt to confer jurisdiction was the inducement that led to the appropriations for salaries for district judges in metropolitan cities, and hence all the enactments must fall together; and it would have required such a holding as this to have sustained the position contended for by respondents' counsel.

An examination of the different sections of the statute governing cities of the different classes convinces us that there is no want of uniformity in the jurisdiction which these statutes confer upon police judges. This court has said in the case of *State v. Magney,* 52 Nebr., 508, that the constitutional rule of uniformity we are now considering is not violated if all courts of the same grade have jurisdiction of the same matters and equal authority "in dealing with them." Applying this rule to these statutes, and considering the police magistrates all as courts of one grade, we find that they all have the same jurisdiction in the enforcement of the statutes of the state, and each one is given an exclusive jurisdiction to prescribe fines and penalties for the violation of the ordinances of the city in which he may exercise the duties of the office of police mag-

istrate. While it may be true that cities frequently pass ordinances attempting to confer illegal authority upon police magistrates, yet, if they do, the courts of the land will strike down the illegal ordinance, and not the constitutional officer who is charged with the duty of enforcing it; and the same result would follow if the legislature should pass a law attempting to confer an unauthorized jurisdiction upon such officer. Even if the provisions of the statute conferring jurisdiction on the police magistrates of the cities of the various classes in the enforcement of ordinances were bad for want of uniformity, still these provisions are plainly severable from the various sections of the Criminal Code, which does confer a uniform jurisdiction on all these magistrates; and even if these various sections had all been passed in one act,—which they were not,—we would still apply to such act the rule of construction announced in *State v. Stuht,* 52 Nebr., 209, 217, which is: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance."

It is therefore recommended that the judgment of the district court be affirmed.

SEDGWICK and POUND, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HENRY GIBSON, ADMINISTRATOR, APPELLANT, V. MANETTA HAMMANG ET AL., APPELLEES.

FILED DECEMBER 18, 1901. No. 10,513.

Commissioner's opinion, Department No. 2.

1. **Finding of Court:** EVIDENCE: DEPOSITIONS. The rule that the findings of the district court will not be disturbed upon appeal if there is evidence sufficient to sustain them, does not apply with the same force to a case heard almost entirely upon depositions which involve transactions in another state, so that the trial judge could have had no advantage from general local knowledge of the parties, the witnesses and the subjects of controversy.

2. **Fraud:** PRESUMPTION: VOLUNTARY CONVEYANCE: RELATION OF PARENT AND CHILD. In case of a gift or voluntary conveyance from parent to child, no presumption of fraud or undue influence arises as between the parties thereto, from the mere fact of the relation.

3. ———: ———: ———: ———: AGE AND PHYSICAL CONDITION: UNDUE INFLUENCE: CIRCUMSTANCES. But where a conveyance from a parent to one of several children by way of gift, *prima facie*, is not a just or reasonable disposition of the parent's property, and the age and physical condition of the parent, the proportion of the property conveyed to the whole estate, and the circumstances surrounding the gift suggest fraud and undue influence, the transaction should be closely scrutinized, and the burden is upon the donee to overcome the presumption of fact arising from such circumstances.

4. **Review:** FACTS. A widow nearly seventy-eight years of age, much weakened by a recent illness, conveyed properties of the value of $10,000, out of a total estate of about $18,000, to one of her eight children. Upon review of the evidence in a suit brought by her to set aside one of the conveyances, *held*, that the transfer was procured by undue influence, and should be canceled.

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

C. E. Herring, for appellant.

William O. Bartholomew and *George A. Day, contra.*

Argued orally by *Herring,* for appellant; by *Bartholomew, contra.*

POUND, C.

Mrs. Sarah Gibson, the original plaintiff in this cause, was a widow, about seventy-eight years of age, residing at Los Gatos, California. She was the owner of the property on which she lived at Los Gatos, a store building there, some stock in a bank and in a water company, and some improved property in Omaha in this state,—in all, if we may judge by the value of her estate when she died, not very long subsequent to the transaction here in question, worth about $18,000. In April, 1896, the defendant, her daughter, who lived in Omaha, came to visit her and remained about six weeks, during which time Mrs. Gibson conveyed to her the home property at Los Gatos and the property in Omaha. This suit was brought by Mrs. Gibson in June following to set aside and cancel the conveyance of the Omaha property on the ground that it had been procured by fraud and undue influence. The plaintiff died soon after, and the cause proceeded in the name of her representative. In the lower court there was a general finding for the defendant, and judgment accordingly, which is now appealed from.

At the outset we are met by the question how far we ought to undertake to review the evidence. As a general proposition, if the evidence is conflicting, or if there is evidence sufficient to sustain the findings of the district court, its determination of questions of fact will not be disturbed, even though we might have reached a different conclusion if called upon to decide such questions in the first instance. If that principle is to be applied to the case at bar, our task is a very simple one; for the testimony of the defendant, of itself, is sufficient to sustain the findings below, within the meaning of the rule. But in *Delorac v. Conna,* 29 Nebr., 791, 811, it is held that the rule does not obtain in its full force where the testimony is not taken orally in

court, and that in such cases this court will examine questions of fact *de novo*. In some cases, it is true, even where all the testimony was taken out of court, and was before the trier of fact only in written form, this court has refused to interfere with findings of fact supported by evidence. *Waldron v. First Nat. Bank*, 60 Nebr., 245. It will be found, however, that there was a peculiar and a sound reason for such course in each of those cases. Thus, in *Waldron v. First Nat. Bank, supra*, the issue was as to the value of certain real property situated in the county where the district court sat, and was to be determined by the affidavits of residents of that county, of whom the trial judge knew more as to their character and credibility than this court could expect to know or to learn from the record. Here we have a case in which a part of the evidence was taken in open court, but by far the greater part was before the district court only in depositions, and in which the transaction in question took place in another state, so that the trial judge could have no advantage over us by reason of general local knowledge of the parties, the witnesses or the subjects of controversy. Under such circumstances, the reason of the general rule fails; and as the rule is of purely judicial origin, intended to promote justice by leaving the determination of questions of fact to those best situated to reach a sound conclusion, we think it should only be applied where its reason operates, and that where the lower court enjoyed no substantial advantage, by reason whereof it was presumably better able to decide rightly than we are, it is the duty of this court to try the facts *de novo* and announce its independent conclusion. We are the more urged to such a holding in this case, because we gather from the record that the lower court misapprehended the rules as to burden of proof which in our opinion should govern.

It seems to be contended by counsel for appellant that the relation of parent and child is so far one of trust and confidence that in any case where one obtains a conveyance from the other the burden is upon the grantee to establish

that the transaction was fair and honest. We are unable to assent to this proposition, nor is it sustained by the authorities cited. While the relation predisposes to trust and confidence, yet some circumstances of reliance or dependence of one upon the other or habitual trust ought to appear in addition. No presumption of fraud or undue influence arises from the mere existence of the relation. *Samson v. Samson,* 67 Ia., 253, 25 N. W. Rep., 233; 27 Am. & Eng. Ency. Law, 488. Where the parent is old and feeble and dependent upon the child, or where the child has been given the control and management of the parent's affairs, or has been largely consulted therein, or where they have long lived together, the fiduciary relation may be clear enough. But where, as in this case, parent and child have long lived apart, neither is dependent on the other, neither has habitually consulted or advised with the other, and but a few weeks have elapsed from their reunion to the transaction in question, while we do not deny that a relation of trust and confidence might arise, as Mrs. Gibson testifies there did in this case, such relation is not a necessary presumption from the mere fact that the parties are parent and child, but must be established by the party attacking the transfer, as a part of his case. At least until such trust and confidence are shown, the burden is upon the plaintiff. Granting so much, however, we do not think that the trial court was right in assuming, as he appears to have done, that in case of conflicting testimony as to the immediate details of the transaction, this conveyance must stand. In this case the grantee was one of eight children of the grantor. The conveyance was a mere gift. The grantor was nearly 78 years of age, a widow, much weakened by a recent illness; and the properties conveyed were of the value of $10,000 out of a total estate of about $18,000. Even if we accept the defendant's statement that she held and intended to hold the Los Gatos property merely in trust and took beneficial title to the Omaha property only, she received one-third, at least, of the entire estate, in which, on the face of things, she should have had but

one-eighth, and that third consisted of the property most likely to rise in value, which has since, as we must know, greatly enhanced. Where a conveyance from a parent to one of several children by way of gift, *prima facie,* is not a just or reasonable disposition of the parent's property, and the age and physical condition of the parent, the proportion of the property conveyed to the whole estate, and the circumstances surrounding the gift suggest fraud and undue influence, the transaction should be closely scrutinized, and the burden is upon the donee to overcome the presumption of fact arising from such circumstances. In other words, though the relation of parent and child may not necessarily and of itself alone cast a burden of proof upon the one receiving a gift or conveyance from the other, so as to bring the rule of law as to burden of proof in cases of relations of trust and confidence into play, it is so far liable to abuse that a strong presumption of fact may arise, from circumstances of a particular transfer, which will require close scrutiny of the transaction, and cast a burden upon the grantee. It is a familiar doctrine that a court of equity scans with great jealousy a transaction where there are any grounds for holding that influence has been acquired and abused, or that confidence has been reposed and betrayed. *Smith v. Kay,* 7 H. L. Cas. [Eng.], 750, 759. In the greater number of cases a long-standing confidential relation existed. But numerous illustrations of the presumption stated may be found in the authorities. Thus, in *Davis v. Dean,* 66 Wis., 100, 110, 26 N. W. Rep., 737, the court reversed a decree sustaining a conveyance by a mother to her adopted son, although it could not be said "that fraud and undue influence were proved affirmatively, but only that the circumstances suggest them." The court said: "Because of the suspicious circumstances under which the conveyances were made, and the injustice which will be inflicted upon the heirs of the grantor if the conveyances are held valid, the law casts upon the grantee the burden of showing that the conveyances are untainted with undue influence or other fraud, but were the intelligent and delib-

erate act of the grantor." In *Worrall's Appeal,* 110 Pa. St., 349, 1 Atl. Rep., 380, it is said that the burden may be cast upon the grantee where there is a suspicion of undue influence raised by general circumstances. Such suspicion of fraud and undue influence is especially strong where the grantee took an active part in procuring the conveyance to be made. *Disch v. Timm,* 101 Wis., 179, 77 N. W. Rep., 196, and cases cited.

It would not be possible, in the reasonable limits of an opinion, to review the evidence in detail. The salient facts giving rise to a presumption of undue influence have been noted already. In addition, it appears that the grantee was an active agent in procuring the conveyance, and in the immediate details of its execution. There is a sharp conflict between her and her mother as to who first suggested it and the reason and cause of its execution. Mrs. Gibson, who impresses us as a fair witness, testifying under no restraint whatever, and, in view of her age and physical condition, sustaining an adroit and protracted cross-examination remarkably well, testifies that the defendant procured the deeds by persistent railing against her brothers, and representations that they, or some of them, were endeavoring to have a guardian appointed; that her intention and that of her deceased husband had always been to divide the property equally among the eight children; that she knew she was doing wrong at the time she made the deed, but was too weak and too much under the influence of her daughter to resist; that she had no one to advise with at the time she signed, except defendant, and "was too much overpowered by her influence and her talk and promises." Another daughter, who lived near at hand, was kept in ignorance of the transaction, as well as a brother living in the same house. The relations of defendant and this brother were not cordial, but no reason appears for concealment from the sister. Mr. Bowden, an attorney, in whose office the deed was drawn, testifies that she appeared perfectly capable, and that the deed was in every way her free and voluntary act, and, as she then

stated, exactly as she wanted it. But several considerations operate to diminish the weight of this testimony. He testifies positively that he was not Mrs. Gibson's attorney at the time, so that he evidently represented Mrs. Hammang, with whom he had been in correspondence previously. He represented the latter in this suit. If such was the case, and Mrs. Gibson was, as she says, completely under her daughter's influence while the two were at his office, he can hardly have had a fair opportunity to judge whether she acted freely or not. It is true, he testifies that she had previously told him that she intended to give the Omaha property to the defendant; but when, on cross-examination, he enedavored to draw a statement to that effect out of Mrs. Gibson, she repeatedly and emphatically denied it. The strongest point made by defendant is that she had received less from her parents than the rest of the family, and that the gift was intended to make up the deficiency. If this were established, it would go far to prove her case. But the most that can be said is that one of the brothers had received about double what had gone to any of the others. Although defendant testified that she had received nothing because of hostility of her parents towards her former husband, her mother denies that there ever was such hostility and asserts positively that, with the exception of the one son who had received more than his proportion, and a daughter other than defendant, who had been given nothing, the children had been dealt with substantially alike. Surely, if the defendant alone of all the children had received nothing, while the others had been well provided for, a fact of such importance was capable of proof by more direct and competent evidence than was adduced. As the case stands, we feel convinced of the substantial truth of Mrs. Gibson's testimony. With respect to the claim that this suit was brought by undue influence exerted by the other children, we think Mrs. Gibson's statements in evidence, in a place where all were represented and she was at full liberty to act freely, speak for themselves. When asked if any one advised her to

bring the suit, she said: "I have the advice this way,—that she had got all my property, and there were seven other children; and I could not feel it was right to let it go. * * I always considered it unjust,—the others being left out." In another place, when pressed on the same point, she said to counsel for defendant: "I told you, Mr. Bowden, had it been left to myself, if I had gone to the grave a beggar, I never would have entered suit against my daughter. But I could not let a greedy girl take it all." We are satisfied that these statements, not the deed, represent the real will and intention of the grantor, and that the deed was procured, if not by fraud, through representations that the sons were taking steps to have a guardian appointed, and by a persistent pressure and urgent solicitation, which Mrs. Gibson, in her then weak condition, could not resist, and hence, under repeated adjudications of this court, by undue influence. *Hartnett v. Hartnett,* 42 Nebr., 23; *Munson v. Carter,* 19 Nebr., 293.

We recommend that the decree be reversed and the cause remanded with directions to enter a decree for plaintiff as prayed.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded with directions to enter a judgment for plaintiff as prayed.

REVERSED AND REMANDED.

ALFRED E. HARGREAVES V. ORESTES B. TENNIS ET AL.

FILED DECEMBER 18, 1901. No. 10,562.

Commissioner's opinion, Department No. 2.

1. **Creditor:** GARNISHMENT: LIEN: SUIT IN EQUITY. A creditor who has obtained by garnishment proceedings a lien upon a stock of goods fraudulently conveyed, may maintain a suit in equity to set aside the transfer and reach the goods or their value.

2. **Creditor's Bill.** Such suit is in the nature of a creditors' bill and is maintainable, without showing special facts making the remedy by action at law for unsatisfactory answer inadequate.

3. **Fraudulent Conveyance:** INTEREST. One who takes a stock of goods under a fraudulent conveyance to defeat the vendor's creditors and converts them to his own use, is properly charged with interest upon their value.

4. **Creditors' Suit:** AMOUNT OF RECOVERY. If the fraudulent vendee disposes of the goods for less than they were worth, recovery in a creditors' suit is not to be limited to the proceeds, but he may be charged with their full value.

5. ———: FRAUDULENT CONVEYANCE: VENDEE: CREDIT: ARTICLES STOLEN. The vendee in a fraudulent conveyance is not entitled to credit in a creditors' suit for articles included in the conveyance which were stolen from him while he held thereunder.

6. **Fraudulent Transfer:** ADVANTAGE TO VENDEE: LIABILITY AS GARNISHEE. A transfer made for the purpose and with the intent of defrauding creditors being of no effect as to the latter, no advantage can accrue to the vendee, as against them, by reason thereof. Hence, although the judgment debtor may have been indebted to the vendee at the date of the fraudulent transfer, the latter is not entitled to a lien on the goods for such amount nor to have it deducted from his liability as garnishee.

7. **Cross-Petition:** ESSENTIAL AVERMENTS OMITTED: DEFECT WAIVED BY ANSWER. An omission of essential averments in a cross-petition, may be cured by allegations in the answer which amount to an admission of the facts upon which the right to relief depends.

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

Tibbets Bros., Morey & Anderson, for plaintiff in error.

James E. Philpott and *Ricketts & Wilson, contra.*

POUND, C.

Charlotte Blair, a milliner, being in embarrassed circumstances, executed a chattel mortgage conveying her stock of goods to her son-in-law, and also transferred a considerable amount of real property belonging to her to his bookkeeper. Thereafter certain of her creditors brought

attachment proceedings, in the course of which they garnisheed the mortgagee of the stock, while he held it under the chattel mortgage. On obtaining judgments against Mrs. Blair, and after return of executions thereon unsatisfied, the creditors brought a general creditors' suit to set aside the transfers of the real property, cancel and set aside the chattel mortgage, and for general relief. They also set up liens upon the stock by virtue of said garnishment proceedings. John H. Blair filed a cross-petition, alleging that he was the husband of Mrs. Blair, and claiming a portion of the real property in question as a homestead. Three trials were had in the court below, each resulting in findings for the plaintiffs. At the last trial, with which alone we are concerned, the court made full and complete findings of fact and law to the general effect that the transfers, both of the stock and of the real property, were fraudulent and void as to creditors, and rendered judgment accordingly. It was also found that John H. Blair was entitled to a homestead in the property described in his cross-petition, and his title thereto was quieted. Error is prosecuted by the mortgagee of the stock of goods.

In view of the relation between the parties, and the consequent incidence of the burden of proof, it is manifest that the findings of the trial court as to the nature and purpose of the transfer are sustained by the evidence. The points chiefly urged in argument, and those which alone require our attention, are points of law. It is first contended that the petition fails to state a cause of action, for three reasons: Because there is no allegation "that Charlotte Blair, the judgment debtor, was a resident of Lancaster county, Nebraska"; because there is no allegation that the garnishee was insolvent or that for any reason the statutory action at law for unsatisfactory answer in garnishment was not adequate; and because there is no allegation that plaintiffs had no adequate remedy at law. We are unable to perceive any force in the first objection. Section 207, Code of Civil Procedure, requires

that the garnishee, not the attachment debtor, be within the county; and by the express terms of the Code an attachment is maintainable against a non-resident, so that the validity of the garnishment did not necessarily depend upon the residence of the judgment debtor. It is alleged that judgments were duly rendered against her, which, under section 127, Code of Civil Procedure, sufficiently alleges all prior steps and shows jurisdiction of the person of the defendant. If it was intended to object because the residence of the garnishee is not alleged, it may be remarked that the Code merely requires that he be "within the county" and that the petition shows this garnishee answered in the garnishment proceedings, and that he was holding in the county the stock of goods in respect of which he was garnisheed. Nor is the next objection of any force. The attaching creditors acquired an equitable lien upon the stock of goods by garnishment without regard to the solvency or insolvency of the garnishee. *Reed v. Fletcher*, 24 Nebr., 435, 458; *Grand Island Banking Co. v. Costello*, 45 Nebr., 119. And after garnishment the creditors might bring the same proceedings to protect or enforce their equitable lien that an attachment creditor or other lien holder might maintain. *Reed v. Fletcher, supra.* "The validity of a mortgagee's right to chattels held in his actual possession by virtue of his mortgage may be called in question by a garnishing creditor alleging and proving fraud, as well as by an actual levy on the chattels in defiance of the claims of such mortgagee." *Grand Island Banking Co. v. Costello, supra.* Such a suit is in the nature of a creditors' suit, to reach the goods and property of the judgment debtor fraudulently disposed of and enforce the equitable lien upon the goods arising from the garnishment. All equitable rights and charges are enforceable by appropriate proceedings in equity. Although we now have a further statutory remedy by action at law for unsatisfactory answer, the equitable remedy by creditors' bill is not superseded. Maxwell, Code Pleading, 165. In this case there were also fraudulent transfers of real

property to a person other than the garnishee, and hence a creditors' bill to reach all the property and adjust the claims of all the creditors in one suit was appropriate, if not necessary. *Stoll v. Gregg,* 23 Nebr., 228. It was not essential to show insolvency of the garnishee or any other fact rendering the statutory action for unsatisfactory answer inadequate. As to the last objection, if the facts alleged entitled the plaintiffs to proceed in equity, there was no need of a formal allegation of no remedy at law. *Ball v. Beaumont,* 59 Nebr., 631. The old "jurisdiction clause" is omitted to-day even in formal chancery pleading. Objection is also made that the court rendered a money judgment against the mortgagee who held the stock. But as he disposed of the goods and converted the proceeds, no other remedy was possible. Where the subject of an equitable lien is put out of existence by the defendant, the court, having once obtained jurisdiction of the cause, will give complete relief by way of a money judgment. *Morrissey v. Broomal,* 37 Nebr., 766.

The court fixed the value of the stock of goods at $3,800, but rendered judgments against the fraudulent vendee amounting to about $4,400. This is complained of as error and it is argued that the liability of a garnishee can not exceed the value of the property or amount of the fund actually in his hands. This would often be true where he was an ordinary debtor or trustee of the judgment debtor. But in this case lawful interest upon the value of the stock from the time it came wrongfully into the hands of the defendant in question to the date of the decree amounts to more than the difference between the value of the stock and the amount for which he was held liable. Hence the question comes to this: Is one who takes a stock of goods under a fraudulent conveyance to defeat the vendor's creditors, and disposes of them and converts them to his own use, chargeable with interest upon their value? There can be but one answer. In equity the property belonged to the creditors, not to him. He converted their property, and deprived them of its use, or the use of the money it would

have brought them, and their right to compensation therefor is obvious. *Risser v. Rathburn,* 71 Ia., 113, 32 N. W. Rep., 198.

Another alleged error grows out of the fact that the stock of goods was sold under the fraudulent chattel mortgage for much less than its value as found by the court. Counsel argue that the mortgagee's liability is that of a garnishee only; that the plaintiffs had a lien upon the goods and their proceeds, and, the goods having been sold, recovery should be limited to the proceeds in his hands. For like reasons they argue that he is entitled to credit for certain articles included in the conveyance, which were stolen from him while he held thereunder. These questions have been settled many times. As we have seen, this is a creditors' suit, and the garnishment proceedings are material only in that by virtue thereof the plaintiffs obtained liens on the stock. It is fundamental that the measure of liability of a fraudulent vendee of chattels in a creditors' suit is the value of the property. *Smith v. Sands,* 17 Nebr., 498; *Meyer v. Stone,* 21 Nebr., 717. The goods belonged to the plaintiffs, as between them and this defendant, and he had converted them. Having converted them, plaintiffs were entitled to claim their value; and when a portion of the goods were stolen, he can not undo his act of conversion as to that portion, and say to the plaintiffs that it was their goods which were stolen. The consideration recited in the chattel mortgage was $2,800. But the court found that, while the evidence showed Mrs. Blair was indebted to the mortgagee in some amount at the date of the transfer, such indebtedness was not shown to have amounted to $2,800, although the goods were found to be worth $3,800; nor was it shown that the mortgage was given to secure such indebtedness. It was also found that the mortgage was made for the purpose of defrauding Mrs. Blair's creditors, and that the mortgagee not only participated in such purpose, but instigated its execution to that end. Hence, under the well settled rule in this state, the transfer was void as to creditors. *Hedrick v. Strauss,* 42

Nebr., 485; *Ellis v. Musselman,* 61 Nebr., 262. This completely disposes of the further claim urged in the briefs that, if Mrs. Blair was indebted to the mortgagee "in any amount, he was entitled to a lien for such amount upon the proceeds in his hands and was entitled to have such amount deducted from his liability as garnishee." The conveyance being of no effect as to creditors, no advantage could accrue to him as against them by reason thereof. He was bound to restore the stock or its value to the creditors, who had a charge thereon in equity to the amount of their claims, and could claim no lien thereon by reason of the fraudulent and ineffectual transfer or his wrongful possession thereunder. *Hardt v. Schwab,* 72 Hun [N. Y.], 109.

Finally exception is taken to that portion of the decree which finds one of the tracts of land conveyed to be the homestead of John H. Blair and awards it to him as such. The averments of his cross-petition are fatally defective, and, if they stood alone, would not suffice to support this portion of the decree. We do not perceive how this portion affects the rights of the present plaintiff in error, or is prejudicial to him. But assuming that it is, we think there is enough in his answer to supply the defect in the cross-petition. By order of court, after the cross-petition of John H. Blair had been filed, Hargreaves filed an itemized account of the sum claimed to have been due him from Mrs. Blair at the time of the transfer. This account was verified and was intended to be taken as part of his answer; the court having ordered him to make his answer more definite and certain by setting forth such sums by items. In this account he recited that he had "indorsed the mortgage now past due on the homestead mentioned in these proceedings." The only homestead mentioned, was the property claimed as such in the cross-petition of John H. Blair. After admiting its homestead character in his answer, and thus admitting the ultimate fact upon which the relief granted by the court had to depend, he can not complain that the allegations of the cross-petition are defective

or insufficient. *Beebe v. Latimer,* 59 Nebr., 305; *Railway Officials' & Employees' Accident Ass'n v. Drummond,* 56 Nebr., 235. It may be proper to say that the able counsel who now appear for the plaintiff in error seem to have had no part in the proceedings in the lower court till after issues had been made up and two trials had been had, and that they were limited on the third trial to the issue as to the value of the stock. We presume that some of the points presented were, in a measure, forced upon them. At any rate, after going over all the errors argued in detail, we find nothing of any force and are satisfied that the decree is in all respects in accordance with law.

We therefore recommend that the decree be affirmed.

SEDGWICK and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MERCHANTS' NATIONAL BANK OF OMAHA ET AL., APPELLANTS, V. JOHN W. MCDONALD, SHERIFF, ET AL., APPELLEES.

FILED DECEMBER 18, 1901. No. 10,119.

Commissioner's opinion, Department No. 3.

1. **Insolvent Corporation:** PREFERRING CREDITORS. It is the firmly established rule in this state that the officers of an insolvent corporation can not prefer debts to third persons for which they are obligated as sureties.

2. **Creditors' Bill:** LIEN. The filing of a creditors' bill establishes a lien in favor of the plaintiff on the property or fund sought to be reached thereby from the date of the filing. One who intervenes in an action in the nature of a creditors' bill is entitled to a lien on the fund sought to be reached in such proceedings from the date of such intervention.

3. **Creditor:** JUDGMENT: INSOLVENT CORPORATION. A creditor whose claim has not been reduced to judgment can not maintain an action against an insolvent corporation for the ratable distribution of its assets among its creditors; and a creditor who has

reduced his claim to judgment and had execution thereon returned unsatisfied who intervenes in such action is entitled to a preference in the payment of his claim.

4. **Admission of Evidence:** TRIAL TO COURT: INCOMPETENT AND IMMATERIAL EVIDENCE SOLE BASIS OF FINDING. It is a settled rule of this court that a judgment will not be reversed simply because the trial court, sitting without a jury, erred in admitting incompetent or immaterial evidence; but this rule has no application in a case in which it appears that such evidence is the sole basis of the findings and judgment assailed.

5. **Replevin From Sheriff:** MEASURE OF DAMAGES. When personal property held by a sheriff under a valid writ of attachment is wrongfully taken from him in replevin, by a person not a party to the suit, the measure of damages, in case the property can not be returned, is its value at the time of the taking, with interest, not exceeding the amount required to satisfy the writs.

6. ———: ———: EVIDENCE. When personal property, consisting of a stock of merchandise held by a sheriff under a valid writ of attachment, is wrongfully taken from him in replevin by a person not a party to the suit, it is error to confine the evidence upon the measure of damages to the market value of the goods in the ordinary course of trade and to the price at which new fresh goods of like descriptions could have been purchased from wholesale dealers in them. The true inquiry in such case is what the value of the goods was at the time of the taking in the situation in which they then were, having a view to the manner in which the sheriff, if his possession had not been disturbed, could lawfully have disposed of them; and if there is no evidence in the record directed to that inquiry, there is no competent evidence from which to assess the amount of the sheriff's recovery.

7. ———: ———: ———: WITNESS. In a case like the foregoing testimony by competent witnesses to the value of the goods in the ordinary course of trade is admissible, as having an indirect bearing upon the principal inquiry; but when it appears that the goods, or a part of them, are to some extent shopworn and deteriorated in value, a witness who has never seen them or one whose only knowledge of value is derived from the inspection of invoices and the examination of trade catalogues of prices, or one who is ignorant of the kind of manufacture and of the description of the form and structure of the articles in controversy, is incompetent to testify as to values.

8. **Review.** On an appeal to this court, in a case in which an important question is that of value, and in which there is not sufficient evidence in the record to permit of its adjudication, the judgment of the district court will be reversed and a new trial awarded.

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

Action by John W. McDonald, sheriff, against the Merchants' National Bank of Omaha, consolidated with other actions for the distribution of the assets of the Hobrecker Stove Company.

George E. Pritchett and *Warren Switzler,* for appellants.

Edson Rich, Winfield S. Strawn, W. A. Corson, C. W. DeLamatre, Arthur C. Wakeley, Bartlett, Baldrige & De Bord and *Congdon & Parish, contra.*

DUFFIE, C.

On April 24, 1896, the Hobrecker Stove Company, a corporation doing business in the city of Omaha, made a bill of sale of all its stock in trade to the Merchants' National Bank of Omaha, to secure the payment of notes in the sum of about $10,000, claimed to be made by said corporation to the bank, and which notes James C. McKell, a director and president of the corporation, signed as co-maker or surety. On the same day, and as a part of the same transaction, the corporation assigned all its book accounts and bills receivable to Luther Drake, trustee, for the purpose of further securing the payment of said notes to the bank. It is conceded that at that time the corporation was insolvent. On said April 24, 1896, the Ellwood Gas & Vapor Stove Company commenced an action in the district court against the Hobrecker Stove Company to recover the sum of about $1,000, and a writ of attachment was issued in that action and levied upon a portion of the stock in trade of the defendant, the Hobrecker Stove Company. On April 27, 1896, the Cleveland Steel Range Company and the Galusha Stove Company each commenced actions in the district court against the Hobrecker Stove Company, which actions were aided by attachment, and the remainder of the stock in trade, not levied on under the attachment

in favor of the Ellwood Gas & Vapor Stove Company, was attached by the sheriff of Douglas county. On May 27, 1896, this action was commenced by the March-Brownback Stove Company, a general creditor of the Hobrecker Stove Company, the action being in the nature of a creditors' bill, alleging the insolvency of the defendant corporation, that it had suspended business and was no longer a going concern, charging that the assets of the corporation were a trust fund for the benefit of all its creditors, and asking the court to appoint a receiver and take possession of the assets and make a distribution of them ratably among the creditors of the concern. The petition recited the bill of sale made by the defendant corporation to the Merchants' National Bank, as well also as the assignment to Luther Drake, trustee, of the book accounts and bills receivable, and asked that these conveyances and the attachments above referred to might be set aside and the property covered thereby held to be the assets of the corporation and distributed among its creditors. The Merchants' National Bank, Drake, trustee, and the attaching creditors of the corporation were made parties defendant to this bill. On June 8, 1896, the Merchants' National Bank brought an action of replevin against the sheriff of Douglas County, Nebraska, to recover possession of the goods under its bill of sale, and which had been taken possession of by the sheriff under the attachments in the three actions above mentioned. May 28, 1897, the Cannonsburg Iron and Steel Company filed a supplemental answer and cross-bill in this action, alleging the entry of a judgment in its favor against the Hobrecker Stove Company subsequent to the commencement of the action, and asking a ratable distribution of the assets. October 19, 1896, the Novelty Manufacturing Company filed its answer and cross-bill in this action, and on October 29, 1896, the A. J. Linderman & Hoverson Company filed its answer and cross-bill in this action. The two parties last named are non-judgment creditors of the Hobrecker Stove Company. March 6, 1897, the Dayton

Manufacturing Company, the Victor Stove Company, the Farmers' National Bank and Schill Bros. intervened in the action, alleging in their petition of intervention that they were creditors of the Hobrecker Stove Company, that they had reduced their claims to judgment, had execution issued and returned unsatisfied and had thereafter garnished the Merchants' National Bank and Luther Drake, trustee, as parties having property and funds of the Hobrecker Stove Company in possession, and claiming a priority in the distribution of the assets of the defendant corporation over all creditors, with the exception of the three attaching creditors first above mentioned. November 1, 1897, the Belding-Hall Manufacturing Company, a creditor at large, intervened in this action, and asked to be allowed to participate in the distribution of the assets. By consent of all the parties, the replevin action brought by the Merchants' National Bank against McDonald, sheriff was consolidated with this action and tried to the court. Upon the trial a decree was entered canceling the bill of sale made by the defendant corporation to the Merchants' National Bank, as well also as the assignment of book accounts and bills receivable made to Drake, trustee, and ordering a distribution of the assets of the corporation, giving the three attaching creditors first above named a first lien on the assets for the payment in full of their claims, and directing the remaining assets to be ratably distributed among all the creditors. It was further found that the value of the property taken by the bank in the action of replevin against the sheriff, together with interest thereon to the date of trial, was $7,682, and that the amount collected by the Merchants' National Bank of Omaha on the accounts and bills receivable assigned to Drake, as trustee, amounted, with interest, to the sum of $1,429.85, and these several amounts the bank was ordered to pay to the clerk of the court, to be distributed under the terms of the decree. The Merchants' National Bank has taken an appeal from this decree, and insists that the value of the goods taken in re-

plevin found by the court is excessive, as well also as the amounts collected on the accounts. The four intervening parties whose claims had been reduced to judgment prior to their intervention in this case, and who had garnished the bank and Drake, trustee, also appealed and insist that the court erred in not allowing them a preference in the payment of their claims over the non-judgment creditors.

The conveyance to the bank and to Drake, trustee, are void, for two reasons: First. McKell, a director of and president of the Hobrecker Company, was a co-maker or surety upon the notes which these conveyances were made to secure. An insolvent corporation can not prefer its officers by securing debts due to third parties for which they are liable. *Tillson v. Downing,* 45 Nebr., 549; *Ingwersen v. Edgecombe,* 42 Nebr., 740. Second. By a supplemental decree entered April 13, 1898, it was found that the debt due the bank, and which these conveyances were made to secure, was the individual debt of McKell, for which the Hobrecker Stove Company was in nowise liable. The question raised by the appeal of the interveners is not only important, but interesting. Are they entitled to priority in the distribution of the assets of the corporation over the non-judgment creditors because of their proceeding in reducing their claims to judgment, and causing the parties in possession of the assets to be garnished, and thereafter intervening in this action? The plaintiff the March-Brownback Stove Company undoubtedly filed its petition in the belief that this court would adopt what is commonly known as the "trust fund doctrine" in relation to insolvent corporations, and deny a preference to any creditor of the corporation, regardless of the steps that had been taken to secure such priority. The question was an open one at the time this action was commenced, but has since been settled against the contention of the plaintiff in *Shaw v. Robinson,* 50 Nebr., 403. Upon the theory that the assets of an insolvent corporation are a trust fund, to be distributed ratably among the creditors of the concern, the action was

well brought and a court of equity was the proper tribunal to ascertain the amount of the liabilities and distribute the assets ratably. By the rule announced in *Shaw v. Robinson, supra,* the insolvent corporation may give one creditor a preference over another, and by analogy one creditor may, by his superior diligence, secure a preference in the payment of his claim over those who are less diligent. When the circumstances are such as to allow of legal proceedings, those first reaching the property of the corporation by attachment or other proper process secure a preference; but when the assets of the corporation are beyond the reach of legal process then a court of equity must be called on to assist the creditor, and the same rules applicable in other equity cases must be observed. It being settled that the plaintiff in this action was not entitled to a ratable distribution of the assets of the Hobrecker Stove Company under the "trust-fund doctrine," the petition must be regarded as a simple creditors' bill; and judged of in that light it was wholly insufficient, because the plaintiff had not reduced its claim to judgment and exhausted its legal remedies. The rule has always obtained in this state that a general creditor has no standing to maintain a creditors' bill. A judgment or special lien is an indispensable requisite. *Weil v. Lankins,* 3 Nebr., 384; *Weinland v. Cochran,* 9 Nebr., 480; *Crowell v. Horacek,* 12 Nebr., 622; *Keene v. Sallenbach,* 15 Nebr., 200, 202. Like all rules this has its exceptions, one being that property in this state may be reached where the defendant is a nonresident, thus making it impossible to procure a personal judgment against him here; and other instances are given by Smith in his Equitable Remedies of Creditors, sec. 167. The plaintiff, because its claims had not been reduced to judgment, stood in no position to pursue the property of the Hobrecker Stove Company or the funds arising therefrom into the hands of the bank, as against the objection of any interested party having a better right thereto, and the question is, do the intervening parties, who had put their claims into judgment and garnished the holder of

the fund, have a preference over the other parties to the suit, who had not attached before the commencement of this action? Incidently, it might be stated that, as to the attaching creditors, the decree, so far as it gave them a preference, was by consent of all the parties to the suit, and no one seeks by this appeal to modify it in that particular, the principal contention being as to whether the interveners are also entitled to priority. It must, we think, be obvious that, if the plaintiff stood in no position to maintain its action because it had not reduced its claim to judgment, the non-judgment defendants, who, by their cross-bills, joined with the plaintiff in asking a pro-rata distribution of the assets of the defendant corporation, occupied no higher or better ground than did the plaintiff. What, then, are the rights of the interveners? They were not originally made parties to this action. After the action was commenced, they put their claims against the Hobrecker Stove Company into judgment, and after execution returned unsatisfied garnished the bank. Upon a return of execution unsatisfied, they had a right, if they desired, to institute independent actions to reach this fund. *Hall v. Alabama Terminal Co.,* 104 Ala., 577, 53 Am. St. Rep., 87. Instead of doing so, they took advantage of section 50*a* of our Code of Civil Procedure, and intervened in this action, asserting their prior right to the fund. That section, in substance, provides that any person who has or claims an interest in the matter in litigation, in the success of either of the parties to an action, or against both, may become a party to the action, either by joining the plaintiff in claiming what is sought by the petition or by uniting with the defendants in resisting the claim of the plaintiff or by demanding anything adversely to both the plaintiff and defendant. In this case the interveners were seeking relief as against both the plaintiff and the defendants. They asked as against the defendants the application of its assets to the satisfaction of their judgments, and, as against the plaintiff and cross-petitioners, that their claim to the fund should be preferred over all others. In this attitude of the

case, we are of the opinion that the interveners stand on independent grounds asking relief against all the other parties to the action, and that their rights must be determined as if they had brought an independent action to which all the other parties to the suit were made parties defendant.

As we now view the case, it is not necessary to determine the effect of the garnishment proceedings instituted by the interveners to reach the fund in controversy. The authorities are all agreed that the filing of a creditors' bill gives the plaintiff a lien upon the property sought to be reached thereby. It is an equitable levy upon the property, and binds it from the time of the filing of the bill. When these parties intervened in this action they acquired a lien on the fund in dispute prior and superior to the non-judgment creditors, who had not taken the necessary steps to maintain a creditors' bill to reach the fund. Their intervention was the first equitable levy upon the fund, excluding the garnishment proceedings from consideration, and the effect of which we are not considering. This is well illustrated in *Miers & Coulson v. Zanesville and Mayville Turnpike Co.*, 13 Ohio, 197, where a bill was brought by a judgment creditor to reach the arrears of certain shares of stock subscribed and unpaid. By its answer the company admitted the existence of the assets, and asked that an account be taken of the creditors of the company, and the amount realized distributed equally among them all. The court refused this, saying: "This claim of the company for equal distribution is inadmissible; for the vigilant creditor, pursuing his claim, acquires a preferable equity, which attaches and becomes a specific lien by the filing of his bill." This is the general rule; and so, whether the lien of the interveners dates from the time of their garnishment, or the time when they intervened in this suit, their lien is prior to the rights of the non-judgment creditors who had failed to take the necessary steps to maintain their suit and obtain a lien.

We have not overlooked the argument made on behalf of

the plaintiff that the Hobrecker Stove Company was wholly insolvent and that reducing its claim to judgment and issuing execution would be a useless and a fruitless proceeding. Cases are cited holding that under such circumstances a creditors' bill may be maintained without showing a judgment. These cases seemingly overlook the right of a defendant to have his liability to a judgment and the amount thereof tried to a jury, instead of being passed upon by the chancellor sitting in equity; but whether these cases are well founded on principle or not, we think the practice in this state in bringing creditors' bills has been too firmly established to be departed from at this time.

The amount of the recovery allowed by the court in this case, and the character of the evidence upon which it is based, are questions which have caused us much trouble and perplexity. Much of the testimony on the question of the value of the goods, if not wholly incompetent, is of the most unsatisfactory character. It must be conceded, we think, that the most satisfactory testimony as to value came from the witnesses Ferrin and Dickey, and this for the reasons, first, it is practically conceded that the inventory which accompanied the bill of sale made by the stove company to the bank was not made at the time, and does not state correctly the quantity or description of the goods delivered at the time. After the seizure of the goods upon the several attachments in behalf of certain of the creditors intervening in this action, certain of them were, by the sheriff, released from the levies, as not being the property of the attachment defendants, and the whole or part of the remainder were taken in replevin at the suit of the appellant, and the goods so taken are alone really in controversy in this suit. This was fully recognized by the trial court in his fourteenth finding of the fact. Ferrin and Dickey are the only witnesses who knew, or who attempted to tell, what the goods so taken were, or what was their value. There is in the record a document which is stipulated to be a "copy of the original writ of replevin" and which was received without objection; but this stipulation

does not refer to or purport to authenticate the written statement, presumably annexed to the copy and immediately following it in the record, which is not represented to be the return to the original writ or a copy of it, but which, on the contrary, recites that such a return was never made and the coroner's reason for a failure to make one. There is no evidence, in other words, that the recitals made in this instrument are true, except the signature thereto of the coroner, which is not official. This omission is not, we think, supplied by the testimony of the coroner, who was sworn as a witness, that he took substantially all the goods mentioned in the writ, accompanied by the admission that he made no list of them himself, and that the appraisers' schedule was lost and he had not retained a copy of it. The only evidence in any degree satisfactory as to what goods were taken in replevin is that of Ferrin, who was one of the appraisers in that suit, and who testified that he wrote the list and appraisement, at the same time making a copy of it, which he retained until he compared it with and verified with it another list, which he made after the property had been turned over to the plaintiff in replevin. This latter list, which he says corresponds with the official schedule, is contained in the record. Even this evidence is not above criticism, but it is substantially all that there is at hand. Ferrin was an experienced salesman of goods of the description of those in controversy, and for some time previous to the failure had been employed by the stove company in that capacity. He was intimately familiar with the stock in hand, and knew its conditions and value as well, perhaps, as it was possible for anybody to know them, and he had the advantage of an opportunity to test that knowledge by making actual sales of the goods as the agent of the bank. Dickey, the other appraiser in the replevin suit, testified that the goods taken were all listed and appraised at their full market value, with which he was at that time acquainted, he being then engaged in the business of handling such goods, but he was not permitted to testify, in answer to questions by the bank, what

the amount of the appraisement was, and there is no evidence what the value of the property was at the time it was taken by the coroner. It is fair to say, however, that the fact that more definite evidence in these particulars is not contained in the record, is not the fault of counsel for the appellant bank.

A second reason for regarding the testimony of the above mentioned witnesses as the most satisfactory is that the remaining witnesses upon the subject, Packard, King and Roberts, confess their own, we will not say incompetency, but lack of satisfactory information or means of information on the question of value. It is conceded in the briefs of counsel that the finding of the trial court with respect to values was based mainly, if not exclusively, upon the testimony of Packard. The witness, prior to the break-up, had been secretary to the stove company, and previous to that time had been secretary and treasurer of another similar concern at Hannibal, Missouri, but he admits that the knowledge of the stove business which he acquired in his former situation was "superficial" because his duties required him to be in the office, and that his knowledge of the business which he acquired in the service of the stove company, "was principally gained from the invoices which all passed through my hands, and from which I arrived at the cost of the articles, and by reference to those invoices or the books, that I made from references to the invoices." From this knowledge and from memoranda which he made from these sources and from comparing catalogues of wholesale dealers, and without any avowed or apparent familiarity with or knowledge of the goods themselves, or of their condition, he undertook to testify as to their value by reference to a list, and stating what he supposed to have been their cost price, and this, not withstanding that the business had been carried on for several years, and that it was not disputed that the goods were, to some extent, rusted, shop-worn, broken and deteriorated in value. In our opinion, the testimony of this witness was of little value in fixing the value of the goods taken on the writ of

replevin. The witness King was a retail stove dealer, of some thirteen years' experience in the city of Omaha, and was one of the appraisers at the time the goods were taken in attachment, and testified generally that the list made at the time was correct, and that the goods were appraised at their then value, which was in the month of April, but he never saw the property afterwards, and did not pretend to testify as to their value in the following June, when they were taken under the order of replevin, or to know what goods were taken under the latter writ. On a somewhat extended cross-examination, going over the list in detail, he was unable to say that at the time of testifying he had any knowledge whatever of the value at that time, or at the time of the appraisement, of any item in the schedule. Not only so, but he admitted, frankly enough, that he was unfamiliar both with the manufacture and manner of construction of many of the articles, and that all he knew about it was by looking at the list made at the time of appraisement, and the figures opposite, and then to say that that was the value. The testimony of this witness is therefore not of that satisfactory character upon which a finding should be based if better evidence can be had. The witness Roberts, who confesses never to have seen any of the goods in controversy, was shown a list represented to be a schedule of the goods taken in attachment and asked to state the value in June, 1896, of the several items and descriptions of goods it contained. This he did, stating that the prices so given were those at which new, fresh goods could be obtained of the jobbing trade. It will hardly be claimed that the right of the parties should be determined and fixed by evidence of this character. In considering the character of evidence on which the finding and judgment of the district court was based, another matter should be considered. At the time the goods were taken in replevin, they were held under attachments sued out by the attaching creditors of the stove company, and but for the taking they would have been sold under the writs or upon orders of sale following the judgments in the attach-

ment suits. What a stock of stoves and kindred hardware would have brought at sheriff's sale in the middle of summer of such year, financially, as 1896, it is not worth while now to conjecture; but it is entirely plain that that of which the bank deprived the plaintiffs and interveners was not the fair market value of the goods in the ordinary course of trade, but what could have been obtained for them in the only manner in which they could lawfully have disposed of them, namely, at forced sale. It was to the ascertainment of this amount to which the evidence should have been directed. The case and the measure of damages would have been far different if the stove company had been plaintiff in an action for damages for the wrongful taking of their goods on mesne or final process.

It is a settled rule of this court that a judgment will not be reversed solely because the trial court, sitting without a jury, erred in admitting incompetent or immaterial evidence; but this rule has no application in an instance in which it is apparent that such evidence is the sole basis of the findings and judgment assailed. Such seems to be the present case. In the present condition of the case, as we are unable to determine with any certainty the value of the goods, we have concluded that the best interests of the parties will be subserved by remanding it for another trial, in which, we have no doubt, better and more satisfactory evidence of the value of the goods taken in replevin by the bank can be secured. When the amount is ascertained, it should be distributed among the parties, by first paying the three attaching creditors, whose suits were brought on the 24th and 27th days of April, the full amount of their claims; secondly, to distribute the remainder, so far as necessary, ratably among the creditors whose claims have been reduced to judgment prior to their intervention in this action; and, third, the remainder of the funds to be distributed ratably among the creditors of the company who are parties to this suit; and we so recommend.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the decree appealed from be reversed and the case remanded to the district court for a new trial; that any amount recovered against the bank on such new trial be distributed among the parties as directed in the foregoing opinion.

REVERSED AND REMANDED.

March 19, 1902, the following supplemental opinion was filed:

Replevin: ATTACHMENT: MEASURE OF DAMAGES. When goods are wrongfully taken in replevin from a sheriff, who holds them under levies for the satisfaction of attachments in his hands, the measure of damages is the loss accruing to the attachment plaintiffs, because of being deprived of the right to have their writ executed; and in such case the ultimate inquiry is, what was the value of the goods in the only market and manner in which the sheriff could have lawfully disposed of them?

AMES, C.

This is a motion for a rehearing. A stock of stoves and kindred hardware were wrongfully taken upon a writ of replevin from a sheriff, who held them under attachment. The principal ground of complaint in the motion is that this court held that the inquiry of damages in an action by the sheriff against the plaintiff in replevin is the actual damage suffered by the plaintiffs in attachment, viz., what the latter could have obtained for the property in the only manner in which they could lawfully have realized upon it, namely, by a public sale after due advertisement. It is argued that this measure is too speculative, and is therefore incapable of accurate ascertainment. That it is to a degree subject to this criticism is conceded, but it has the merit of taking into account the actual situation of affairs. As much can not be said for the rule contended for by the appellees, which is, as interpreted by their argument, that the correct measure is the fair market value of the goods in Omaha, where they were situated. In the first place, this rule presupposes that there was in that city, in the

midsummer of 1896, a market value, fair or otherwise, for a stock amounting to several thousand dollars, like the one in controversy. Of this there is no evidence in the record. There was an attempt to prove, by witnesses not shown to have been competent, what such a stock probably could have been bought for from jobbers and manufacturers in distant eastern cities, which tends somewhat to show, but by no means conclusively, what it would have been worth or have cost laid down in Omaha, and there is some evidence what, in the opinion of the witnesses, it might have been sold for in the ordinary course of retail trade in the last-mentioned city; but this estimate makes no account of the time which probably would have been consumed, or of the expense likely to have been incurred, in making such a disposition of it. That this inquiry was less speculative than that proposed by this court we are unable to see. The argument of counsel amounts to this, practically, that because it is difficult, or perhaps impossible, to ascertain with accuracy the sum which could have been obtained for the goods by the sheriff in the time and manner in which he would have been obliged to sell them, therefore the true rule of damages is what they would have sold for at a time and in a manner which were, under the circumstances, wholly unavailable, and resort to which, in the absence of agreement by the parties, would have been forbidden by law. It is a rigid rule in this state, upheld by a multitude of decisions, that in an action for damages, whether upon contract or for tort, the recovery is limited to such sum as will afford to the complaining party actual compensation for the injury inflicted. In many cases the ascertainment of that amount is, from the very nature of the case, speculative, and can be nothing more than a more or less vague opinion, derived from a general survey of all the circumstances bearing upon the inquiry; but this fact does not justify confining the inquiry to part of those circumstances only. In a case like the one at bar, the scope of the investigation should be sufficiently broad to include evidence, by competent witnesses, of the value

of the goods in all the various situations in which they might probably have been converted into money at the place, and within the time, in which such conversion must necessarily have been made; and, the goods having been sold, the circumstances and manner of sale, and the amount obtained for them, were proper matters to be inquired into. The more obscure the inquiry, the greater the need of illumination. The ultimate fact to be ascertained as nearly as possible is to what extent, or in what amount, have the attaching creditors been damaged by having been deprived of the opportunity to execute their process upon the property. From the necessities of the case the evidence can not rise above the rank of the opinions of witnesses, but it is equally important that the opinion of no incompetent witness should be admitted, and that the opinion of no competent witness, concerning any matter bearing upon the ultimate issue, should be excluded. Evidence of the manufacturers' and jobbers' prices, and of the wholesale and retail value of the goods, if offered by competent witnesses, is admissible, and in some cases may be the only evidence obtainable; but it is not free from the criticism that it is speculative, and it has only an indirect bearing upon the real matter in issue, which such evidence alone, when that which is more direct is at hand, is incompetent to determine. If, for the sake of verbal uniformity, the measure of damages in such cases is stated to be the market value of the property taken, still it must be understood to mean in the only market and manner in which the sheriff could lawfully have disposed of them.

It is recommended that the motion for a rehearing be denied.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the motion for rehearing be denied.

REHEARING DENIED.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY v. RUTH A. SHAW.

FILED DECEMBER 18, 1901. No. 10,694.

Commissioner's opinion, Department No. 3.

1. **Surface Water.** RAILROAD. A railroad company may, like any other proprietor, protect itself from the flow of ordinary surface water, and will not be liable to an adjoining owner for so doing. *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Nebr., 406.

2. ———: ———: RAVINE: FLOOD: MELTING SNOWS: ROAD-BED: DAM: EMBANKMEMT. Where, however, a large territory is drained by a ravine or draw, through which the surface water of such territory flows in times of flood or melting snows in such quantities as to cut a channel, a railway company should, in constructing its road-bed across such draw, provide for the discharge of such water as naturally flows therein; and if its road-bed is so constructed as to dam the water and flow it back over the premises of an adjoining proprietor, or to discharge the accumulated water in unusual quantities upon the land of those adjoining, it will be liable for the damages occasioned thereby. *Lincoln & B. H. R. Co. v. Sutherland*, 44 Nebr., 526; *Town v. Missouri P. R. Co.*, 50 Nebr., 768.

3. **Act of God.** The act of God, when relied on as a defense, must be specially pleaded.

4. **Amendment:** EVIDENCE. It is usually a matter within the discretion of the trial court to allow or refuse to allow a pleading to be amended to conform to the evidence given on the trial.

5. **Instructions.** Instructions examined, and found to state the law correctly.

ERROR from the district court for Jefferson county. Tried below before LETTON, J. *Affirmed.*

M. A. Low and *W. F. Evans*, for plaintiff in error.

A. H. Babcock, contra.

DUFFIE, C.

The defendant in error is the owner of the east half of the south-west quarter of section 31, in township 4 of range

4 east, in Jefferson county, Nebraska. In 1892, the plaintiff in error constructed its road through Jefferson county, passing in a southwesterly direction over a part of the land of the defendant in error; entering on the same about 1,100 feet north of the southeast corner thereof, and leaving it about 800 feet west of the southeast corner. A draw runs through this land in a southeasterly direction, which drains a large body of country, estimated by the witnesses at from 1,500 to 1,800 acres. This draw carries a large volume of water during, and for some time after, a period of heavy rains, or melting snow, and it is described by most of the witnesses as having well defined banks for at least a portion of its length; and it flows into Cub creek about 50 yards from the point where it leaves the plaintiff's land. When the railroad company constructed its road-bed over plaintiff's premises, a dirt embankment was thrown up across this draw; provision being made for the escape of water running therein by placing a pipe 36 inches in diameter under the embankment, at or near the channel. Up to the year 1896 this pipe was apparently sufficient for the flowage of water running in the channel, but on June 6, 1896, a heavy rain precipitated a large volume of water into the draw, and, the pipe proving insufficient to allow its discharge, the water forced its way through the embankment, washing away a considerable portion thereof; and a 16-foot bridge was built in the opening thus made, and the pipe removed. This is the first flood for which damage is claimed. Other freshets occurring at subsequent dates washed away other portions of the embankment, and the bridge was enlarged until it is now 60 feet in length. This bridge, the plaintiff alleges, was not built over the channel formed by the running waters of the ravine, but some four rods north thereof, and on ground much higher than was the channel in which the water had been accustomed to run, the channel itself being obstructed by a solid earth embankment, and on three occasions, viz., June 6, 1896, June 30, 1896, and April 23, 1897, the flowing water was diverted from its accustomed channel and

impeded and obstructed in its passage by the road-bed of the company so negligently, wrongfully and improperly constructed, and caused to dam up and accumulate in large quantities against and alongside of said road-bed and embankment, on the upper side thereof, and to back up and flood over a large tract of plaintiff's land on the west side of said embankment, destroying her crops growing thereon; that finally the great pressure of water thus accumulated on the west side of said embankment broke through the same, and the pent-up waters in large volume and with great force rushed over and flooded a large part of her land on the southeast corner of her 80-acre tract, and on the east side of the road-bed, carrying with it sand, dirt and flood-trash, and depositing the same on various parts of her premises, and injuring her buildings and improvements which are located on the east side of the road-bed. The plaintiff's petition is in three counts, the first claiming compensation for the damage from the overflow of June 6, 1896; second, for that of June 30, 1896, and the third for that of April 23, 1897. The answer, in addition to a general denial, alleged that the railway was constructed, operated and maintained over the premises of the plaintiff, and at all other places, in a proper and lawful manner. A trial resulted in a verdict for the plaintiff and from a judgment entered thereon the railroad company has taken error to this court.

The first assignment discussed by the plaintiff in error is instruction No. 13 given by the court, which is as follows: "The plaintiff sues upon three counts, damages for the flood occurring June 6, 1896, for the flood occurring June 30, 1896, and for the flood occurring April 23, 1897. You will estimate the damages, if any, occurring at the time of each flood separately, and if you find defendant liable for the damages caused by any one flood and not for the others, you will confine the amount you find to the damages suffered at such time, but will bring in your verdict for the total amount of damages for which defendant is liable. If you find the defendant railroad company was

not negligent in the premises, you will find for the defendant." It is urged that there was no evidence whatever tending to show that the damage suffered by the plaintiff below from the storm of April 23, 1897, was caused by the railroad company or by the manner in which the railroad was constructed or maintained. While the direct evidence is not clear as it might have been upon this question, we are not prepared to say, considering all the circumstances of the case, that the court would be warranted in taking from the jury, or refusing to submit to the jury, the defendant's liability for the damages caused by the April flood. We think that there was evidence sufficient to go to the jury under the carefully prepared instruction of the court, and to uphold a finding that the damages were caused by the defendant's negligence in the construction of its roadbed.

The next assignment of error discussed in plaintiff's brief is the eighth instruction, as follows: "If you believe, however, that on said June 30, 1896, said embankment and the opening therein were so constructed as not to allow the discharge of the surface waters ordinarily flowing down or which might reasonably be expected to flow down said channel, and that by reason of such faulty construction, the plaintiff was damaged by said surface waters, then the plaintiff would be entitled to recover upon the second cause of action for damages caused by said flood of June 30th." As the material question in this case is the negligence of the company in not providing a sufficient opening in its embankment for the discharge of the surface water accumulating in the ravine or draw under the circumstances shown by the evidence in this case, we think it proper to state the objections taken to this instruction in the language used by the plaintiff in error in its brief, as follows: "This was clearly erroneous, as it assumed as a matter of law that if 'said embankment and the opening therein were so constructed as not to allow the discharge of the surface waters,' the railway company was guilty of negligence. In other words, the court told the jury by this instruction that, if the railway was 'so constructed as not

to allow the discharge of surface water' that, as a matter of law, was a 'faulty construction,' and the plaintiff below was entitled to recover all damages caused thereby. The following language of this court is especially applicable to this: 'A railroad company, in the absence of evidence to the contrary, must be presumed to have constructed its embankment in a manner proper for the operation of its line of railway. If in doing so surface water was deflected from its course so as to be thrown * * * over the land of the plaintiff, no right of action thereby accrues to the plaintiff.' *Morrissey v. Chicago, B. & Q. R. Co.,* 38 Nebr., 406. In that case the evidence showed that the railroad was constructed and maintained upon an embankment in such a manner as to cause the surface water to back up and flow over the plaintiff's land, but this court held that 'it is proper to presume, in the absence of proof on the subject, that said embankment was, for railway purposes, properly constructed.' In a later case this court said: 'This question was carefully considered in the case of *Morrissey v. Chicago, B. & Q. R. Co.,* 38 Nebr., 406, and the conclusion therein announced that the rule of the common law prevails in this country. Subject to that rule every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless he is guilty of some act of negligence in the manner of its execution, he will not be answerable to his neighbor, although he may thereby cause the surface water to flow upon or from the premises of the latter to his damage.' *Anheuser-Busch Brewing Ass'n v. Peterson,* 41 Nebr., 897."

We have given the argument and the citation of authorities in support thereof made by the plaintiff in error in order that its contention may be fully understood. If we understand the argument, it is to the effect that the common-law rule in relation to surface water is in force in this state, and that a railroad company, in common with other proprietors of land, may claim the benefit of that rule. At common law the proprietor has a right to protect his real estate against surface water. In doing so he may

turn the water on the servient or lower land without liability to damage. Mere surface water—that which does not run in any confined course or channel—is regarded as a common enemy against which any landowner affected by it may fight. This rule was recognized and enforced in *Morrissey v. Chicago, B. & Q. R. Co., supra,* and it was the only question discussed or decided in the case. There was no question in that case, as we understand it, that the railroad company had negligently constructed its embankment so as to collect the surface water and flood it back on the land of another, or, after confining it, allowing it to break away and flood the servient estate. It was a mere question of whether, by the erection of an embankment which diverted the course of surface water upon the lands of another, the company was liable, and it was held that it was not liable. In the present case the question of a negligent construction is added as another element to be considered. At common law one could not negligently improve his property to the detriment of another. This is recognized in *Anheuser-Busch Brewing Ass'n v. Peterson, supra,* quoted by the plaintiff in error, and it is there said: "Every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow onto the premises of the latter to his damage. But if in the execution of such enterprise he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor." No one has the right to collect surface water upon his premises and flood it back upon his neighbor, or, after being collected in large quantities, to discharge it upon the adjoining estate to the injury of the latter. He may dike his own premises against its flow thereon. He may use such reasonable means as are necessary to retain it upon his premises, if he so desires; but he can not use his own premises to accumulate it in large quantities, and then flow it down upon

his neighbor, causing to the latter damage and injury. We think that this principle has been fully recognized and enforced in *Lincoln & B. H. R. Co, v. Sutherland*, 44 Nebr., 526, and *Town v. Missouri P. R. Co.*, 50 Nebr., 768. In the case first cited it is said: "The doctrine of this court is the rule of the common law,—that surface water is a common enemy, and that an owner may defend his premises against it by dike or embankment, and if damages result to adjoining proprietors by reason of such defense, he is not liable therefor. But this rule is a general one and subject to another common-law rule,—that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor. Therefore, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow onto the premises of the latter to his damage; but, if in the execution of such enterprise, he is guilty of negligence, which is the natural and proximate cause of injury to his neighbor, he is accountable therefor." In *Town v. M. P. R. Co.*, it is said: "Surface waters may have such an accustomed flow as to have formed at a certain place a channel or course, cut in the soil by the action of the water, with well-defined banks, and having many of the distinctive attributes of a watercourse; and though there are no exceptions to the general rule except from necessity, this may constitute an exception, and if the flow is stopped by the erection of an embankment across and in the channel, some provision may be necessary for the allowance of the regular flow of the surface waters. Whether such embankment has been negligently constructed with reference to the obstruction of the flow of the surface waters, and whether such negligence, if any, is the proximate cause of an alleged injury, are generally questions to be submitted to the jury." We think that the case last cited from is decisive of the one at bar, and we fully agree with the reasoning of that case. It

would be an unfortunate rule of law which would allow a railroad company, or any other proprietor of land, to erect an embankment across a ravine in which a large body of water is accustomed to run during the rainy season or upon the melting of snow without making the necessary provision for its flow in the usual manner. In the present case there was a ravine of some miles in length, down which the water poured in large quantities at certain seasons. It was fed by other like draws and streams. The fact that it cut its way through the solid embankment on different occasions, is evidence sufficient to show the volume and force of the water which it carried. It might, almost as a matter of law, be said to be negligence to throw an embankment across a ravine, without providing adequate means for the flow of the water; and it certainly ought not to be contended that the finding of the jury that such an act was negligence ought to be disturbed by the court. We regard it as now settled by the former decisions of this court that a railway company, or other proprietor of land, can not throw an enbankment across a ravine or draw, into and through which the surface water of a large scope of country is accustomed to flow, without providing adequate means for the usual flowage of the water naturally seeking such an outlet. We think that the court was fully justified, in giving its eighth instruction, by the cases above quoted, and that error can not be predicated thereon.

Complaint is made of the concluding paragraph of the sixth instruction of the court. Taking that part of the instruction alone, it would probably be incorrect and misleading, as the jury was told that the company was liable for not providing for the deposition of surface water which might injure the plaintiff. As we have seen, and as was held in *Morrisey v. Chicago, B. & Q. R. Co., supra,* the company was under no obligation to guard against the flow of surface water upon the premises of the plaintiff under ordinary circumstances, and where the conformation of the surrounding country did not force the water toward a common point of final drainage, and through which it had run

until a channel has been formed through which it seeks its natural outlet. The surroundings here were, however, of an exceptional character, and almost identical with those set out in *Lincoln & B. H. R. Co. v. Sutherland, supra*, and the court, evidently with that case in mind, called the attention of the jury, in another part of the sixth instruction, to the state of facts which the evidence tended to establish, and made it clear that it was only to the exceptional circumstances of the case that the instruction was applicable. That there may be no misapprehension of our meaning, we quote so much of the sixth instruction as precedes the phrase complained of: "The question whether or not the defendant railroad company was negligent in the construction of its embankment across the ravine or draw which traversed the plaintiff's land is a question which you must determine from all the facts and circumstances in evidence before you, and in passing upon this question you should take into consideration the length of the ravine or draw, the area of land which it and its branches and feeders drained above the point where the railroad crossed it, the height of its banks, its width, and whether or not water flowed or stood in the same for any length of time. You should consider the configuration of the ground at the place where the railroad embankment crossed it, the height of the embankment, and all other facts which have been testified to before you which will aid in deciding upon the effect that the construction of said embankment had upon surface waters which flowed down said draw. You should also consider the testimony as to the openings made in said embankment by the railroad company prior to the 6th day of June, 1896, when the first damage is claimed to have been suffered by the plaintiff; and should also consider the means, if any, devised by the railroad company for discharging the water which flowed down said channel through said embankment into the natural channel at a lower point, and if from all the evidence in the case you believe that said railroad company had used at or before the 6th day of June, 1896, such precautions

and means as an ordinarily prudent and reasonable person would use, to guard against any damage to the plaintiff by reason of the construction of said embankment, then the defendant railroad company would not be guilty of negligence in the premises and it would be your duty to find for the defendant in such case." The instruction, as a whole, correctly states the law as we understand it.

Complaint is further made that the court refused an instruction tendered by the plaintiff in error to the effect that if the floods, or either of them, which did the damage complained of, were unprecedented in character, and of such force and volume as to make them, or either of them, without parallel in the vicinity in which they occurred, and were such as not to be anticipated, then for the damage done by such floods the defendant would not be liable. The court, we think, correctly refused the instruction. In the first place, no defense of that character was tendered by the answer filed by the defendant; and, secondly, there is no evidence that the floods of June 6, 1896, and April 23, 1897, were of the character described in the instruction. There was some evidence offered by the defendant company tending to show that the storm of June 30, 1896, was unprecedented in its character and force. After both parties had rested, the defendant asked leave to amend its answer to conform to the evidence, by alleging that the damages, if any, which occurred from the flood of June 30, 1896, were the result of such unprecedented storm and the act of God. This request was refused, and the ruling of the court is one of the errors assigned. Numerous authorities are cited to the effect that, where evidence is offered and received without objection upon a question not made an issue by the pleadings, the court may allow an amendment to conform the pleadings to the evidence. The practice of allowing amendments under the circumstances shown in the cited cases has undoubtedly been in force almost from the adoption of the Code practice. In many instances it has, without doubt, been in the interest of justice; and this court would hesitate to take any stand to discourage

its allowance in all proper cases, in the discretion of the trial court. So much must, however, be left to the discretion of that court in the trial of a cause, that the facts showing an abuse of discretion must be strong and pointed before we should feel justified in reversing a case either for a refusal to amend to conform to the proof, or because such an amendment was allowed. It is seldom that we meet with a record that discloses such care on the part of the trial court, in guarding the rights of the parties as the one under consideration. The fact, if so it be, that the storm of June 30, 1896, was of the character described in the amendment proposed, was undoubtedly known to the company long prior to the time when its answer in this case was filed; and such a defense, if it existed, would hardly be overlooked by the eminent counsel representing the plaintiff in error. In any event, the matter of allowing or refusing the amendment was so wholly in the discretion of the trial court that we do not feel called upon to interfere, in the absence of a stronger showing of prejudice than is here made.

We recommend the affirmance of the judgment.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NOTE.—As to surface water, and natural water course, as described in the foregoing opinion, see *Chicago, R. I. & P. R. Co. v. Andreesen*, 62 Nebr., 456, opinion by OLDHAM, C., and authorities cited in note. —REPORTER.

MCCORMICK HARVESTING MACHINE COMPANY V. MADISON WILLAN.

FILED DECEMBER 18, 1901. No. 10,677.

Commissioner's opinion, Department No. 3.

1. **Damages:** MALICIOUS PROSECUTION. Damages are recoverable for the prosecution, maliciously and without probable cause, of a civil action in which there has been no restraint of the person or seizure of property.

2. **Instruction.** An instruction which submits to the jury an inquiry of fact concerning which there is no evidence, is reversable error.

ERROR from the district court for Lancaster county. Tried below before TUTTLE, J. *Reversed.*

Ricketts & Wilson, for plaintiff in error.

Morning & Berge, contra.

AMES, C.

This is an action to recover damages for malicious prosecution. The facts, to the extent that a recital of them is deemed requisite for the purpose of this opinion, are disclosed, practically without dispute, in the record, as follows: The plaintiff in error had in its possession certain notes executed to it by the defendant in error and another, and from which it was contended by the defendant in error that he had, for a valuable consideration, been released by an agreement between the parties, and upon which, otherwise, an action was barred by the statute of limitations. Well knowing that upon either or both grounds no right of action existed upon the instruments, the plaintiff, after having, through its agents, demanded and been refused payment, maliciously and for the purpose of injuring and annoying the defendant, at successive times prosecuted suits upon them before justices of the peace in out-of-the-way places in counties far distant from the county of the defendant's residence, which suits were, however, abandoned

and dismissed after the defendant had been put to great inconvenience, labor and expense in preparing to defend against them. For the purpose of giving colorable jurisdiction to the justices, the plaintiff procured irresponsible persons residing in the counties in which the suits were being brought to become apparently bound upon the notes by indorsement of them. The defendant in error, plaintiff below, recovered a verdict and judgment in the district court, which it is sought to reverse by this proceeding. A large number of alleged errors are assigned, two only of which do we think it necessary to decide upon.

The plaintiff contends that an action for damages for malicious prosecution will not lie when the proceeding complained of is a civil suit in which there has been no restraint of the person or seizure of the property of defendant. In support of this contention he cites a paragraph from the opinion of the late Chief Justice MAXWELL, in *Rice v. Day*, 34 Nebr., 100, as follows: "At common law, prior to the statute of Marlbridge (52 Hen. III.), which gave costs to a defendant where the action against him failed, a defendant who had defeated the party bringing the action might bring an action against him for malicious prosecution. The fact that an action was not well founded—had been brought against a party and failed—was sufficient to justify a suit for malicious prosecution, although neither his person nor property had been taken into the custody of the court. After the statute of Marlbridge above referred to took effect, the general rule has been that in a civil action, to justify an action for malicious prosecution, there must have been an arrest of the person or seizure of his property." We do not think, however, that this paragraph was intended to commit the court, or even the writer of the opinion, to the general rule therein stated. It does not do so explicitly, and the matter under consideration was an action for the malicious seizure of property upon a writ of attachment, for the decision of which, or, at any rate, for the reaching of the conclusion arrived at, an invocation of the rule was not requisite.

We therefore regard the question as an open one in this state. As is said by Chief Justice Corliss, speaking for the supreme court of North Dakota, in *Kolka v. Jones*, 71 N. W. Rep., 558, 66 Am. St. Rep., 615, the decisions upon the question in this country are in hopeless conflict. But inasmuch as the rule is not a part of the common law, strictly so called, but was introduced in England by statute, the statute may properly be said to be the reason for it, and in those states, like this, where the statute, or the principle of it, is not in force, the case may with propriety be said to fall under the operation of the maxim that when the reason for a law fails the law itself ceases to exist. We quote from the opinion in the case last cited: "Before the statute of Marlbridge (52 Hen. III.) an action for the malicious prosecution without probable cause of a mere civil action would lie. *Closson v. Staples*, 42 Vt., 209-214; *Lockenour v. Sides*, 57 Ind., 360, 364; *Lipscomb v. Shofner* (Tenn. Supp.), 33 S. W. Rep., 818; *Pope v. Pollock*, 46 Ohio St., 367, 21 N. E., 356, 14 Am. & Eng. Ency. Law, 32. Why this rule should have been departed from after the act of 52 Henry III. had been passed, is apparent from the language of that act. It gave to the defendant who had prevailed in the cause, not merely his costs, but also his damages; and, to make apparent the purpose of parliament to substitute this remedy for the action for malicious prosecution, these costs and damages were given only in actions which were malicious, and not in all actions generally. *Lehigh V. R. Co. v. McFarland*, 44 N. J. Law, 674-676. Subsequent legislation in England shows that the statute of Marlbridge was enacted, not as a general law regulating costs, but to afford a summary remedy to the successful defendant in place of the existing right of action to recover his damages on account of the malicious prosecution of a civil action against him. The statute of Gloucester (6 Edw. I. c. 1) gave the defendant costs where he recovered damages, and finally, by the act of 23 Henry VIII. c. 15, the defendant was given costs in all cases in which he was successful, whether he recovered damages or not, provided the case

was one in which the plaintiff could have recovered costs had he been the prevailing party. *Lehigh V. R. Co. v. McFarland,* 44 N. J. Law, 674-676. The act of the British parliament which was held to take away the existing cause of action for damages for the malicious prosecution of a civil suit was an act which in terms was limited to cases of that kind; and when it is remembered that it gave the defendant, not merely his costs, but also his damages, it is obvious that the statute was framed to give the successful defendant his remedy in the very case in which he was maliciously prosecuted, instead of compelling him to seek redress in an independent action." Not only are the majority of the later decisions in this country in accord with *Kolka v. Jones*, but, in our opinion, they rest upon the more weighty and satisfactory reasons. We have not the time nor space at our command for undertaking an extended criticism of the conflicting opinions upon the subject, and, if we had both, such a course would perhaps prove unprofitable. Certainly nothing would be gained by tabulating their names and places of publication, which, however, is done to a considerable extent in the cases above mentioned. It must suffice for us to say that the statute 52 Henry III., above referred to, did not take away the right of recovery for malicious prosecution in cases like the suit at bar, but provided a specific and exclusive remedy therefor. That remedy has not been adopted in this state, and the reasonable consequence is that the right of action continues to exist, so that this case does not present an instance of a wrong without a remedy, contrary to a time-honored maxim.

We think, however, that a new trial must be granted, because of an inadvertent error committed by the learned judge who presided at the trial in giving an instruction. The jury were told that one of the elements of damages for which the plaintiff below would be entitled to be compensated, in case he should receive a verdict at their hands, would be for the injury to his reputation and credit, if any was shown. It can not be presumed that by this phrase the

jury were intended to be given to understand that the plaintiff might be awarded a sum of money, as under former rules of practice might have been permitted in an action for slander or libel, on account of injury to his standing in the community for integrity, honor and good citizenship, independent of any actual pecuniary loss resulting therefrom. The instruction, so construed, certainly could not be upheld, especially in connection with, and as supplemental to, the correct instruction that the plaintiff, in the event of his success in the suit, might be compensated for his mental worry and distress. This last item covered all of the elements of the former that could properly be taken into consideration, and the former, coupled with it, implied that something additional might be allowed. What, in this connection, the phrase in question means, and what the judge, had his attention been especially challenged to it, would doubtless have construed it as meaning, is such reputation and credit as affected the business or financial standing and ability of the plaintiff to his actual injury. So construed, the instruction, considered as an abstract proposition of law, is not, we think, objectionable; but, unfortunately, we are unable to find any evidence to which it is applicable; and so the jury were told, in effect, that it was permissible for them to find as a fact a material matter whose existence was not shown by any evidence, or, what perhaps is more likely, the jury, in the absence of such evidence, adopted the former interpretation, and understood themselves to be authorized to make an award of practically exemplary or punitive damages, or, at any rate, of something in addition to compensatory damages, which is not allowable in this state. The rule is too well settled in this state to require the citation of authorities in its support that the giving of an instruction, faulty in the respect that it submits to the jury an inquiry of fact concerning which there is no evidence, is reversible error.

It is recommended that the judgment of the district court be reversed, and a new trial granted.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial awarded.

REVERSED AND REMANDED.

FRANK H. HARPHAM, SR., v. STATE OF NEBRASKA, EX REL. CALVIN W. CRUSE.

FILED DECEMBER 18, 1901. No. 10,768.

Commissioner's opinion, Department No. 3.

Quo Warranto: APPLICATION: PROSECUTING ATTORNEY. An application in the nature of an information in quo warranto filed by a private citizen to recover the possession of a public office is fatally defective if it omits to allege that the relator has applied to the prosecuting attorney to file the same, and that the latter has refused or neglected so to do.

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

McCreary & Button, for plaintiff in error.

L. J. Capps and *John C. Stevens, contra.*

AMES, C.

This cause was submitted, without oral argument, upon the brief of the plaintiff in error alone. From the brief it appears that the action is a proceeding in the nature of a writ of quo warranto to recover the possession of a school district office. The relator is a private citizen, claiming title to the office as the result of an election. The statute enacts (Compiled Statutes, ch. 71, sec. 1) as follows:

"When any citizen of this state shall claim any office which is usurped, invaded, or unlawfully held and exercised by another, the person so claiming such office shall have the right to file in the district court an information in the nature of a quo warranto, upon his own relation,

and with or without the consent of the prosecuting attorney, and such person shall have the right to prosecute said information to final judgment; *Provided,* He shall have first applied to the prosecuting attorney to file the information, and the prosecuting attorney shall have refused or neglected to file the same."

The information does not purport to have been filed by or at the instance of the prosecuting attorney, and it omits to allege that that officer had been requested to file the same and had refused or neglected to do so. Objection upon this ground was made in due season and overruled. The statute is explicit in its terms, and is founded upon a wise public policy. We think that the information fails to disclose capacity in the relator to begin or prosecute the action, and it is recommended that the judgment of the district court be reversed, and that the suit be dismissed.

DUFFIE and ALBERT, CC., concur.

By the Court: For reasons stated in the foregoing opinion, the judgment of the district court is reversed and the suit is dismissed.

REVERSED AND DISMISSED.

NOTE.—The attorney general is the proper officer to institute proceedings in quo warranto in the supreme court, and not the district attorney. Syllabus. In opinion *quære. State v. Cones,* 15 Nebr., 444. The county attorney is the successor of the district attorney. *Dinsmore v. State,* 61 Nebr., 418.—REPORTER.

PETER MANGOLD V. CLAUS OFT.

FILED DECEMBER 18, 1901. No. 10,706.

Commissioner's opinion, Department No. 3.

1. **General Denial:** JUSTIFICATION. Evidence in justification of an assault, is not admissible under a general denial.

2. **Assault and Battery:** THREATS: MITIGATION: EVIDENCE. In this state, evidence of threats made by the injured party is not ad-

missible, in mitigation of damages, in an action for assault and battery.

3. **Exclusion of Witness:** VIOLATION OF RULE: TESTIMONY OF WITNESS. In order to entitle a party to the testimony of a witness who has violated a rule of the court for the exclusion of the witnesses, he must apprise the court of the facts he expects to prove by such witness, and it must appear that such facts are material, and that such violation of the order of the court was without the knowledge, consent or connivance of himself or his attorneys.

ERROR from the district court for Douglas county. Tried below before KEYSOR, J. *Affirmed.*

J. J. O'Connor, for plaintiff in error.

Albert S. Ritchie and *Carl E. Herring, contra.*

ALBERT, C.

This action was brought by Claus Oft against Peter Mangold to recover for an assault and battery alleged to have been committed on the former by the latter. The jury found for the plaintiff, and the court rendered a judgment accordingly. The defendant brings the record here for review on error.

A considerable portion of the defendant's brief is devoted to discussion of alleged errors of the trial court in excluding evidence tending to show a justification of the assault. In our opinion, such evidence was properly excluded. The petition, so far as is material at present, is as follows: "That on the 8th day of October, 1897, the defendant assaulted and beat the plaintiff, and did then and there wrongfully knock the said plaintiff down, and did then and there, by such beating and knocking, break the plaintiff's right leg at the ankle." The defendant answered as follows: "Now comes Peter Mangold, and for answer to the petition of said plaintiff filed herein, denies each and every allegation in said petition contained, and, further answering said petition, alleges the facts to be that on or about the 8th day of October, 1897, said plaintiff

made an assault on this defendant, and while this defendant was pulling back, and using no more force than was necessary to resist said assault, said plaintiff slipped and fell to the floor; and whatever injury he received was caused by his own fault and not by any blow of this defendant." This answer amounts to a denial that the defendant assaulted or beat the plaintiff, and an affirmative allegation that the plaintiff injured himself in his efforts to commit an assault and battery on the defendant. The affirmative matter amounts to nothing more than an argumentative denial. Taken as a whole, then, the answer is a bare general denial. In an action of this kind, evidence of facts tending to justify the assault is not admissible under a general denial. One of the prime objects of pleading is to apprise his adversary of the nature of the charge or defense of the pleader. It would be too much to insist on absolute fairness in this regard, but certainly it is not unreasonable to refuse to listen to the excuses one attempts to make for committing an act which at the same time he solemnly denies he committed. *Barr v. Post,* 56 Nebr., 698; *Levi v. Brooks,* 121 Mass., 501; *Senecal v. Labadie,* 42 Mich., 126; *Grace v. Teague,* 81 Me., 559. But the defendant insists that the evidence of previous threats was admissible in mitigation of damages. In this state, the recovery in cases of this kind is limited to compensatory damages. No recovery can be had of punitive or exemplary damages. In theory, at least, the damages recoverable are the pecuniary equivalent of the injury. By offering such evidence in mitigation of damages, the defendant admits the assault, and that it was wrongful. As the law will not permit any assessment of damages against the defendant by way of punishment, neither will it permit any reduction of the pecuniary damages actually sustained by the plaintiff, for that purpose. In short, threats can not be shown in mitigation of compensatory damages. *Goldsmith v. Joy,* 15 Am. St. Rep., 923.

After showing the amount of time lost by the plaintiff, because of his injuries, his attorneys propounded this

question: "What was your loss per day on account of not being able to work?" Over defendant's objection, he was permitted to answer. His answer was: "Well, my loss is, not take it very high, it is worth $2 a day." The defendant insists that the admission of this evidence was error, as it was for the jury to determine the amount of his loss. But taken in connection with the rest of plaintiff's testimony, we are satisfied that it worked no prejudice. His testimony shows the period for which he was disabled. In other parts of his testimony, more especially on cross-examination, it appears that the value of his time during that period, but for such disability, would have been $2 per day. This evidence is uncontradicted. The jury having found for the plaintiff, there was nothing to warrant them in awarding him less than $2 per day for his loss of time. Whatever error may have been in the reception of the evidence was error without prejudice.

Just before resting his case, the defendant produced three witnesses; and their testimony was objected to on the ground that they had been present a portion of the time during the trial of the cause, in violation of a rule of the court excluding the witnesses on pain of their testimony being rejected, made on the motion of the defendant himself. The objection was sustained, and the exclusion of this testimony is assigned as error. As to one of these witnesses, the defendant in his offer disclosed no fact which he expected to prove by him. As to the other two, he made no showing that their presence in the court room during the trial was not with the knowledge, consent or connivance of himself or counsel. To predicate reversible error on a ruling of this kind, it must appear that the court was apprised of the facts the party expected to prove by such witnesses, that such facts are material, and that their disobedience of the order of the court was without the knowledge, consent or connivance of the party offering their testimony. The defendant did not bring himself within this rule; hence there is no reversible error in the ruling of the court in this regard. It is true, these facts

were shown by affidavit after verdict, but the showing came too late. We find no error in the record.

We recommend that the judgment of the district court be affirmed.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HARVEY SPALDING ET AL. V. ANDREW MURPHY ET AL.

FILED DECEMBER 18, 1901. No. 10,725.

Commissioner's opinion, Department No. 3.

1. **Party in Interest:** INTERVENTION. Any person who can, by proper averments, show that he has an interest in the matter in litigation, may, without leave of court, become a party to the suit and obtain an adjudication of his rights.

2. **Confirmation:** OBJECTION: FACTS. On the facts disclosed, *held*, that the objections to the confirmation of a sale of real estate should have been sustained.

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

David Van Etten, for plaintiffs in error.

Smyth & Smith, contra.

ALBERT, C.

In an action wherein Andrew Murphy was plaintiff and George M. O'Brien, Jr., defendant, a decree of foreclosure was entered, for the satisfaction of which the mortgaged premises were offered for sale by a special master. Thereupon Harvey Spalding and Isaac N. Hammond, the latter as the administrator of the estate of George M. O'Brien, Sr., whom we shall hereafter call "interveners." filed objections to the appraisement. The premises were offered

for sale, and the intervener Spalding, through another, was one of the bidders. His bid was not accepted, and the premises were struck off to another. He and his co-intervener then jointly and severally moved for the confirmation of the sale to Spalding on the ground that he was the highest bidder, or, failing in that, that the sale to the party to whom the premises were struck off be set aside. The court overruled their objections to the appraisement, and their motion for and against confirmation, and confirmed the sale to the highest bidder. From the order of confirmation the interveners jointly and severally prosecute error to this court.

Complaint is first made of the ruling of the trial court on the objections to the appraisement, but as the interveners joined in a motion for the confirmation of an alleged sale to one of them, based on the appraisement assailed, they are held to have waived all objections to such appraisement.

The remaining ground of complaint, is that the court erred in confirming the sale over the objections of the interveners. Their adversaries urge that the facts disclosed by their objections to the confirmation are not sufficient to entitle them to intervene, and therefore that they have no standing in court. But it sufficiently appears on the face of these objections and the exhibits therein referred to that the mortgage in suit was given by the defendant at a time when he held the property conveyed thereby in trust for George M. O'Brien, Sr., now deceased; that the intervener Spalding after the commencement of this action obtained a judgment against George M. O'Brien, Sr., which judgment afterward, in an action wherein said intervener was plaintiff and the defendant George O'Brien, Jr., and others were defendants, and during the pendency of the present action, was adjudged to be a lien on the premises in controversy. It also appears that George M. O'Brien died some time subsequent to the date of said judgment, and that the intervener Hammond is the administrator of his estate. These facts stand uncontradicted. Hence it

will be seen that the interveners were interested in securing the best price for the premises at the sale in question. Whatever surplus, if any, should remain after the satisfaction of all liens prior to theirs, would apply first in satisfaction of Spalding's judgment, and the balance, if any, would go to the estate of which Hammond is administrator. It has been held by this court that any person who can by proper averments show that he has an interest in the matter in litigation, may, without leave of court, become a party to the suit and obtain an adjudication of his claim. *State v. Holmes,* 60 Nebr., 39. We think the interveners brought themselves within this rule. It is but fair to the trial court, however, to say that it is only by taking into account the exhibits referred to in their motion that the interveners can be said to have brought themselves within the rule. These exhibits are affidavits among the files. We are by no means sure that, in the hurry of the proceedings, they were ever brought to the attention of the trial court.

The next question that arises is whether their objections to the confirmation of the sale, in themselves, are sufficient. Several objections are urged, but it will only be necessary to notice one of them specifically. It is shown by affidavit that the intervener Spaulding was the highest bidder at the sale. His bid was made through his attorney, one of the officers of the trial court. Before the sale was closed, the attorney was asked whether he was prepared to make the bid good. With some warmth, which we can not say was wholly unjustifiable, in view of the uncontradicted facts shown by the affidavit, he replied: "That is none of your business; I expect to make my bid good according to law, whatever it may be, as soon as the amount is ascertained." His bid was rejected, for no reason, that we can discover, save that appearing from the foregoing. It further appears from the affidavits that the bids of his successful competitor were not announced openly, but could be ascertained only upon inquiry, and that throughout the bidding the special master and such competitor were in

frequent whispered consultation. In view of these facts, with others of an equally sinister character, standing uncontradicted, there is grave reason to doubt the fairness and impartiality of the sale, and it should be set aside.

We recommend that the order confirming the sale be reversed, and the cause remanded for further proceedings according to law.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the order of confirmation is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1902.

PRESENT:

HON. J. J. SULLIVAN, CHIEF JUSTICE.

HON. SILAS A. HOLCOMB, HON. SAMUEL H. SEDGWICK, } JUDGES.

DEPARTMENT No. 1.
HON. WILLIAM G. HASTINGS,
HON. GEORGE A. DAY,
HON. JOHN S. KIRKPATRICK,

DEPARTMENT No. 2.
HON. JOHN B. BARNES,
HON. WILLIS D. OLDHAM,
HON. ROSCOE POUND,

DEPARTMENT No. 3.
HON. EDWARD R. DUFFIE,
HON. JOHN H. AMES,
HON. I. L. ALBERT,

} COMMISSIONERS.

DAKOTA COUNTY V. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

FILED JANUARY 8, 1902. No. 10,583.

1. **Taxes:** CONSTITUTIONAL LIMIT: ILLEGAL. Taxes levied in excess of the constitutional limit, are for an illegal and unauthorized purpose and are void.

2. ——: ——: ——: PROTEST. One paying taxes in excess of the constitutional limit, may recover such excess in an action at law, although such taxes were not paid under protest.

ERROR from the district court for Dakota county. Tried below before FAWCETT, J. *Affirmed.*

William P. Warner, for plaintiff in error.

John B. Barnes, contra.

NORVAL, C. J.

In 1893 Dakota county levied taxes upon the taxable property in said county, including that owned by the Chicago, St. Paul, Minneapolis and Omaha Railway Company, for county purposes, in excess of the constitutional limit of 15 mills on the dollar valuation. The company subsequently paid these taxes, without making any formal protest, and thereupon demanded a return of the amount paid in excess of the constitutional limit. The county having failed to comply with said demand, this action was brought to recover the amount of the taxes so paid in excess of the 15 mills. Plaintiff obtained judgment, from which the county brings error.

The contention of defendant below is that, the taxes having been paid without protest and notice to the county of their invalidity, the payment was voluntary, and there can be no recovery. The point presented makes necessary the consideration of section 144, article 1, chapter 77, Compiled Statutes, under which this action was instituted. The section follows: "Sec. 144. No injunction shall be granted by any court or judge in this state, to restrain the collection of any tax, or any part thereof, hereafter levied, nor to restrain the sale of any property for the non-payment of any such tax, except such tax, or the part thereof enjoined, be levied or assessed for an illegal or unauthorized purpose; nor shall any person be permitted to recover by replevin, or other process, any property taken or distrained by the county treasurer, or any tax-collector, for the non-payment of any tax, except such tax be levied or assessed for illegal or unauthorized purpose; but in

every case the person or persons claiming any tax, or any part thereof, to be for any reason invalid, who shall pay the same to the county treasurer, tax-collector, or other proper authority, may proceed in the following manner, viz.: First—If such person claim the tax, or any part thereof, to be invalid for the reason that the property upon which it was levied was not liable to taxation, or that said property has been twice assessed in the same year and taxes paid thereon, he may pay such taxes under protest to the tax-collector, county treasurer, or other proper authority, and it shall be the duty of the collector, treasurer, or other proper authority receiving such taxes, to give a receipt therefor, stating thereon that they were paid under protest, and the grounds of such protest, whether not taxable, or twice assessed and taxes paid thereon. If such taxes are paid to the proper authority, other than the county treasurer, such person so receiving them shall, within ten days thereafter, deliver such taxes, or so much thereof as are paid under protest, to the county treasurer, together with a copy of the receipt given for the same, and the county treasurer shall retain the money so paid under protest until otherwise directed by order of the county board. Within thirty days after paying such taxes, the person paying them shall file a statement in writing, duly verified, with the county board, setting forth the amount of tax paid under protest, the grounds of such protest, and shall attach thereto the receipt taken for said taxes. Whereupon at the first meeting of the county board thereafter, they shall inquire into the matter, and if they shall find either that the property upon which such taxes were levied, was not liable to taxation, or that it had been twice assessed in the same year, and taxes paid thereon, they shall issue an order to the county treasurer to refund said taxes, stating therein what sum shall be refunded, and if they shall find that the grounds of such protest are not true, they shall issue an order to the county treasurer to dispose of said money in the same manner, as though it had not been paid under protest. Appeals may be taken

from such decisions in the same manner and within the times set forth in sections 37 and 38, chapter 18, of the Compiled Statutes of Nebraska; and if such an appeal be taken, the treasurer shall retain such taxes until the case is finally determined; Provided, That he shall in all cases retain said money until the time for an appeal shall have elapsed. If an appeal from the decision of the county board be taken, and upon the final determination thereof their decision be affirmed, the treasurer shall at once carry the order of said board into effect, and if their decision be reversed, they shall issue a new order to the treasurer conforming to the decree of the court finally determining the case. In all cases where the treasurer shall refund such taxes, he shall write opposite such taxes, in the tax list, the words, 'Erroneously taxed—Refunded.' The term county board, as used in this section, shall be held to mean board of county commissioners, and board of supervisors, as the case may be. Second—If such person claim the tax, or any part thereof, to be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose, or any other reason, except as hereinbefore set forth, when he shall have paid the same to the treasurer, tax-collector, or other proper authority, in all respects as though the same was legal and valid, he may, at any time, within thirty days after such payment, demand the same, in writing, from the treasurer of the state, of the county, city, village, township, district, or other subdivision, for the benefit, or under the authority, or by the request of which the same was levied, and if the same shall not be refunded within ninety days thereafter, may sue such county, city, village, township, district, or other subdivison, for the amount so demanded, and if upon the trial it shall be determined that such tax, or any part thereof, was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases." The meaning of the provisions of the foregoing section has been determined by this court on a former oc-

casion. In *Chicago, B. & Q. R. Co. v. Nemaha County,* 50 Nebr., 393, it was held that the section quoted provides two methods for the recovery from a county of illegal taxes which had been paid: First, where property is not liable for taxation, or has been twice taxed in the same year, and the taxes thereon have been paid under protest, the taxpayer may within thirty days after such payment file a verified claim with the county board for such taxes so paid under protest, with the grounds of protest accompanied with the tax receipt, for an allowance; second, when a tax has been paid which was imposed for an illegal or unauthorized purpose, or for any reason other than double assessment or that the property was not taxable, a suit at law may be brought to recover the amount of such tax. To recover under the first method, the statute expressly provides, the illegal tax must be paid under protest. No such condition precedent is essential to maintain an action under the second method. This is plain. Our decisions do not militate against this conclusion. *Burlington & M. R. R. Co. v. Buffalo County,* 14 Nebr., 51, was where the property of the plaintiff had been doubly assessed,—once by the state board of equalization, and once by the precinct assessor. The illegal taxes were paid under protest. The case clearly fell under the first method pointed out by section 144, and that method was followed in bringing the action to recover the illegal taxes. So that case is not an authority here. *Caldwell v. City of Lincoln,* 19 Nebr., 569, was to recover an illegal occupation tax imposed under a void ordinance, and which was paid under protest. That case was not predicated upon section 144 of the revenue law. Undoubtedly the general rule is that taxes voluntarily paid can not be recovered back. But this rule is modified by statute as to taxes collected for an illegal or unauthorized purpose. *Davis v. Otoe County,* 55 Nebr., 677, was brought under the first method pointed out in section 144, and a recovery was denied because the protest against the payment of the tax was insufficient. *Bankers' Life Ass'n of Des Moines v. Commissioners of Douglas*

County, 61 Nebr., 202, was to recover taxes levied on property not within the county imposing the same, and fell under the first method of proceeding we have been considering; and to entitle plaintiff therein to recover, the court held he must allege and prove that he made specific objections to the tax at the time of payment. The writer is not aware of a single case in which the court has held that a tax levied for an illegal or unauthorized purpose can not be recovered back, unless the same was paid under protest. That the taxes sought to be recovered in the case at bar were imposed for an illegal and unauthorized purpose, is no longer an open question in this state. It has been so held repeatedly. *State v. Weir,* 33 Nebr., 35; *Young v. Lane,* 43 Nebr., 812; *Chicago, B. & Q. R. Co. v. Nemaha County,* 50 Nebr., 393; *Grand Island & W. C. R. Co. v. Dawes County,* 62 Nebr., 44; *Rothwell v. Knox County,* 62 Nebr., 50. It follows that the failure to protest against the taxes will not defeat recovery.

The judgment is

AFFIRMED.

HORACE A. KELLEY V. MARIA J. WEHN ET AL.

FILED JANUARY 8, 1902. No. 10,689.

1. **Taxes on Real Estate:** PERSONAL OBLIGATION. A real estate tax is not the personal obligation of the landowner. The real estate alone is liable for its payment.

2. **Tax Foreclosure:** DEFICIENCY JUDGMENT. A deficiency judgment entered against the landowner in a suit to foreclose a tax lien, is void.

3. **Prayer for General Relief.** A prayer for general relief is sufficient to authorize any judgment to which the party is entitled under the pleadings and evidence.

4. **Reversal:** WRONG REASON FOR DECISION. A judgment will not be reversed, merely because the court gave a wrong reason for the rendition thereof.

5. **Error Not Prejudicial.** Error which is not prejudicial to the party complaining, will not work a reversal of a cause.

ERROR from the district court for Gage county. Tried below before LETTON, J. *Affirmed.*

A. D. McCandless and *Alex Q. Smith,* for plaintiff in error.

H. J. Dobbs, contra.

NORVAL, C. J.

Horace A. Kelley brought suit in the court below to foreclose a tax lien. Personal service was had upon the defendants, but they made default. On August 16, 1895, a decree of foreclosure was entered. An order of sale was subsequently issued, the property was sold, sale confirmed, and a deficiency judgment was rendered against the defendant Maria J. Wehn for $62.59. On February 16, 1898, she filed a motion to set aside and vacate the deficiency judgment, which was sustained on the ground that the prayer of the petition was insufficient to authorize a deficiency judgment.

There is no room for doubt that a tax upon real estate is not a personal obligation against the owner of the property. The tax is a charge against the property alone. Personal property is not liable for the payment of taxes imposed upon real estate. This is well settled. *State v. Cain,* 18 Nebr., 631; *D'Gette v. Sheldon,* 27 Nebr., 829; *Grant v. Bartholomew,* 57 Nebr., 673. It follows, therefore, that the district court was without jurisdiction to render a deficiency judgment for real estate taxes. We are persuaded that the trial court was in error in holding that the prayer was insufficient to authorize a judgment for a deficiency. The prayer, in addition to asking for a foreclosure of the tax lien, concluded, "that plaintiff have such other, further, greater or different relief as may be just and equitable." This was a prayer for general relief, and justified the entry of a judgment for any relief to which plaintiff was entitled under the pleadings and evidence. *Grand*

Island Savings & Loan Ass'n v. Moore, 40 Nebr., 686. The petition, however, did not state a cause of action for a deficiency judgment, for the obvious reason, as we have already seen, that a personal judgment against a land owner for real estate taxes can not lawfully be rendered. Therefore, though the prayer was for general relief, the judgment for deficiency was unauthorized.

It is firmly established that a cause will not be reversed because the court gave a wrong reason for its judgment. If the judgment was right, that is enough, whatever may have been the ground given for its rendition. *Yates v. Kinney,* 19 Nebr., 275; *Leake v. Gallogly,* 34 Nebr., 857; *Denslow v. Dodendorf,* 47 Nebr., 328.

It is urged that the court below had no jurisdiction to set aside the deficiency judgment after the term at which it was entered. Conceding this to be true, without deciding the point, the order complained of should not for that reason be reversed. The deficiency judgment was illegal and void, and the vacation thereof was, at most, an error without prejudice to plaintiff. The decision must therefore be

AFFIRMED.

NEW HAMPSHIRE SAVINGS BANK, APPELLEE, V. SAREPTA S. DILLRANCE ET AL., APPELLANTS.

FILED JANUARY 8, 1902. No. 10,727.

1. **Preponderance of Evidence:** NUMBER OF WITNESSES. The preponderance of evidence is not determined alone by the greater number of witnesses who testify in favor of a party.

2. **Appraisement:** CONFLICTING EVIDENCE. The finding of the trial court, upon conflicting evidence, that an appraisement of real property for judicial sale was fair will ordinarily be sustained on review.

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

Willam A. Redick, for appellants.

C. H. Balliet, contra.

NORVAL, C. J.

This appeal is from an order confirming the sale of real estate made under a decree of foreclosure of a mortgage. We are asked to pass upon but a single question, namely, whether the premises were appraised too low. The property was found by the appraisers to be of the value of $22,500, from which they deducted $2,937.66 for taxes, appraising the defendants' interest at $19,562.34. Plaintiff became the purchaser at the sale, paying $15,000 for the premises. A mass of testimony was taken on the hearing in the court below on the motion to vacate the appraisement, which has been incorporated in the bill of exceptions. Eleven witnesses called by the defendants, placed the value of the property at $30,000 and upwards, and six witnesses on behalf of the plaintiff, placed the value from $16,500 to $20,000. While defendants' contention is sustained by the greater number of witnesses, that does not of itself determine the question of value in their favor. There was ample evidence to establish that the appraisement was fair, and not made fraudulently. The order is

AFFIRMED.

CHARLES M. BECK, APPELLEE, V. HARRY C. MCKIBBEN ET AL., APPELLANTS.

FILED JANUARY 8, 1902. No. 10,785.

1. **Appraisers:** TAXES INCLUDED IN DECREE. It is improper for the appraisers to deduct from the gross value of lands, as found by them, the amount of taxes included in the decree of foreclosure.

2. ——: TAXES NOT INCLUDED IN DECREE. Taxes against real estate which are not included in the decree, should be deducted by the appraisers in determining the defendants' interest in the premises.

3. Decree: EXCESSIVE AMOUNT: VACATING SALE. That a decree of foreclosure is rendered for an excessive amount, is not sufficient ground for vacating a sale made thereunder in the appellate court.

4. Excessive Decree: REMEDY: APPEAL. When the amount of a decree is excessive, the remedy is to appeal from the decree itself, or by appropriate proceedings in the trial court to correct or modify the decree.

APPEAL from the district court for Dawson county. Heard below before WESTOVER, J. *Affirmed.*

E. A. Cook, for appellants.

E. C. & H. V. Calkins and *D. P. Ashburn,* co.

NORVAL, C. J.

It is sought by this appeal to vacate an order of the district court confirming a sale of real estate made under a decree foreclosing a real estate mortgage. The gross value of the property was found by the appraisers to be the sum of $3,220, from which was deducted $99.61 for taxes certified to by the county treasurer. The interest of the defendants in the property, was appraised at the difference between these two sums, or $3,120.39. The property brought at the sale $2,100. It is insisted that the appraisers erroneously deducted from the gross appraisement the sum of $99.61 on account of taxes for the reason that the same were included in the decree. Taxes included in a decree of foreclosure, should not be deducted by the appraisers from the gross value of the land as a prior incumbrance. *Drew v. Kirkham,* 8 Nebr., 477. The decree, a copy of which is in the record, fails to show that a recovery was had for taxes in any amount. The court below merely found that there was due the plaintiff upon the notes set out in the petition which said mortgage was given to secure the sum of $1,872.97, and a decree for that amount was rendered. The decree makes no mention of taxes whatever, so that the defendants' contention is not well founded. It is urged, however, that taxes must have

been included in said sum of $1,872.92, since a lien for taxes paid by plaintiff was prayed for in the petition, and that there was not due upon the mortgage the amount for which the decree was taken. It can not be presumed that the decree includes taxes. The most that can be claimed is that the decree was for an excessive amount, but that is not sufficient reason for vacating the sale. The appropriate remedy was to appeal from the decree itself, or by appropriate proceedings in the trial court to correct the decree. *Hamer v. McKinley-Lanning Loan & Trust Co.*, 52 Nebr., 705.

The order confirming the sale is

AFFIRMED.

CHARLES F. SALISBURY, APPELLEE, V. EMORY W. MURPHY ET AL., APPELLANTS.

FILED JANUARY 8, 1902. No. 10,789.

1. **Freeholder:** HUSBAND ON WIFE'S LAND. A husband is a freeholder, who lives with his wife on land of which she has the title, when occupied by them jointly as a homestead.

2. **Decree of Foreclosure:** AUTHORITY TO SELL. A decree of foreclosure is sufficient authority to make the sale thereunder, without a formal order of sale.

3. **Foreclosure Sale:** DESCRIPTION OF LAND. A sale of lands under a decree of foreclosure, will not be invalidated by reason of a manifest error in giving the meridian number, when the remainder of the description as to the location of the property, after rejecting that which is erroneous, is sufficiently definite and certain to enable the land to be located.

APPEAL from the district court for Lincoln county. Heard below before SULLIVAN, J. *Affirmed.*

Thomas C. Patterson, for appellants:

Under the common law, a freehold estate must be either an estate for life or an estate of inheritance. 4 Kent [12th ed.], pp. 23, 24. A mere contingent interest, like the one in this case, has no attribute of a freehold.

Wilcox & Halligan, contra.

NORVAL, C. J.

A decree was rendered in the court below foreclosing a real estate mortgage, and the premises were sold thereunder. The defendants have appealed from the order confirming the sale.

The first point urged is that the sale should be set aside because one of the appraisers, W. S. Peniston, was not a freeholder, which the statute requires as a qualification to act as an appraiser of property about to be sold under judicial proceedings. Code of Civil Procedure, sec. 491*a*. Upon the hearing below it was stipulated by the parties that Peniston owned no real estate in his own name, but that he was a married man, living with his wife and family upon a homestead in the county, the title and fee to which tract of land was in his wife. The homestead of a married person can not be conveyed or incumbered, unless both husband and wife join in the conveyance. So this homestead was not subject to alienation by Mrs. Peniston alone. Compiled Statutes, ch. 36, sec. 4. By virtue of section 17 of the same chapter, should Mr. Peniston survive his wife, the homestead would vest in him for life. Therefore Peniston had a freehold estate in the property occupied as a homestead, and was a qualified appraiser. A similar question was before this court in *Cummings v. Hyatt,* 54 Nebr., 35, 38, when it was held that a husband was a freeholder and qualified petitioner for the calling of an election to vote bonds when he resided with his wife on a homestead in her name. See *Hughes v. Milligan,* 22 Pac. Rep. [Kan.], 313, 314.

It is next urged that the sale is invalid for the reason that the clerk of the district court omitted to attach the seal of his office to the order of sale. The decree was sufficient authority for the sheriff to sell the property. The issuance of the order of sale was unnecessary; hence the omission of the seal was not a fatal defect in the proceedings.

Lastly, it is insisted that the notice of sale was defective

in describing the premises to be sold. The property is described in the decree as being situate in township 14 north, rang 31 west of the 6th principal meridian. In the notice of sale the meridian is given as "9" instead of "6," but in the notice it was also stated that the lands were in Lincoln county, Nebraska. The error in giving the meridian number in the notice of sale was not a fatal defect. We know judicially that there is no real estate in Lincoln county west of the ninth meridian, and that there are lands lying in said county in township 14 north, of range 31 west of the sixth meridian. The notice of sale gave the section and part thereof, town, range and county, so that it was unnecessary that the meridian should be given; and, as it was erroneously stated, it may be rejected, and the description was yet sufficient and definite. *Hubermann v. Evans,* 46 Nebr., 784. The error in the description is not fatal. *Nebraska Loan & Trust Co. v. Hamer,* 40 Nebr., 281; *Amoskeag Savings Bank v. Robbins,* 53 Nebr., 776; *Hamer v. McKinley-Lanning Loan & Trust Co.,* 52 Nebr., 705; *Nebraska Land, Stock-Growing & Investment Co. v. Cutting,* 51 Nebr., 648; *Kansas City & S. W. R. Co. v. Hurst,* 22 Pac. Rep. [Kan.], 618. The order appealed from is

AFFIRMED.

NOTE.—A *freeholder* is the owner of a freehold estate. Such a man must have been anciently a freeman; and the gift to any man by his lord of an estate to him and his heirs made the tenant a freeman, if he had not been so before. Rawle's Bouvier, Law Dictionary, p. 850. A freeholder is one who owns land in fee or for life or for some indeterminate period. As there are legal and equitable estates, so there are legal and equitable freeholds. *State v. Ragland,* 75 N. Car., 12, 13. —REPORTER.

EFFIE M. WOOLWORTH, APPELLEE, V. THOMAS H. SATER ET AL., AND MATTIE BOHRER, APPELLANT.

FILED JANUARY 8, 1902. No. 10,872.

1. **Foreclosure:** PROOF: PETITION: PROCEEDINGS AT LAW: ISSUE: ANSWER. In a suit to foreclose a real estate mortgage, plaintiff is not entitled to relief without proof to support the averment of his petition that no suit or proceeding at law has been had to recover the debt, or any part thereof, when such allegation is put in issue by the answer.

2. **Proceedings at Law:** EVIDENCE: NOTE: MORTGAGE. The introduction of the note and mortgage in evidence is not sufficient to sustain an allegation that no action at law has been instituted to collect the debt.

APPEAL from the district court for Custer county. Heard below before SULLIVAN, J. *Reversed.*

John N. Dryden, for appellant.

Effie M. Woolworth, for herself, *Fred A. Nye* and *E. J. Woolworth,* with her.

NORVAL, C. J.

This appeal is from a decree foreclosing a real estate mortgage. The petition contained the averment that no proceedings at law have been had or commenced to collect the mortgage debt, or any part thereof. This allegation was put in issue by the general denial in the answer of the defendant Mattie Bohrer. Yet plaintiff introduced no proof to establish this essential allegation in her petition. The decree is therefore without sufficient evidence to sustain it. *Jones v. Burtis,* 57 Nebr., 604; *Miller v. Nicodemus,* 58 Nebr., 353.

It is, however, insisted by counsel for plaintiff that, as the note and mortgage which were introduced in evidence do not show that they have ever been filed in any other court or cause, it must be presumed that no suit or proceeding at law had ever been had for their recovery. This argument is not convincing. No legal inference can be so

drawn from the lack of filing marks on the note and mortgage.

The decree is reversed and the case remanded.

REVERSED AND REMANDED.

SARAH A. MEAD, APPELLEE, V. MAURICE A. HOOVER ET AL., APPELLANTS.

FILED JANUARY 8, 1902. No. 10,905.

1. **Foreclosure Sale:** DECREE: AUTHORITY OF SHERIFF. A decree foreclosing a real estate mortgage, is sufficient authority to the sheriff to make the sale thereunder.

2. **Order of Sale:** CLERICAL ERRORS. Mere clerical errors in an order of sale, which are not prejudicial, will not invalidate a sale made in pursuance thereof.

3. **Judicial Sale.** NOTICE: DATE OF DECREE. A sale will not be vacated merely because the notice of sale does not correctly state the date the decree was rendered, where the notice otherwise with sufficient accuracy describes the decree under which the sale was made.

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

Willis D. Oldham and *Miller & Easterling*, for appellants.

E. C. & H. V. Calkins, contra.

NORVAL, C. J.

Errors are alleged in the overruling of defendants' motion to vacate a judicial sale of real estate. There are some clerical errors in the order of sale, but they are unimportant and not prejudicial. The decree alone was sufficient authority to the sheriff to make the sale. The notice of sale, in describing the decree, gave a date different from that on which the same was rendered, but this did not invalidate the sale, since the published notice with sufficient

particularity otherwise described the decree, the court in which it was rendered and the names of the parties being stated. The other criticisms upon the sale, are likewise without merit.

The order is

AFFIRMED.

JULIA M. CROSS, APPELLEE, V. WILLIAM E. LEIDICH ET AL., IMPLEADED WITH HENRY LAMMERS ET AL., APPELLANTS.

FILED JANUARY 8, 1902. No. 10,910.

1. **Foreclosure:** SALE: RETURN: SIXTY-DAY LIMIT. A sale of real estate under a decree foreclosing a mortgage, will not be set aside, merely because the officer did not return the order of sale within sixty days from the date thereof.

2. **Notice:** MERIDIAN. That the meridian in which lands are situate is not stated in the notice of sale will not invalidate the sale made thereunder, when the county, town, range, section and part thereof, are correctly given in the notice.

3. **Sale of Real Estate:** STATUTE. The statute does not require that a sale of real estate under a mortgage foreclosure shall be held open for any specific length of time.

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

B. O. Hostetler, for appellants.

A. B. Coffroth, contra.

NORVAL, C. J.

Complaint is made of the order of the court below confirming the sale of real estate under a decree of foreclosure of a real estate mortgage because the order of sale was returned sixty-two days after the date it bore. We have decided this point more than once adversely to the defendants. *Jarrett v. Hoover,* 54 Nebr., 65; *Amoskeag Savings Bank v. Robbins,* 53 Nebr., 776; *Clark & Leonard Inv. Co. v. Hamilton,* 54 Nebr., 95; *Philadelphia Mortgage & Trust Co. v.*

Buckstaff Bros. Mfg. Co., 61 Nebr., 54. But it is insisted that these cases are not decisive of the question here, since the decree of foreclosure expressly stipulated "that an order of sale shall be issued, directed to the sheriff of Buffalo county, Nebraska, commanding him to appraise, advertise and sell the above described premises as upon execution." This provision is insufficient to make the former decisions inapplicable here. The sheriff did, as he was ordered, appraise, advertise and sell the mortgaged premises as upon execution. The decree contained no stipulation concerning the time he should make his return, and the language quoted can not be construed as requiring the order of sale to be returned in sixty days.

The order of confirmation is assailed on the ground that the notice of the sale omitted to give the meridian in which the mortgaged premises are located. The notice, however, correctly designated the land, by giving the county, town, range, and part of section. This was sufficient. *Miller v. Lanham,* 35 Nebr., 886; *Pearson v. Badger Lumber Co.,* 60 Nebr., 167.

Finally it is urged that the order of confirmation should be reversed, because the sale was made according to the standard time, which is about twenty-five minutes faster than sun time in Kearney. It is disclosed by the record that the sheriff opened the sale at 2 o'clock P. M., standard time, on the date advertised, and held the sale open until 3 o'clock P. M., standard time of the same day. So that the sale was not concluded according to common or sun time until about thirty-five minutes after the hour advertised. The statute does not require that mortgage foreclosure sales shall be held open for any length of time.

The order assailed is

AFFIRMED.

PETER K. DEDERICK, APPELLEE, V. JAMES S. GILLESPIE ET AL., APPELLANTS.

FILED JANUARY 8, 1902. No. 10,912.

1. **Judicial Sale:** AMOUNT: NOTICE. A judicial sale will not be set aside, merely because the notice of sale does not state the amount due on the decree.

2. **Evidence:** REVIEW: BILL OF EXCEPTIONS. Evidence will not be reviewed, where it is not disclosed that all the evidence adduced in the court below is contained in the bill of exceptions.

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

B. O. Hostetler, for appellants.

Thomas L. Hall and *William Gaslin, contra.*

NORVAL, C. J.

This is an appeal from an order confirming a sale of real estate. That the notice of sale did not state the amount due on the decree, did not invalidate the sale. This has been expressly held by this court. *Stratton v. Reisdorph,* 35 Nebr., 314; *Amoskeag Savings Bank v. Robbins,* 53 Nebr., 776.

The remaining point—that the property was appraised at a sum greatly less than its actual value—can not be reviewed, because the bill of exceptions does not purport to contain all the evidence adduced on the hearing. Neither in the caption nor in the certificate of allowance thereof, is it stated that the bill contains all the evidence in the case. It is merely recited in the caption that a certain affidavit embraced in the bill has been embodied as evidence by defendant. Whether other evidence was or was not adduced does not appear.

The order appealed from is accordingly

AFFIRMED.

ADALENA DE GROOT, APPELLEE, V. JAMES W. WILSON ET AL., APPELLANTS.

FILED JANUARY 8, 1902. No. 10,924.

1. **Appraisement:** PRESUMPTION. All presumptions will be indulged in favor of the fairness of an appraisement made by a sheriff.

2. **Foreclosure Sale:** CONFIRMATION: RETURN. The confirmation of a mortgage foreclosure sale, will not be vacated, merely because the order of sale was not returned within sixty days from its date.

APPEAL from the district court for Buffalo county. Tried below before SULLIVAN, J. *Affirmed.*

Fred A. Nye, for appellants.

John N. Dryden, contra.

NORVAL, C. J.

The first objection to the confirmation of sale, that the property was appraised too low, lacks merit. There were two appraisements of the mortgaged premises. Under the first appraisement the property was valued at $4,399. Having been twice offered for sale under this appraisal, and not sold for want of bidders, there was another appraisement made. This appraisement was in the sum of $4,160, under which the sale was made at more than two-thirds the appraisement. No evidence was adduced to show that this appraisement was unfair and unjust. It, therefore, must be presumed that the appraisers did their duty.

Lastly, it is urged that the sale is invalidated, because the order of sale was not returned within sixty days from its date. We have passed upon this question adversely to the contention of the defendants below. *Amoskeag Savings Bank v. Robbins,* 53 Nebr., 776. The order assailed is

AFFIRMED.

HARVEY LINK V. JOSEPH C. REEVES, ADMINISTRATOR, ET AL.

FILED JANUARY 8, 1902. No. 12,063.

1. **Revivor of Action:** ADMINISTRATOR: SUMMONS IN ERROR. Where a cause is properly revived in this court in the name of the administrator of a deceased defendant in error, no summons in error is required to be served upon that administrator.

2. **Conditional Order of Revivor:** SERVICE. The serving of the conditional order of revivor, confers jurisdiction upon the substituted party.

3. **Summons in Error:** SERVICE: ATTORNEY OF RECORD. A summons in error may properly be served upon the attorney of record in the trial court in the original case, though at the time of such service the defendant in error should be dead.

ERROR from the district court for Douglas county. Tried below before BAXTER, J.

Heard on objections to jurisdiction. *Objections overruled.*

J. O. Detweiler, for plaintiff in error.

B. N. Robertson, contra.

Argued orally by counsel for both parties.

NORVAL, C. J.

Preston Reeves recovered a judgment in the district court against William Kaelber and Harvey Link in the sum of $933.50, besides costs. On May 21, 1901, Link filed the record in this court, and a petition in error to reverse said judgment, making Reeves and Kaelber defendants in error. A summons in error was issued on the same day, which was served upon B. N. Robertson, the attorney of record in the cause in the court below for said Reeves. On the day this petition in error was filed, and the summons in error issued, but before the service thereof, Preston Reeves died; and subsequently the action was revived in this court

in the name of Joseph C. Reeves, administrator of the estate of said Preston Reeves, deceased. The administrator objects to the jurisdiction of the court on the ground that the summons in error was not served upon him until more than one year after the rendition of the final judgment which is sought to be revived by this proceeding.

A conditional order of revivor was issued, in pursuance of section 459 of the Code of Civil Procedure, which was duly served upon the administrator; and, no sufficient cause being shown to the contrary, the court ordered the action to stand revived in the name of the administrator of the estate of the decedent, in accordance with section 461 of said Code. The issuance and service of summons in error upon the administrator were wholly unnecessary. The service of the conditional order of revivor was sufficient to bring the administrator into court, since said order was served within one year from the time the revivor could have been first made. Code of Civil Procedure, sec. 466.

Of course, there could be no review, unless the court had acquired jurisdiction of the cause by reason of the service of the summons in error upon Mr. Robertson. It is argued that service of process upon him was of no validity, inasmuch as Preston Reeves died the day the cause was docketed in this court and the summons in error issued, and prior to the time service was made upon Robertson. Without doubt, the relation of attorney and client ceased upon the death of Mr. Reeves; and, had the statute required a summons in error to be served upon the defendant in error or his attorney, then the service upon Mr. Robertson would be of no validity. But the statute does not so provide. Section 584 of the Code of Civil Procedure declares: "The proceedings to obtain such reversal, vacation, or modification, shall be by petition, entitled 'petition in error,' filed in a court having power to make such reversal, vacation, or modification, setting forth the errors complained of, and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action. A service on the attorney of record in the original case shall be

sufficient." The language of the statute is plain. It makes the service of a summons in error upon the attorney of record in the court below sufficient. Robertson being the attorney of record of Preston Reeves in the original case, the service of summons upon him conferred jurisdiction, though Mr. Reeves was then dead. It is reasonable to suppose that the statute was thus framed to meet a case like the present one, as well as where the defendant in error is a non-resident, upon whom personal service of process could not be had.

The objection to jurisdiction is overruled.

OBJECTIONS OVERRULED.

NOTE.—*Service of Appellate Process on Attorney.* Under common law practice the attorney of record for the appellee in the trial court is his authorized agent to receive appellate process. 2 Ency. Pl. & Pr., 222. "No attorney or solicitor can withdraw his name, after he has once entered it on the record, without the leave of the court. And while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself. *United States v. Curry*, 6 How. [U. S.], 106, 111. "Where an appellant, in ignorance of the death of the respondent, serves a notice of appeal on the attorney who has appeared for the latter, and the service is accepted by him, the appeal will not be dismissed on a motion made by the attorney who accepted the service, on the ground that the service was void, because made after the death of the respondent." *Moyle v. Landers*, 75 Cal., 595. But see Hayne, New Trial & Appeal, sec. 210, p. 631; *Sanchez v. Roach*, 5 Cal., 248; *Judson v. Love*, 35 Cal., 463; *Shaitzer v. Love*, 40 Cal., 93; *Sheldon v. Dalton*, 57 Cal., 19; *Warren v. Eddy*, 13 Abb. Pr. [N. Y.], 28. "Where, after the death of a party, notice of appeal from an order is served upon his attorney, the appellant can not object on motion of said attorney to dismiss appeal, that he has no standing in court because of the death of his client. Having called the attorney into court as the proper representative of the deceased, the appellant may not object to his being heard." *In re Beckwith*, 90 N. Y., 667.—REPORTER.