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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1903.

VOLUME LXVII.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

LINCOLN, NEBR.:
STATE JOURNAL COMPANY, LAW PUBLISHERS.
1905.

Entered according to act of Congress in the office of the Librarian of Congress,
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In behalf of the people of Nebraska.

SUPREME COURT

1903-1905.

CHIEF JUSTICES AND JUDGES.

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SILAS A. HOLCOMB, CHIEF JUSTICE.†
SILAS A. HOLCOMB, JUDGE.*
SAMUEL H. SEDGWICK, JUDGE.
JOHN B. BARNES, JUDGE.†

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* Until January 4, 1904.
† After January 4, 1904.
‡ After January 5, 1905.
§ Succeeded Bryant September 1, 1905.
‖ After May 1, 1904.
¶ See volume 65.

JUDICIAL DISTRICTS, AND DISTRICT JUDGES OFFICIATING AT THE ISSUANCE OF THIS VOLUME.

NUMBER OF DISTRICT	COUNTIES IN DISTRICT	JUDGES IN DISTRICT	RESIDENCE OF JUDGE
First.....	Gage, Jefferson, Johnson, Nemaha, Pawnee and Richardson.	Albert H. Babcock... William H. Kelligar.	Beatrice. Auburn.
Second.....	Cass and Otoe.....	Paul Jessen.....	Nebraska City.
Third.....	Lancaster.....	Albert J. Cornish .... Lincoln Frost ..... Edward P. Holmes...	Lincoln. Lincoln. Lincoln.
Fourth	Burt, Douglas Sarpy and Washington.	George A. Day..... Lee S. Estelle..... Howard Kennedy, Jr. William A. Redick... Willis G. Sears ..... Abraham L. Sutton.. Alexander C. Troup..	Omaha. Omaha. Omaha. Omaha. Tekamah. South Omaha. Omaha.
Fifth	Butler, Hamilton, Polk, Saunders, Seward and York.	Arthur J. Evans. ... Benjamin F. Good...	David City. Wahoo.
Sixth	Colfax, Dodge, Merrick, Nance and Platte.	Conrad Hollenbeck.. James G. Reeder.. ..	Fremont. Columbus.
Seventh.....	Clay, Fillmore, Nuckolls, Saline and Thayer.	Leslie G. Hurd.....	Harvard.
Eighth.....	Cedar, Cuming, Dakota, Dixon, Stanton and Thurston.	Guy T. Graves.....	Pender.
Ninth	Antelope, Knox, Madison, Pierce and Wayne.	James F. Boyd.....	Neligh.
Tenth	Adams, Franklin, Harlan, Kearney, Phelps and Webster.	Ed L. Adams.....	Minden.
Eleventh.....	Blaine, Boone, Garfield, Grant, Greeley, Hall, Hooker, Howard, Loup, Thomas, Valley and Wheeler.	John R. Hanna..... James N. Paul.....	Greeley. St. Paul.
Twelfth.....	Buffalo, Custer, Dawson, Sherman.	Bruno O. Hostetler...	Kearney.
Thirteenth ..	Arthur, Banner, Cheyenne, Deuel, Keith, Kimball, Lincoln, Logan, McPherson, Perkins and Scott's Bluff.	Hanson M. Grimes...	North Platte.
Fourteenth...	Chase, Dundy, Furnas, Frontier, Gosper, Hayes, Hitchcock, Red Willow.	Robert C. Orr.....	McCook.
Fifteenth	Box Butte, Brown, Cherry, Dawes, Holt, Keya Paha, Rock, Sheridan, Sioux and unorganized territory.	James J. Harrington. William H. Westover.	O'Neill. Rushville.

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ADMITTED SINCE THE PUBLICATION OF VOL. LXVI.

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MCELFRESH, CLARENCE N.
MCKENZIE, JOHN AUGUSTUS.
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TE POEL, LOUIS J.
VAIL, EDWIN.
VEATCH, ALVIN E.
WILLIAMS, HOWARD R. H.
WILLIAMS, JOSEPH A.
WILSON, JOHN E.

TABLE OF CASES REPORTED.

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CASES CITED BY THE COURT.

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CASES MARKED † ARE CRITICISED IN THIS VOLUME.
CASES MARKED ‡ ARE DISTINGUISHED IN THIS VOLUME.
MODIFIED CASES IN THIS LIST ARE MARKED AS OVERRULED.

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STATUTES AND CONSTITUTIONAL PROVISIONS

CITED AND CONSTRUED.

Figures in parentheses indicate corresponding sections in Cobbey's Annotated Statutes.

NEBRASKA.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1903.

PRESENT:

HON. J. J. SULLIVAN, CHIEF JUSTICE.
HON. SILAS A. HOLCOMB, } JUDGES.
HON. SAMUEL H. SEDGWICK, }

DEPARTMENT NO. 1.
HON. WILLIAM G. HASTINGS,
HON. CHARLES S. LOBINGIER,*
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.

ELBRIDGE L. RHODES V. EDGAR SAMUELS.

FILED JANUARY 8, 1903. No. 12,220.

1. Attachment: LEVY: LIEN. When an attachment is rightfully issued and levied upon property of the defendant, it creates a lien in favor of the plaintiff for the amount of his claim and for all costs, whether incident to the action or resulting from the special proceeding.

Syllabus by court; catch-words by editor.

*Succeeded George A. Day, whose opinion in *State v. Omaha Nat. Bank*, 66 Nebr., 857, is the first filed during the term. Before the close of this term the commissioners were rearranged as follows:
Department 1—Hastings, Ames, Oldham.
Department 2—Barnes, Albert, Glanville (succeeded Lobingier).
Department 3—Duffie, Kirkpatrick, Pound.

2. ———: ———: ———: JUSTICE OF THE PEACE: ERROR. An error proceeding from an order of a justice of the peace discharging an attachment preserves and continues the lien of the attachment and brings the ruling of the justice before the district court for review.

3. ———: PENDING ERROR PROCEEDING, JUSTICE MAY TRY CASE: JURISDICTION: COSTS. While the error proceeding is pending the justice may try and determine the action, but he is without jurisdiction or authority to make an order taxing the costs of the attachment to either party.

4. ———: ERROR: REVERSAL: ANCILLARY PROCEEDING: JURISDICTION OF JUSTICE. But when the district court has given its decision, and the order discharging the attachment has been reversed, the justice of the peace is reinvested with complete jurisdiction of the ancillary proceeding, and it is then his right and duty to tax the attachment costs against the unsuccessful party.

5. ———: PAYMENT OF JUDGMENT: EFFECT. Payment of a judgment rendered by a justice of the peace in favor of a party who has prosecuted error from an order discharging an attachment, will not, without payment of attachment costs rightfully incurred, dissolve the lien of the attachment.

6. ———: ERROR PROCEEDING: COSTS. The costs of the error proceeding, like other costs incident to the litigation, are secured by the attachment lien, and the attached property may be sold to satisfy the same.

7. Error: JUSTICE: ATTACHMENT: POWER OF DISTRICT COURT. In an error proceeding from an order of a justice of the peace discharging an attachment, the only judgment which the district court is authorized to render and enforce is a judgment affirming or reversing the order of the justice and taxing the costs incident to such proceeding.

8. Error from Justice: DISPOSAL OF CAUSE AFTER REVERSAL. Section 601 of the Code of Civil Procedure, which declares that when the judgment of a justice of the peace shall be reversed the cause shall be retained in the district court for trial, has reference only to cases which have been entirely disposed of by final order or judgment, and which may be again tried and determined.

ERROR from the district court for Butler county. Action for money due on contract. Ancillary proceeding in attachment; attachment discharged. Further history of

case appears in the opinion. Tried below before SORNBORGER, J. *Reversed.*

L. S. Hastings and *E. G. Hall,* for plaintiff in error.

E. W. Hale, contra.

SULLIVAN, C. J.

In an action brought before a justice of the peace to recover money due upon contract, the plaintiff, Rhodes, caused an attachment to be issued and levied upon two horses and a buggy owned by the defendant, Samuels. Afterwards, on defendant's motion, the justice made an order discharging the attachment. The plaintiff excepted to the order, and by proceeding in the manner indicated by section 236*e,* Code of Civil Procedure, secured a reversal of it in the district court. Meanwhile the action was tried before the justice of the peace, and judgment rendered in favor of the plaintiff for $26.05 and all costs except those made in the ancillary proceeding. This judgment was paid on the day it was rendered. The further history of the case is found in the journal of the district court, and is as follows:

"And now on this 28th day of June, 1901, the same being a day of the regular May, 1901, term of the district court for Butler county, Nebraska, this cause came on for hearing on the application of the plaintiff in error for an order to sell the attached property to pay costs of this suit and costs of keeping said attached property, the court, on consideration, overrules the same; to which ruling of the court the plaintiff in error duly excepts. And said cause coming for further hearing this day upon the motion of the plaintiff in error that the attached property be sold to pay costs of this proceeding in error, and the court, being well and fully advised in the premises, overrules the same; to which ruling of the court the said plaintiff in error duly excepts. And the said plaintiff in error not desiring to plead further in said cause, and electing to stand upon

his application and motion aforesaid, the court, on consideration, finds for the defendant in error and that plaintiff in error has no cause of action; and the action is dismissed at the costs of the plaintiff in error, made since the judgment sustaining the petition in error in said cause. And on motion of the defendant in error, and due consideration thereof had, it is ordered that the attachment in this action be, and the same hereby is, discharged, and the special constable ordered to return to the defendant in error the property taken under said attachment. It is therefore considered by the court that said action be, and the same hereby is, dismissed, and that the plaintiff recover his costs herein expended to the date of judgment sustaining petition in error, taxed at $16.42, and that the defendant recover his costs herein expended since the date of judgment sustaining the petition in error, taxed at $16.08, and it is ordered that execution be awarded in this court to carry into effect said judgment."

The theory upon which this decision was rendered, or at least the theory upon which counsel has attempted to defend it, is that the payment of the judgment rendered by the justice of the peace satisfied the plaintiff's claim and released the property from the lien created by the attachment. It seems to us this view can not be sound. By the attachment plaintiff obtained security for his claim and for all costs, whether incident to the action or resulting from the rightful use of the provisional remedy (*Miller v. James,* 86 Ia., 242; 3 Am. & Eng. Ency. Law [2d ed.], 222); and he was entitled to have the attached property, or so much of it as might be necessary, sold for the satisfaction of such claim and costs. Code of Civil Procedure, sec. 943. The proceeding in error preserved and continued the attachment lien (*Adams County Bank v. Morgan,* 26 Nebr., 148) and brought the ruling of the justice of the peace on the motion to discharge the attachment before the district court for review. When the justice gave judgment in favor of the plaintiff, he was acting within the authority of section 236*f* of the Code of Civil Procedure,

which provides that "the original action shall proceed to trial and judgment in every other respect as though no writ of error had been prosecuted."

The costs of the attachment were not taxed by the justice, because, when the action was tried and determined, the motion to discharge the attachment was still pending and the decision of the court upon the motion could not, of course, be anticipated. Besides, the question of defendant's liability for attachment costs being involved in the motion to discharge the attachment, the justice was without jurisdiction or authority to deal with the matter. 2 Cyc., 970. But when the district court had given its decision and the order discharging the attachment had been reversed, the justice was reinvested with complete jurisdiction of the ancillary proceeding, and it was then his right and duty, upon a proper showing, to tax the costs of the attachment against the defendant and to order a sale of the attached property for the satisfaction of such costs. Code of Civil Procedure, sec. 943. The effect of the decision of the district court was to sustain the attachment and leave the property in the hands of the officer, subject to a lien in favor of plaintiff for the unpaid costs. The payment made by defendant did not discharge the lien, because it did not discharge his obligation. It was only a partial payment, because it did not cover the attachment costs that had already accrued. The costs of the error proceeding, like other costs incident to the litigation, were secured by the attachment lien, and plaintiff was entitled to have them satisfied by a sale of the attached property.

Counsel on both sides seem to think that the reversal of the order of the justice of the peace had the effect of giving the district court exclusive jurisdiction of the attachment proceeding, but this, in our opinion, is an erroneous view. Undoubtedly, the district court had authority to enforce its own judgment, but the only judgment it was authorized to render was a judgment affirming or reversing the order of the justice of the peace and taxing the

costs incident to the error proceeding. The cause could not be retained for trial. When the judgment of reversal was entered, the controversy in the district court was ended and no issue remained to be tried. The provision of section 601 of the Code of Civil Procedure, which declares that when the judgment of a justice of the peace shall be reversed the cause shall be retained for trial, has reference to cases which might have been brought by appeal to the district court for trial *de novo;* or perhaps it would, in view of the former state of the law on the subject of appeals, be more accurate to say cases which have been entirely disposed of in the justice's court by final order or judgment. Such cases were the only ones which might be removed by appeal or error to the district court at the time section 601 was adopted.

It results from what has been said that the judgment under review deprives the plaintiff of a substantial right and should, therefore, be reversed.

REVERSED AND REMANDED.

HORACE A. KELLEY V. COUNTY OF GAGE.*

FILED JANUARY 8, 1903. No. 12,573.

1. **Statutes:** LETTER OF THE LAW: INTENTION OF LAWGIVER. In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.
2. **Revenue Act of 1879:** LEGISLATIVE INTENT. By the adoption of section 131 of the revenue act of 1879, the legislature intended, not to make counties liable for the derelictions of the officers and agents of cities and villages, but only to change the tax-sale purchaser's ground of action,—to take away the right to sue when there is a valid tax, and in its place to give the right to sue when the tax is void or the land not subject to taxation.
3. **County Clerk:** COUNTY TREASURER. In dealing with taxes certified by city authorities to the county clerk, neither the county clerk nor county treasurer acts as agent of the county.

Syllabus by court; catch-words by editor.

* Rehearing allowed. See opinion, p. 11, *post.*

4. **Special Assessment:** SALE OF REAL ESTATE: WRONGFUL ACT. When a tax or special assessment, certified to the county clerk by the proper authorities of a city or village, is void on account of some irregular action taken by such authorities, a sale of real estate for the non-payment of such tax or assessment does not result from the mistake or wrongful act of either the county clerk or county treasurer.

5. **Liability of County Under Revenue Act.** A county is only liable under section 131 of the revenue act for the mistakes and wrongful acts of its own officers—the officers through whom its taxes are levied and collected.

ERROR from the district court for Gage county. Action for the recovery of indemnity under section 131 of the general revenue law. Tried below before LETTON, J. Judgment for defendant. Plaintiff brings error. *Affirmed.*

Alexander Q. Smith and *William H. Ashby,* for plaintiff in error.

Babcock, Sackett & Spafford, contra.

SULLIVAN, C. J.

Horace A. Kelley, the holder of tax-sale certificates covering real estate upon which no taxes were due when the sales were made, having sued for indemnity under section 131 of the general revenue law, now brings to this court for review the record of an adverse judgment. The lots described in the certificates are situated in the city of Beatrice, and the taxes charged against them and certified by the city authorities to the county clerk of Gage county were what is commonly known as special assessments for improvements. These assessments were not made in the manner prescribed by the statute, and, according to the stipulation of the parties, were void. The irregularities which rendered them void did not, however, appear in the certificates sent, under the direction of the city authorities, to the county clerk. The clerk, therefore, in entering the assessments upon the tax lists, performed a duty plainly enjoined upon him by the statute. And in making

sales for the non-payment of these assessments the treasurer was acting in obedience to the command of the clerk's warrant; he was discharging a duty imposed by law. Neither of these officers made any mistake or did any wrongful act which resulted in the sales to plaintiff's assignor. The cause lay farther back; the making of the assessments and the certification of them to the county clerk were the acts from which the sales proceeded and without which they would not have been made. The section of the statute here in question provides: "When by mistake or wrongful act of the treasurer or other officer land has been sold on which no tax was due at the time, or whenever land is sold in consequence of error in describing such land in the tax receipt, the county is to hold the purchaser harmless by paying him the amount of principal and interest and costs to which he would have been entitled had the land been rightfully sold, and the treasurer or other officer and their bondsmen will be liable to the county to the amount of their official bond; or the purchaser, or his assignee, may recover directly of the treasurer or other officer, in an action brought to recover the same in any court having jurisdiction of the amount, and judgment shall be against him and his bondsmen; but the treasurer or other officer and their bondsmen shall be liable only for their own and deputies' acts." According to the plain terms of this section the loss sustained by a tax-sale purchaser falls ultimately upon the person or persons through whose fault the sale was made. The county, as said in *Hurd v. Hamill,* 10 Colo., 174, is liable in any event, but its liability is that of a surety; it is made to answer for the misconduct of the officers by which it levies and collects taxes, but it was not the intention of the legislature to make it liable for the mistakes and wrongful acts of city and village officers, with whom it has no business relations and over whom it has no control or authority. It is a well-settled rule in the interpretation of statutes that the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to pal-

pable injustice or absurdity. To require a county to answer for the negligence or delinquency of city or village officers would be contrary to reason and monstrously unjust. A statute which would permit a city to retain money which had come into its treasury by reason of the mistake or wrongful act of its own officers, while compelling the county to reimburse the person whose money was so received and retained, would be an anomaly in legislation; it would run counter to the plainest principles of natural justice and would, we suppose, be without precedent or analogy anywhere. Why should a county make atonement for wrongs done by a city through officers which it had itself freely chosen? Why should municipal corporations be allowed to profit by the derelictions of their own officers? And why should the consequences of such derelictions be borne by the counties? It is hardly possible to believe that a lawmaking body, composed of rational men, intended to tax property beyond corporate boundaries to swell municipal revenues, or that they intended to establish a rule of liability which would be at once condemned by the instinct and reason of all right-minded people. It is certain the original legislative purpose was to make counties liable only when, through the fault of their own officers, a tax sale failed to transfer title to the purchaser. Section 71 of the revenue act of 1869,* as amended, was as follows: "When, by mistake, or wrongful act of the treasurer or other officer, land has been sold contrary to the provisions of this act, the county is to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold, and the treasurer, or other officer, and their sureties, shall be liable for the amount, on their bonds to the county, or the purchaser may recover the amount directly from the treasurer, or other officer, making such mistake or error." Construing this section, it was held in *Otoe County v. Gray*, 10 Nebr., 565, that if there was no tax due at the time of the sale,

* Session Laws, 1871, p. 83.

there was no liability either against the county or the officer through whose fault the sale was made. By adopting section 131 as part of the revenue law of 1879, it was evidently intended, not to make counties answerable for the mistakes and wrongful acts of municipal officers, but only to change the tax-sale purchaser's ground of action,—to take away the right to sue when there is a valid tax and in its place to give the right to sue when the tax is void or the land not subject to taxation. In the case last cited and also in *Kaeiser v. Nuckolls County,* 14 Nebr., 277, the words "other officer," as used in section 71 of the act of 1869, were interpreted to mean "other officer of the revenue," and in *Martin v. Kearney County,* 62 Nebr., 538, it was held that "irregular action by a city council in making a levy of taxes for municipal purposes, resulting in the levy being declared illegal and void, is not a 'mistake or wrongful act of the county treasurer or other officer,' within the meaning of section 131, article 1, chapter 77, Compiled Statutes, for which the county can be held liable to refund to a purchaser at delinquent tax sale the illegal taxes so attempted to be levied." This last case is a direct adjudication of the question here in controversy. To the extent, at least, that the decision rests upon the proposition quoted, it is sound law and is adhered to.

In *Merriam v. Otoe County,* 15 Nebr., 408, it was decided that it is only when a tax sale is made in consequence of a mistake or wrongful act, which is not matter of record, that the county is to save the purchaser harmless. This decision seems to be approved in *Martin v. Kearney County,* but whether it is a correct construction of the statute it is not now necessary to determine. It may, however, be remarked that we are not aware that it has ever been directly or indirectly overruled. It is certainly not in conflict with *Roberts v. Adams County,* 18 Nebr., 471, 20 Nebr., 411; *Wilson v. Butler County,* 26 Nebr., 676; or *Fuller v. Colfax County,* 33 Nebr., 716,—to which counsel for plaintiff have directed our attention. In those cases the lands sold were not subject to taxation, but that fact

did not appear of record. In other cases cited by counsel, such as *Grant v. Bartholomew,* 57 Nebr., 673, and *John v. Connell,* 61 Nebr., 267, the court was dealing with the rights of a purchaser at a tax sale which, although void on account of some irregularity, was made for the non-payment of a valid tax. The construction of section 131 was not involved.

The judgment of the district court is affirmed, and upon these grounds: (1.) A county is only liable under section 131 for the mistakes of its own officers—the officers through whom its taxes are levied and collected. (2.) In dealing with the Beatrice assessments, neither the county clerk nor county treasurer was acting as an officer or agent of the county. (3.) Neither of these officers made any mistake or did any wrongful act within the meaning of section 131.

AFFIRMED.

The following opinion on rehearing was filed April 21, 1904. *Former judgment adhered to:*

Commissioner's opinion, Department No. 3.

Let It Stand as Decided. On reexamination the former judgment is adhered to.

DUFFIE, C.

I think that the former judgment entered by this court should be adhered to. The reasoning in the former opinion, page 6, *ante,* and also in *Martin v. Kearney County,* 62 Nebr., 538, is to my mind conclusive of the question in controversy. To hold that the county is liable, or that the legislature intended to make it liable, to a tax-sale purchaser for money invested by him in the purchase of real property delinquent for special or ordinary taxes levied by the authorities of a city, is to offer a premium to the city officials to neglect their duty in the manner and method of imposing taxes for municipal purposes, and to impose a penalty on the county and its inhabitants for a wrong done by third parties, officers over whom they

have no control and for whose official position they are not responsible. In the absence of a statute making the county liable to the tax-sale purchaser, when the sale is invalid for any reason, it is plain that the purchaser would have no remedy against the county. If the purchaser, in the absence of this statute, could not recover from the county for a sale for taxes levied by its own agents, it is equally plain to my mind that the county can not recover from the city on account of city taxes which it has refunded, in the absence of a statute giving that right. I am clear that the law leaves the purchaser of lands delinquent for city taxes in the same position that he occupied before the enactment of section 131 of the revenue act of 1879. Where he bought at a sale for state and county taxes, he bought at his peril. But in relation to taxes levied by county authorities the legislature saw fit, on account of the needs of the state and county in promptly collecting their revenue, to offer as an inducement to those who would come forward and purchase lands upon which taxes were delinquent, to guarantee a return of their money with legal interest in case the sale was set aside because of any irregularity in the imposition of the tax. That the legislature might assist the several city governments in this state in the same manner is not questioned, but that it has done so, or intended the provisions of section 131 to cover a sale for city taxes, is so improbable from the circumstances of the case that I can not give my consent to such a construction of the law.

It is recommended that the judgment heretofore entered be adhered to.

SEDGWICK, J., concurring.

I consent to adhering to the former opinion in this case reluctantly and because we are committed to such construction of the statute in *Martin v. Kearney County*, 62 Nebr., 538, and *Otoe County v. Gray*, 10 Nebr., 565, and not because I think it is based upon the better reason.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the former opinion heretofore entered in this cause be adhered to.

FORMER JUDGMENT ADHERED TO.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. LUCIE M. WINFREY.

FILED JANUARY 8, 1903. No. 11,803.

1. **Conflicting Evidence.** The finding of a jury on a disputed question of fact, when supported by sufficient competent evidence, will not be disturbed by a reviewing court, even though, from an examination of the record, the evidence seems to preponderate to the contrary.
2. **Railroad:** INJURY TO PASSENGER: PRESUMPTION. It is the settled law of this state that when, in the operation of a train carrying passengers, an injury results to one of them, the imputation of negligence arises, and the liability to respond in damages becomes fixed, unless it is made to appear that the injury arose from the criminal negligence of the passenger, or was the result of the violation of some express rule or regulation of the carrier, actually brought to the notice of the party injured.
3. **Negligence.** Ordinarily the existence of negligence such as will justify or defeat a right of recovery for damages for an injury received by a passenger while being transported by a railway company is for the jury to determine as it determines other questions of fact.
4. **Contributory Negligence:** PLEADING: CONFLICTING EVIDENCE: QUESTION FOR JURY. Where, upon an issue of fact raised by a plea of contributory negligence, the testimony is conflicting, or where the evidence as a whole is of such a character as that reasonable minds may fairly draw different conclusions therefrom, it is for the jury and not the court to determine the question of contributory negligence.
5. ———: ———: ———: QUESTION FOR COURT. It is only where the facts are not in controversy or the evidence is of such a character as but one rational inference can be drawn therefrom, that the court is warranted in determining the question of negligence as a matter of law.

Syllabus by court; catch-words by editor.

6. **Passenger:** LEAVING TRAIN: NEGLIGENCE. It is not necessarily gross negligence in every case for a passenger to attempt to leave a train, even though at the time it be in motion.

7. ———: ———: ———: WILLFUL DISREGARD OF DANGER. Contributory negligence on the part of a passenger which will avoid a recovery must be an act committed under such circumstance as to render it obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby.

8. ———: ———: PERSONAL INJURY: RECOVERY. Plaintiff was a passenger on defendant company's train. When she had reached her destination, and while attempting to leave the car in which she was riding, and before she had reached the door, the train began to move and she was compelled to choose instantly and without time for reflection as to her course of action, and continued the act of alighting from the train, and in doing so was injured thereby. *Held*, That such action would not of itself necessarily bar a recovery, and that the question of contributory negligence was properly submitted to the jury, and its determination thereof was final.

9. **Criminal Negligence.** "Criminal negligence," as used in the statute, which will defeat a recovery for an injury received by a passenger is defined to mean gross negligence, such as amounts to a reckless disregard of one's own safety, and a willful indifference to the consequence liable to follow. *Union P. R. Co. v. Porter*, 38 Nebr., 226.

10. **Evidence.** Evidence examined, and *held* sufficient to support the verdict of the jury.

11. **Instructions.** Certain instructions complained of, given to the jury, examined, and *held* not to be prejudicially erroneous.

ERROR from the district court for Nemaha county. Action against a common carrier for personal injury. Tried below before STULL, J. *Affirmed.*

B. F. Neal, J. W. Deweese and *Frank Elmer Bishop*, for plaintiff in error.

H. A. Lambert, E. B. Quackenbush and *W. C. Lambert, contra.*

HOLCOMB, J.

Plaintiff began an action and recovered a judgment for damages against the defendant railroad company because

of alleged personal injuries sustained by her in alighting from one of its passenger cars, which had begun to move from the station before she alighted, where she left the train. The defendant company prosecutes error.

It appears that the plaintiff purchased from the defendant company, through one of its agents at a station on its road in Iowa, a ticket to carry her to the station of Bracken, in Nemaha county, this state. When she asked for a ticket to Bracken, for some reason she was informed by the station agent in Iowa that he could not sell her a ticket to that station, but could to Auburn, which was the next stopping place immediately west of Bracken, and that by informing the conductor of her desire to leave the train at Bracken, she would be allowed to get off at that place, as desired. Under this arrangement the ticket was purchased, and her baggage checked to the town of Auburn, and the plaintiff thereupon became a passenger, having for her destination the station of Bracken, instead of Auburn, as her ticket and baggage check seemed to indicate. The pith of the controversy becomes apparent by reading the following excerpts from the pleadings. In the petition it is alleged "that as soon as said train had stopped at said station of Bracken, this plaintiff gathered up her said baggage and personal effects and started to the front end of said car to leave the same and alight therefrom. That plaintiff had reason to expect and did expect that said conductor would be at said point to aid her in alighting from said car. That at or about the time plaintiff reached the front end of said car, and but a few moments after the same had stopped, the said defendant, its agents, and employees negligently and carelessly started said car and train and continued to move negligently and carelessly the same, and while said train was moving slowly, as plaintiff thought, and had moved but a short distance forward, and becoming suddenly convinced that said train had started on its journey to the next station, plaintiff passed down the steps of said car and stepped therefrom to the ground. * * * That in alighting from

said train as aforesaid, without any fault, carelessness, or negligence on her part, plaintiff was violently thrown to the ground and then and there and thereby was seriously and permanently injured." To this it is answered by the defendant: "The defendant further alleges that while the plaintiff was riding as a passenger on the defendant's train, and before she reached her destination, and between the stations of Bracken and Auburn in the state of Nebraska, and while the train was running, she, without any notice to the conductor or trainmen, went out of the coach in which she was riding and jumped off on the ground; and that in thus jumping off while the train was running, she was thrown off her feet and fell onto the ground; but this defendant is not advised as to whether she was injured by said fall, or the extent of such injury; but alleges the fact to be that whatever injuries she sustained, if any, the same were sustained and caused by her own willful misconduct and carelessness, and without any fault or negligence on the part of this defendant." It is disclosed by the evidence that between the starting point and the destination of the plaintiff there were two conductors in charge of the train on which plaintiff was riding as a passenger, a change having taken place at Nebraska City. It further appears that the plaintiff informed the conductor to whom she first presented her ticket of her arrangement with the station agent at the time of its purchase, and of her destination being Bracken, regarding which there is no controversy in the evidence. There is, however, a very sharp and irreconcilable conflict as to whether she informed the Nebraska conductor, who was in charge of the train when it reached the station where she designed to leave it, of the circumstances relating to the purchase of her ticket, and of her wish to leave the train at the point mentioned. Regarding this phase of the case, the court instructed the jury unqualifiedly that before the plaintiff could recover, they must find from the evidence "that between Nebraska City and Bracken on the train in question the plaintiff notified the

conductor in charge of the train that she was riding on, that she desired to leave the train at Bracken." The evidence, to us, seems to preponderate in favor of the company's contention, to the effect that the conductor had no knowledge or notice that the defendant was a passenger, otherwise than as her ticket indicated, whose destination was Auburn. There was, however, positive and direct testimony that she did notify the conductor last in charge of the train of her desire to get off at Bracken; and the jury having resolved the disputed point in her favor, and they being the judges of the credibility of the several witnesses and of the weight to be attached to the testimony of each and all of them, it is not the province of the court to overturn the jury's finding in this respect, when supported by sufficient competent evidence, as we think it was in the present instance. Assuming, then, as we must do under the jury's finding on the court's instruction, that the conductor was notified of the plaintiff's desire to leave the train at the station of Bracken, and that in attempting to leave it at that place she received injuries in alighting therefrom, by its being moved forward before she had safely stepped off the car in which she was riding, we pass to the consideration of some of the other alleged errors complained of in brief of counsel for defendant company.

Counsel say: "The principal error relied upon is the fact disclosed by the petition and the evidence that the plaintiff below voluntarily jumped off of the defendant's train while it was in motion." The facts, as gleaned from the record, prove, or tend to prove, that as the train neared the station the plaintiff gathered her baggage and placed it in the aisle of the car, by the seat in which she was sitting. Whether she was acquainted with the country and knew that she was nearing the station, or whether she was advised of that fact by a traveling companion who sat in the seat with her, it is manifest that she was cognizant of the fact that she was nearing the station, and made preparations to leave the car accordingly. The conductor passed through the car, called out the station, and, as the

train slowed up or stopped at the station, the plaintiff gathered up her baggage and started to leave the car through the front door. Before or about the time she reached the door, the train began to move, and she passed on out and down the steps, attended by a gentleman passenger, who apparently was endeavoring to assist her to alight. She stepped from the platform and steps of the car, and in doing so was thrown on the ground and received the injuries of which she complains. The conductor had left the train, stepped on the depot platform, and reentered from the rear platform of the car. Upon entering, he was advised that a lady was endeavoring to get off in front, but before he could reach the front end of the car the plaintiff had alighted in the manner stated. There is some conflict in the evidence as to whether the plaintiff left the train promptly when it stopped, but an examination of the evidence satisfies us that her movements justify a finding that she acted with all the promptness in leaving the car that could be asked for by the most exacting. In fact, some of the evidence tends to show that she started to leave the car before it came to a full stop. Other evidence fully warrants the inference that at least, immediately upon the stopping of the train, and without any appreciable delay, she started to leave the car. While there is some evidence that after the train stopped, and about the time it began to move on to the next station, plaintiff made a remark indicating that she had forgotten that that was the place where she had intended to get off, and then attempted to leave the car, other evidence of prompt action on her part is in the record, sufficient to overcome the testimony of this character. We are satisfied that an examination of the whole of the evidence on the subject warrants the inference that the plaintiff, immediately upon the stopping of the train, and with all reasonable dispatch, started to leave the car when she had reached her destination, of which she was fully cognizant. Further than that, it is a reasonable inference from the evidence that she started to leave the car before the train came to a standstill.

Another important item of evidence having a material bearing on the case is with respect to the period of time the train was stopped at the station. Some of the testimony indicates that it did not come to a complete stop. Some of the witnesses testify that it stopped but for a few seconds. The testimony of others varies in time from eight or ten to thirty seconds. It is evident that the stop was very brief, and, under the theory of the defendant, we can readily believe that in view of the fact that the place was a small way station, with no passengers to get off or on, and probably but little, if any, mail or baggage matter, it was regarded as unnecessary by those in charge of the train to more than merely stop at the station, and to scarcely allow the train to come to a standstill before starting onward again. The very brief period the train stopped, if it stopped at all, manifestly was the real cause of the injury. The train scarcely stopped at the station, and the plaintiff, however active and prompt, was unable to alight before the train continued on its journey.

Should the defendant be held liable to respond in damages under the facts as narrated in the résumé of the testimony just given? It is manifest the plaintiff knew that the train was in motion when she attempted to step from the car, and must have, in the nature of things, known that some risk attended her action in thus alighting. It is, we think, equally clear that she relied upon the train being stopped for sufficient time to allow her to alight, and was, when the train started on, compelled to choose on the spur of the moment between carrying out her previously formed intention to leave the train, under the belief that the opportunity would be afforded her to do so, and remaining on the car until the train could be stopped, because she had failed to get off, or remain thereon until she had reached the next station, and thus be carried that distance beyond her destination. It will not, we apprehend, be seriously controverted that it was the duty of the defendant company, through its servants in charge of the train, as a common carrier, to afford to its passengers at

each station, when their destination is reached and they desire to leave the train, a reasonable time to do so, and to afford a reasonable opportunity to alight therefrom before the train is moved on to its next stopping place, and that the failure to do so, from which an injury resulted, would constitute negligence, for which, and the damages resulting therefrom, the carrier would be held responsible. This rule of law is practically conceded by the defendant company in the two following instructions to the jury, requested by it to be given at the trial, which was done. As the instructions present clearly the theory of the defense, we incorporate them here in full. They are as follows:

"4th. If the jury find from the evidence that the plaintiff did notify the conductor who had charge of the train running through the station of Bracken that she wanted to get off at said station, then you are instructed that it was the duty of the conductor to stop the train at said station the usual and reasonable length of time to allow the plaintiff to alight in safety from said train; but that there was no legal obligation or duty on his part that he should personally take hold of the plaintiff to assist her in alighting from the train. If the plaintiff intended to stop at Bracken it was her duty when the train stopped to promptly leave the car and step out on the platform of said station while the train was standing at said station."

"7th. If the jury believes from the evidence that although the plaintiff held and presented to the conductor having charge of the train running through the station of Bracken and Auburn, a ticket to the station of Auburn, and you find from the evidence that she notified him that her destination was the station of Bracken, and that she wanted to get off there; and you are convinced that that is true, then it was the duty of the conductor to stop said train at said station of Bracken as heretofore explained to you, so as to allow the plaintiff to safely alight therefrom. But you are further instructed, that if the conductor did not do his duty in that respect, and the plain-

tiff did not have sufficient time to alight from said train at the said station of Bracken, this failure of duty on the part of the conductor would not of itself justify the plaintiff in jumping from the moving train."

But it is insisted by the defendant that the proximate cause of the injury was not, in fact, the starting of the train as it left the station, but the act of the defendant in stepping from the car after it had commenced to move, and while in motion, which act constituted such gross negligence on her part as to preclude a recovery for the damage resulting therefrom. To draw the distinction a little clearer, if it may be done, the contention is, as we understand counsel, that if the plaintiff, while in the act of stepping from the car platform to the station platform, had been thrown down and injured because the train began to move before she had alighted therefrom, and without a reasonable opportunity being given therefor, this would constitute negligence for which an action would lie; but if the train was in motion at the time she attempted to leave the car, and her effort was to step from the platform of the car while the train was in motion, she being aware of that fact, then the proximate cause of the injury was the act of stepping from a moving train, which in itself would constitute contributory negligence of a gross or criminal character, under our statute, and thereby absolve the carrier from liability. The statute referred to (Compiled Statutes, ch. 72, art. 1, sec. 3) has been frequently considered and construed by this court. It is a well-settled rule that when, in the operation of a train carrying passengers, an injury results to one of them, the imputation of negligence arises, and the liability to respond in damages becomes fixed unless it is made to appear that the injury arose from the criminal negligence of the passenger, or was the result of the violation of some express rule or regulation of the carrier actually brought to the notice of the party injured. *Union P. R. Co. v. Porter,* 38 Nebr., 226; *Chicago, R. I. & P. R. Co. v. Zernecke,* 59 Nebr., 689; *Chicago, B. & Q. R. Co. v. Wolfe,* 61 Nebr., 502. In

Union P. R. Co. v. Porter, supra, it is said (p. 233): "The existence of negligence, as justifying or defeating a right of recovery, is for the jury to determine as it determines any other question of fact. If the jury find negligence as against the defendant, such as to justify a recovery, or find contributory negligence such that a recovery can not be had, such finding must stand, unless it has no support in the evidence considered, just as must any other essential finding of fact. It is useless, therefore, to urge that the presiding judge is the proper trier of questions of this kind, and that as to such he should find the presence or absence of negligence upon the weight of the testimony, or instruct the jury to find its presence or absence according as a given fact or group of facts shall be proved or disproved. The court can but state to the jury the law applicable to the facts in respect to which evidence has been introduced. It thereupon remains with the jury to determine the existence of the essential facts. If there is no evidence such as the jury should act upon in its province, the court should instruct accordingly, or set aside the verdict as unsupported by the proofs." Whether the plaintiff was guilty of negligence of a gross and willful character, within the meaning of the statute, was a question of fact to be determined by the jury from the evidence. Where the testimony is conflicting, as it is in the case at bar, or where from a conceded state of facts the evidence is of such a character as that reasonable minds may fairly draw different conclusions therefrom, it is for the jury, and not the court, to determine the question. It is only where the facts are not in controversy, or the evidence is of such a character as but one rational inference can be drawn therefrom, that the court is warranted in determining the question of negligence as a matter of law. In the case at bar we entertain no doubt but that the question of contributory negligence, such as would avoid a recovery against the defendant, was a question of fact, to be determined by the jury under proper instructions from the court. It is not necessarily gross negligence

in every case for a passenger to attempt to leave a train, even though at the time it be in motion. This is the settled doctrine in this jurisdiction, as announced by the prior decisions of the court. Whether or not such an act constitutes gross negligence, such as would prevent a recovery for damages sustained, must depend upon the facts and circumstances surrounding each individual transaction. If the act be one showing a willful disregard of one's own safety, and a deliberate assumption of the risk and danger consequent thereon, unattended by circumstances calculated to create excitement or alarm, and regarding which every one of common sense must know is fraught with danger, then no recovery can be had. *Chicago, B. & Q. R. Co. v. Martelle,* 65 Nebr., 540. It is said in *Chicago, B. & Q. R. Co. v. Landauer,* 36 Nebr., 642: "Where it is impossible to infer negligence from the established facts without reasoning irrationally and contrary to common sense and the experience of average men, it is not a question for the jury, and the court should direct a verdict." In the same case it is further held that contributory negligence on the part of a passenger which will avoid a recovery must be an act committed under such circumstances as to render it obviously and necessarily perilous, and to show a willful disregard of the danger incurred thereby.

The plaintiff in the case at bar was proceeding to alight from the train when it had stopped at her destination, under the belief that she would be afforded a reasonable opportunity to accomplish the act in safety. While engaged in the performance of the act, by the starting of the train, or the failure to allow her a reasonable time to alight, which can be regarded only a wrongful and negligent act of the carrier, she was placed in a position where she had to choose instantly, and without time for reflection, between two lines of action;—one a continuation of the act of alighting, and the other a retracing of her steps, and remaining on the train till the next station was reached. Acting under such circumstances, and compelled to so act because of the negligent act of the carrier, she left the

train, and in doing so received the injury for which she seeks a recovery in damages. Such action would not, in our judgment, amount to gross negligence, such as would preclude a recovery for the damages received as a result thereof. In any view of the subject, under the controverted facts in the case, the question was one for the jury, and its determination thereof, when properly submitted, becomes final. The case at bar is somewhat analogous to that of *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Nebr., 161, where a verdict for the plaintiff was upheld under facts less favorable to a right of recovery than those disclosed by the record herein. It appears from the opinion in that case that the passenger having arrived at her destination, and the train making its usual stop, the plaintiff immediately went out upon the platform of the car in which she was riding, for the purpose of getting off; and finding that the car had not reached the station platform, and the ground being covered with water, which, with the height of the car-step, prevented her from there alighting, she then, at the suggestion of a passenger, passed through the coach immediately in front, in order to reach the platform, and by the time she had reached the centre of it she ascertained the train was moving slowly toward the next station, yet she hurried through the car, and on reaching the front platform thereof, jumped off, receiving an injury, for which a recovery in damages was sustained. The case cited but followed and adhered to the rule announced in *Union P. R. Co. v. Porter, supra.* In the *Hyatt Case,* "criminal negligence," as used in the statute, was defined to mean gross negligence, such as amounts to reckless disregard of one's own safety and a willful indifference to the consequences liable to follow. To the same effect are *Omaha & R. V. R. Co. v. Chollette,* 33 Nebr., 143; *Missouri P. R. Co. v. Baier*, 37 Nebr., 235; *Chicago, B. & Q. R. Co. v. Hague,* 48 Nebr., 97.

From what has been said, we reach the conclusion that whether or not plaintiff was guilty of gross negligence in attempting to alight from the train under the circum-

stances was a question of fact, to be determined by the jury, and that its verdict thereon can not be controlled by the court, and the question determined as one of law. We are also of the opinion that the evidence regarding the issue of fact as to the alleged contributory negligence on the part of the plaintiff is sufficient to sustain the finding of the jury as evidenced by its verdict, and that it can not rightfully be disturbed on the ground that her action and conduct was gross negligence *per se*.

Some complaint is made as to some of the instructions of the court given to the jury. Upon the whole, we are constrained to believe that the instructions were as favorable to the defendant as could rightfully be asked for. The case seems to have been submitted to the jury very largely on the theory of the defendant as to the law applicable to the evidence. When all the instructions are considered and construed together, as should be done, they appear to have fairly submitted the issues of fact to the jury for its determination. An instruction given by the court, and which is excepted to, stated the law correctly, as an abstract proposition, and appears to have been copied from the syllabus in *Chicago, B. & Q. R. Co. v. Landauer, supra*. The instruction was not entirely applicable, under the evidence, but it could not, nor did it, we apprehend, mislead the jury, or operate to the prejudice of the defendant.

An examination of the entire record, having in mind the errors assigned for reversal of the judgment, leads to the conclusion that no prejudicial error is apparent, and that the judgment should be affirmed, which is accordingly done.

AFFIRMED.

ANDREW J. EWINGS, APPELLANT, V. SOLOMON HOFFINE, APPELLEE.

FILED JANUARY 8, 1903. No. 12,706.

Appeal: LAW ACTION: JURISDICTION: DISTRICT COURT: SUPREME COURT. An appeal from an order or judgment of the district court in a law action does not invest this court with jurisdiction of the cause. *Uecker v. Magdanz*, 62 Nebr., 618; *Hayden v. Hale*, 57 Nebr., 349.

APPEAL from the district court for Otoe county. The appeal was from an order taxing costs upon an application to amend pleadings. No jurisdiction. Heard below before JESSEN, J. *Dismissed.*

William F. Moran, for appellant.

Edwin F. Warren, contra.

HOLCOMB, J.

This is an attempted appeal from an order of the district court taxing against the plaintiff all costs of an action made at a designated term of said court held during the pendency thereof. From the stipulations in the record which it is agreed "shall stand as and for the transcript, bill of exceptions, and record in such action," it is disclosed that the action as originally begun was equitable in character, and that at the March, 1893, term of court, after trial began, the plaintiff requested and was permitted to amend his petition, and the cause was ordered continued at the cost of the plaintiff for the term. It was for the purpose of making this order effective, which seems never to have been done by a taxation of the costs in pursuance thereof, that the order complained of was entered of record. After the continuance referred to, the pleadings were recast and the action became one at law in ejectment. The cause was tried twice in the district court, and after each trial the record was brought here for review by a proceeding in

Syllabus by court; catch-words by editor.

error. After remanding the cause the second time for final disposition in pursuance of the mandate of this court, on motion of defendant's counsel the order complained of was entered taxing against plaintiff all costs of the term at which the continuance referred to was taken. It is at once apparent from the forgoing statement that this court is without appellate jurisdiction to review the order complained of. It is only in actions in equity that either party may appeal from the judgment, decree, or final order, rendered or made by the district court, to the supreme court. Code of Civil Procedure, sec. 675; *Whalen v. Kitchen*, 61 Nebr., 329; *Uecker v. Magdanz*, 62 Nebr., 618. As no petition in error is presented, and no such record brought here as gives to this court jurisdiction to review the action of the trial court leading to the order taxing costs, of which the plaintiff complains, by proceeding in error, the only proper disposition we can make of the cause is to dismiss the appeal, which is accordingly done. A motion to summarily dismiss the appeal has heretofore been overruled tentatively until a full examination of the record was made. Such examination leads to the conclusion we have just announced. The appeal is

DISMISSED.

BENJAMIN BEHA ET AL. V. STATE OF NEBRASKA.

FILED JANUARY 8, 1903. No. 12,718.

1. **Statutes:** REPEAL BY IMPLICATION. The repeal of a statute by implication is not favored, and it is only where two statutes relating to the same subject are so repugnant to each other that both can not be enforced that the last one enacted will supersede the former and repeal it by implication.

2. **Act of Legislature:** FOOD COMMISSION. The act of the legislature of 1899, entitled "Food Commission" (Compiled Statutes, 1901, ch. 33), does not by implication repeal the act of 1895 (Session Laws, ch. 78), entitled "An act concerning imitation butter and imitation cheese," etc., or any part thereof; said last-mentioned act being incorporated into the 1901 Compiled Statutes as section 245*m*[1] *et seq.* of the Criminal Code.

Syllabus by court; catch-words by editor.

3. **Criminal Code:** VALID EXERCISE OF POLICE POWER. The act of 1895 (Criminal Code, section 245*m*, *et seq.*), forbidding the selling or keeping for sale "imitation butter" colored so as to resemble butter made from pure milk, or the cream thereof, and the other regulations imposed by the act, is a valid exercise of the police power of the state; and it is competent for the legislature to provide such regulations as therein prescribed and to enact suitable penalties for their violation, for the better protection of the public health, and to prevent fraud and deception.

ERROR from the district court for Lancaster county. Conviction of selling oleomargarine colored to resemble butter. Tried below before CORNISH, J. *Affirmed.*

Henry H. Wilson and *Elmer W. Brown*, for plaintiffs in error.

Frank N. Prout, Attorney General, Norris Brown and *William B. Rose*, for the state.

HOLCOMB, J.

The defendants in the trial court, who appear here as plaintiffs in error, were convicted of violating the provisions of section 245*m*[2] of the Criminal Code (Session Laws, 1895, ch. 78, sec. 2). They were charged with having sold and with keeping for sale oleomargarine or imitation butter, colored to resemble butter made of milk and the cream thereof, the product of the dairy.

One of the grounds presented on which a reversal of the judgment of the lower court is asked is that the section on which the prosecution is grounded has no legal existence. It is argued that the provisions of the act of 1895 providing for punishment for selling or keeping for sale "imitation butter" colored so as to resemble the genuine article were repealed by implication by the passage of the act of 1899 entitled "Food Commission." Session Laws, 1899, ch. 35; Compiled Statutes, 1901, ch. 33. The substance of the argument is that by the latter act it was made lawful to sell imitation butter, even though colored to resemble the genuine article, which of necessity would repeal the

provisions of the former act making it unlawful to sell or keep for sale such product so colored to resemble the product of the dairy, because of the repugnance and inconsistency of the two acts. An examination of the acts of 1895 and 1899 compels the conclusion, we think, that there is no inconsistency or repugnancy between the two, and that the only bearing the latter has on the former is to require the dealer in "imitation butter," as therein defined, to take out a license or permit as an element of regulation before he is authorized to engage in handling the product by buying and selling the same.

The act of 1895 is "An act concerning imitation butter and imitation cheese, defining the same, prohibiting their being colored in semblance of butter, and cheese, regulating their manufacture, shipping and selling, and protecting the consumers at the table, and prescribing penalties for the violation thereof." By section 1 imitation butter is defined as every article, substitute or compound, other than that produced from pure milk or cream from the same, made in the semblance of butter and designed to be used as a substitute for the same, provided, it is said, the use of salt, rennet, and other harmless coloring matter for coloring the product of pure milk or cream shall not be construed to render such product an imitation. Section 2 declares that no person shall coat, powder or color with annatto or any coloring matter whatever any substance designed as a substitute for butter or cheese, whereby such substitute or product, so colored or compounded, shall be made to resemble butter or cheese, the product of the dairy, and provides a suitable penalty for its violation. It is also provided that this same section shall not be construed to prohibit the manufacture and sale, under the regulations provided for in the act, of substances designed to be used as a substitute for butter, and not manufactured or colored as therein prohibited. Briefly, then, the act of 1895 divides the product of the dairy, which we term "butter" and all substitutes thereof, such as oleomargarine, butterine, and "imitation butter," into two classes, with

restrictions and penalties attached for the purpose of prohibiting the substitutes from being colored so as to resemble the genuine article, and with certain regulations permitting the sale of the substituted article when sold for what it actually is, and not as genuine butter.

The act of 1899 creates a food commission and regulates the manufacture and sale of foods, including "imitation butter" and "imitation cheese," and dairy products, and provides for a system of reports, inspection, and the issuance of permits, fixing fees for the same, and providing penalties for a violation of the act. Compiled Statutes, 1901, ch. 33. By section 6 it is enacted that every person, firm or corporation who sells or offers for sale or has in his possession for sale, "imitation butter" in packages containing ten pounds or more, shall be deemed a wholesale dealer, and in packages containing less than ten pounds shall be deemed a retail dealer, in "imitation butter"; and by section 7 it is made unlawful for any wholesale or retail dealer in "imitation butter" to engage in the business of handling or having in his possession for sale or selling, "imitation butter," without first procuring from the food commissioner an annual permit, such permit describing the occupation and place of business of the person, firm, or corporation receiving the same, and conditioned on the faithful observance of the laws of the state by the recipient thereof. The latter act, it will be observed, in nowise affects the provisions of the former, nor the definitions as therein found by which to distinguish the dairy product from the substitutes; nor does it in terms directly or inferentially seek to make lawful the sale of "imitation butter" by securing a license or permit for the keeping or selling of the substitute, when compounded or colored, contrary to the provisions of the act of 1895, so as to resemble genuine butter. The latter act can be regarded only in the nature of an additional regulation, which requires the dealer of the substitute article to obtain a permit before engaging in the business, and leaves unaffected otherwise all of the provisions of the act of 1895.

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It is not by the act first passed made unlawful for one to sell or keep for sale oleomargarine or imitation butter, when not colored for the purpose of making it resemble butter as made from pure milk and the cream thereof. The act of 1899 but provides that the dealer in "imitation butter," which may be sold under the regulations and in the manner prescribed by the first act, must submit to the additional regulation of securing a permit from the food commission before engaging in the business. It is said by this court that it is only where two statutes on the same subject are so repugnant to each other that both can not be enforced that the last one enacted will supersede the former and repeal it by implication. *State v. Moore,* 48 Nebr., 870. The rule is general that repeals by implication are not favored, and the statute will not be declared so repealed unless the repugnancy between the new statute and the old one is plain and unavoidable. *Albert v. Twohig,* 35 Nebr., 563. We find no inconsistency or repugnancy in the two acts, and are therefore of the opinion that the act of 1899 does not by implication repeal the act of 1895, or any part thereof.

It is next argued that the provisions of the act of 1895 are unconstitutional, in that it deprives a person of his property without due process of law; that the whole purpose and effect of the act is to take value from one man's property and add it to the value of another's property. It is argued that in the absence of all constitutional restraints, the legislature can not take A's property and give it to B, and yet it is said this is clearly the purpose and effect of the law under which the defendants were convicted. Counsel argue on the proposition that the coloring matter which may be used to make genuine butter more attractive and salable is harmless in itself, whether used in the genuine article or the substitute; and that, therefore, it is unlawful to prohibit the dealer in imitation or substitute butter to use the same or similar ingredient to make his article of commerce likewise more attractive and salable; that, there being nothing deleterious to the

health in the coloring matter used, prohibiting its use in the substitute can not be justified as a proper exercise of the police power, and the only effect and purpose of the legislation is to add value to the product of the dairy and detract value from the substituted article, otherwise conceded wholesome as a food product, and this it is incompetent for the legislature to do. To illustrate the argument, it is said a law which allowed the butter made from the milk of a Jersey cow to be colored, and prohibited like coloring of butter from the milk of the Holstein, or some other breed of cows, would be clearly an unwarranted exercise of legislative power. Counsel, we think, are not fortunate in drawing their analogy. It is a matter of common knowledge that genuine butter is not always and at all seasons of the year of the same color, but ranges from almost white to a deep shade of golden yellow; that for the sake of uniformity in color and for trade purposes, harmless coloring is frequently used to give to the article a shade of golden yellow resembling it in its natural state in its most desirable color,—the rich yellow colored butter that comes from the dairy in June time, when the cows are browsing on the succulent green grasses of the prairies and the rich red clover in the pastures. These tints and shades of coloring in natural butter in nowise render it deleterious to the health, or change it from its true and genuine character as the natural product of the dairy, made from pure milk and the cream thereof. The act of 1895 was designed to prevent fraud and deception, by rendering it impossible, so far as legislation could do so, to sell to the people and for table use, as for genuine butter, an article made in imitation thereof which, correctly termed, is but a substitute therefor.

It is contended that the provisions found in the act for packing, wrapping and labeling the "imitation butter" answer all purposes of regulation and are sufficient to prevent imposition and deception in the sale thereof, without the added provision making it unlawful to color it so as to resemble butter. But certainly, because these other

means may be reasonably effective to accomplish the legislative purposes, considering them to be so, this of itself is no valid reason why other and more effective measures may not also be resorted to, to accomplish the desired object. The legislative intendment obviously was to prevent oleomargarine and other substitutes in imitation of butter from masquerading in the cloak of the genuine article, and thereby deceiving and defrauding the public. It is declared that the substituted article shall not be colored so as to resemble the product of the dairy, and this, it occurs to us, is one of the most effective means which could be adopted to prevent the sale of the substitute as and for the genuine article. The legislation is, we think, manifestly a legitimate exercise of the police power of the state, for the purpose of promoting the public health and welfare and to prevent the perpetration of fraud and deception on the public generally. Oleomargarine, or imitation butter, is recognized as a legitimate subject of commerce, to be dealt with under the regulations imposed by statute; but this fact does not by any means admit the proposition that such regulations are unnecessary in order that the public may properly be protected from imposition, or that the general health and welfare of the people does not require such regulations in order to insure the use of healthy and wholesome materials in the manufacture of such imitation butter. It will, we apprehend, be readily conceded that the opportunities for manufacturing an unwholesome article from unhealthy ingredients are very many, and the temptation to do so renders it the part of wisdom to regulate by legislation the manufacture and sale of the product. The legislation complained of can, we are satisfied, be justified both on the ground that it prevents fraud and imposition on the public by rendering it less probable that imitation butter can be disposed of as the genuine article, and also as a measure of regulation, with the view of controlling its manufacture and sale, so as to prevent the placing in the market and the sale to the

public generally of an unhealthy and unwholesome food product.

We do not wish to be understood as saying that as now manufactured the product is unhealthy and unwholesome, but only that it might be made so, and that regulative measures by way of legislation are permissible in order to avoid this undesirable condition. A law in substance quite similar to our own has been under consideration by the supreme court of Ohio. *State v. Capital City Dairy Co.*, 62 Ohio St., 350. It is there held to be a valid exercise of the police powers of the state. It is held in the syllabus that the police power of the state is properly exercised in the prevention of deception in the sale of dairy products and in the protection of the health of the public; that the several acts of that state on the subject, the purpose of which, it is said, is to prevent deception in the sale of dairy products and to preserve the public health, are a reasonable exercise of the police power and do not contravene any section of the constitution. The case was appealed to the supreme court of the United States, and the judgment of the state court upheld. *Capital City Dairy Co. v. Ohio*, 22 Sup. Ct. Rep., 120. In the opinion of the state supreme court it is said (p. 363): "At the outset it should be understood that the statutes do not undertake to prohibit the manufacture or sale of oleomargarine; on the other hand their expressed purpose, gathered from text and title as well, is to regulate its manufacture and sale. In substance they provide that no one shall manufacture for sale any article in imitation of butter, or any compound or substance or any human food in imitation or semblance of natural butter which is not pure butter; that no one shall manufacture or offer or expose to sale any oleomargarine which contains any coloring matter; that no one shall sell any substance purporting, appearing or represented to be butter or having a semblance of butter, unless it be under its true name and with proper mark designating such name, and that all persons dealing in food shall, upon proper application and tender of price, furnish a sample suitable

for analysis. Construed with that part of section 2 of the act of March 7, 1890, which provides that oleomargarine may be manufactured 'in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from any coloring matter or other ingredient, causing it to look like, or appear to be butter,' it becomes entirely manifest that this legislation is regulation, not prohibition. * * * This court has held again and again that the police power of the state is properly exercised in the protection of the people in all matters concerning their health, and that it is within the scope of this power to regulate the manufacture and sale of articles of food even though the right to so manufacture and sell is a natural right guaranteed by the constitution. Conceding that where the pursuit rests upon natural right, and the product is not harmful, this power may not be exercised in a way which will result practically in inhibition, though under the guise of regulation, and in fostering the interests of a rival product; yet, where the manufacture is conducted in such a way as is calculated to deceive, lead the buyer to suppose he is purchasing an article of food which is everywhere recognized as wholesome, and especially where the article sought to be regulated may easily be manufactured so as to be harmful, and thus result in fraud upon and injury to the public, the police power is properly exercised in the regulation of the manufacture and sale of such article by such requirements as will tend to insure the public against fraud and injury." And further on it is observed: "In order to avoid misunderstanding it may be well to here repeat what substantially appears elsewhere, that there is no inhibition, under the laws of Ohio, of the manufacture or sale of oleomargarine. The requisite simply is that it shall purport to be what it really is, and shall not be so manufactured and put up as to deceive the consumer." To the same effect may be cited: *State v. Marshall,* 64 N. H., 549; *State v. Addington,* 77 Mo., 110; *Powell v. Commonwealth,* 114 Pa. St., 265; *Butler v. Chambers,* 36 Minn., 69; *Weideman v. State,*

56 N. W. Rep. [Minn.], 688; *Waterbury v. Newton*, 21 Vroom [50 N. J. Law], 534; *McAllister v. State*, 72 Md., 390; *People v. Arensberg*, 105 N. Y., 123; *Plumley v. Massachusetts*, 155 U. S., 461.

The conclusion we reach is that the section of the act of 1895 which is complained of comes within the proper scope and power of the lawmaking branch of the state government, and that it is competent for the legislature to provide for the regulations imposed by it on those engaged in the buying and selling of imitation butter, for the better protection of the public health, and to prevent fraud and deception; and also to provide proper penalties for a violation of such regulations. The judgment of the district court should be, and accordingly is, in all things

AFFIRMED.

NOEL MARTIN V. STATE OF NEBRASKA.

FILED JANUARY 8, 1903. NO. 12,872.

1. **Larceny**: INFORMATION: CHARGE: DESCRIPTIO DELICTI: INTENT: FELONIOUS ASPORTATION: INTENT TO PERMANENTLY DEPRIVE OWNER OF PROPERTY INCLUDED IN SUBSTANTIVE CHARGE. An information charging that the accused unlawfully and feloniously did steal, take and carry away certain property, with the intent then and there to steal and carry away the said personal property, includes therein the element of felonious intent upon the part of the taker to deprive the owner permanently of such property, and convert the same to his own use.
2. **Affidavits**: BILL OF EXCEPTIONS. Affidavits offered in support of one of the grounds presented in a motion for a new trial can not be considered in this court when the same are not preserved in a bill of exceptions.
3. **Motion for New Trial**: PRESUMPTION. In the absence of competent evidence to the contrary, the presumption will be indulged in that the trial court ruled correctly on a motion for a new trial, where the ground relied on is required to be supported by evidence.
4. **Admission of Evidence**. Alleged errors in the admission of certain evidence examined, and found not well taken.
5. **Instruction Not Prejudicial**. An instruction to the jury excepted

Syllabus by court; catch-words by editor.

to by the defendant examined, and, although incorrect in the way framed, *held* to be neither confusing nor prejudicial to the defendant.

6. **Instructions:** TENDER NECESSARY TO PREDICATE ERROR. Where the trial court has instructed generally as to the issues in a criminal prosecution, error can not be predicated on its failure to instruct as to a particular phase of the case, where no proper instruction has been requested by the party complaining.

7. **Evidence.** Evidence examined, and found sufficient to support a verdict of guilty returned by the jury.

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

M. S. McInnich and *Charles O. French,* for plaintiff in error.

Frank N. Prout, Attorney General, Norris Brown and *William B. Rose,* for the state.

HOLCOMB, J.

The defendant was tried in the district court for Nemaha county, and by a jury found guilty of the larceny of a watch from the person of one Strawn. The court sentenced him to imprisonment in the penitentiary for a period of five years. He prosecutes error.

His counsel complain of a ruling of the trial court on a motion interposed by the defendant to quash the information. The information, it is argued, is fatally defective, because it does not allege that the property charged to have been stolen was taken with the felonious intent to convert it to the use of the taker without the consent of the owner. The information charges that the defendant "unlawfully and feloniously * * * from the person and against the will of the said B. F. Strawn, did steal, take and carry away, with the intent then and there to steal and carry away the said personal property," etc. While not charging in direct terms that the property was taken with intent on the part of the defendant to convert it permanently to his own use, this element of the crime charged is

manifestly included in the statement that he feloniously took and carried away the property with intent to steal. The charge that the property was stolen embodies the idea that it was taken without the consent of the owner, and with the intent of the taker to wrongfully convert it to his own use. The allegation found in the information is undoubtedly sufficient to constitute the offense of larceny from the person, as defined by our statute. As is said in *Rema v. State*, 52 Nebr., 375, 379, where the court expressed itself on a like question: "There is no force in the position. The averment in the information is that the defendant 'unlawfully and feloniously did steal, take, and drive away' the cow in question. This is the usual form of the charge in an information for larceny, substantially follows the language in the statute, and discloses that the animal was stolen with felonious intent of the accused to permanently deprive the owner thereof without his consent." See, also, *Chezem v. State*, 56 Nebr., 496.

One of the grounds for a new trial appears to have been the alleged misconduct of counsel for the state in making certain statements to the jury at the opening of the trial, and also in his closing arguments; and the ruling of the court thereon is now complained of. To support this assignment in the motion for a new trial, certain affidavits seem to have been filed in the case, which appear only in the transcript of the record as presented to this court. Whether this was all the evidence on which the court acted, we are unable to say, but as none of the evidence, whether in the form of affidavits or otherwise, has been preserved in a bill of exceptions, we can not consider the affidavits thus found in the transcript. In the absence of any competent evidence in the record to the contrary, the presumption will be indulged in that the court ruled correctly regarding the matter. Were we permitted to consider these affidavits as establishing the truth regarding the matter complained of, we could not but express our condemnation of the action of the prosecuting attorney in referring to the failure of the accused to testify in his own

behalf. The statement alleged to have been made was altogether inexcusable, and should, if made, have been met with a prompt reprimand and merited reproof by the trial court.

The admission of certain evidence over the objection of the defendant is assigned as error, but an examination of the record fails to convince us that error in this regard prejudicial to the defendant was committed. The substance of some of the evidence objected to was that the passengers on the train where the offense was alleged to have been committed had had their suspicions excited by the action and conduct of the defendant and a traveling companion at and prior to the time the larceny was committed. When taken in connection with the other testimony of the witness, the statement amounts to nothing more than that the conduct and dress of the accused and his traveling companion had excited the attention and notice of the passengers in the same car.

An instruction is complained of because of an error in framing it which appears to have crept in, which, upon examination, we are satisfied could have resulted in no prejudice to the accused. In the instruction it is said, in speaking of the law as to reasonable doubt: "Unless it is such that were the same kind of doubt interposed in the graver transactions of life it would cause a reasonable and prudent man to hesitate and pause, *it is insufficient to cause a reasonable and prudent man to hesitate and pause,* it is insufficient to authorize a verdict of not guilty." The interpolation of the words italicized did not, we apprehend, confuse the jury as to the main idea sought to be conveyed by the instruction, nor was it prejudicial to the accused.

A police officer testified in the case, and, because the court failed to instruct the jury as to the rule applicable especially to the consideration to be given the testimony of detectives, error is sought to be predicated on such failure to so instruct. As no instruction was requested on this particular phase of the case, no prejudicial error was com-

mitted by the court's failure to charge the jury thereon. *Ferguson v. State,* 52 Nebr., 432. The jury having been instructed generally upon the law applicable, the failure to charge upon some particular feature of the case, unless the proper instruction has been requested by the party complaining, and refused, will not amount to prejudicial error. *Carleton v. State,* 43 Nebr., 373; *Dolan v. State,* 44 Nebr., 643.

It is also argued that the evidence is not sufficient to warrant a verdict of guilty of the crime charged. An examination of the evidence convinces us that it is not only sufficient, but amply so, to sustain the verdict. It would, however, serve no useful purpose to discuss the evidence in detail. The conviction appears from the record to have been rightfully brought about, and the judgment, we are of the opinion, should be affirmed, which is accordingly done.

AFFIRMED.

NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER, VERMONT, V. COUNTY OF DAWES.

FILED JANUARY 8, 1903. No. 12,459.

1. **County Warrants: FACIAL EXPRESSION: PURPOSE OF LAW.** The purpose of the requirement that county warrants shall express on their face the amount levied and appropriated to the fund upon which they are drawn, and the amount already expended of such sum, is to guard against the overdrawing of warrants against the fund.

2. **———: ———: FALSE STATEMENT: ESTOPPEL.** A county warrant, in excess of eighty-five per cent. of the levy against which it it drawn, is void. The county board can not estop the county to assert the invalidity of such warrant by indorsing on the warrant a false statement of the amount of the levy, which makes the warrant on its face appear to be within the statutory limit. *Bacon v. Dawes County,* 66 Nebr., 191.

Syllabus by court; catch-words by editor.

ERROR from the district court for Dawes county. Action upon county warrants. Tried below before WESTOVER, J. *Reversed.*

Stephen L. Geisthardt, for plaintiff in error.

Albert W. Crites, contra.

SEDGWICK, J.

This is an action upon county warrants of Dawes county. It was begun in the district court of that county and tried to the court without a jury, and judgment entered for the defendant, from which judgment plaintiff prosecutes error to this court. The defense to some of the warrants was that they were issued in excess of eighty-five per cent. of the levy; and the statute of limitations was relied upon as a defense to all the warrants.

1. The first question presented is as to those warrants in dispute which were drawn after eighty-five per cent. of the original levy for the general fund upon which they were drawn had been exhausted. As to those warrants, it is contended that the county board transferred to this fund moneys from the levies for the bridge, road, insane, and soldiers' relief funds, and after that fund had been so increased, these warrants were not in excess of eighty-five per cent. The facts in regard to these transfers are so similar to the facts in the case of *Bacon v. Dawes County,* 66 Nebr., 191, that it is unnecessary to repeat them here. We are satisfied with the conclusion reached upon this point in that case, and the holding of the trial court as to these warrants is approved. In that case it was said: "There is no merit in the suggestion that the county is estopped by the indorsement on the warrants to assert that the levy for the general fund was less than the amount so indorsed. If the county board could bind the county in this manner it could evade all restrictions on the amount of the levy." This question is so thoroughly discussed in the brief of plaintiff in error in the case at bar, and was so ably presented in the oral argument, that we have reex-

amined it. The statute provides: "Each warrant shall specify the amount levied and appropriated to the fund upon which it is drawn, and the amount already expended of such sum" (Compiled Statutes, 1901, ch. 18, art. 1, sec. 35); and it is suggested in the brief of plaintiff in error that "the statute could have but one legitimate purpose, and that was to advise those who might purchase these claims whether or not they were issued in accordance with the statutory requirement in that particular." This section is a part of the statute of 1879, which superseded chapter 13 of the General Statutes of 1873. In that act the power of the county board to draw warrants against the levy was also limited, and it was provided that any warrant drawn after the amount levied for the year is exhausted "shall not be chargeable as against the county," and by section 25 of the act it was provided: "In order to guard against any such overdraft, each warrant shall express plainly on its face, the amount of tax levied for the current year, and the amount already expended." The recital of the purpose of the requirement that the warrant shall express on its face the amount of tax levied and the amount expended, is omitted from the present statute, but the reason for the requirement continues. A county warrant is not commercial paper. Its primary object is to provide a means for drawing money from the treasury, rather than to obtain a loan of money, or even to evidence the indebtedness of the county. There can be no doubt of the power of the legislature to prohibit the issuing of warrants in excess of the levy; nor is there any doubt that the legislature might provide that on warrants so issued no action could be maintained by the party to whom they were issued, or by anyone to whom they might be transferred. The question is as to the intention of the legislature in that regard. The provision is that such warrants shall not be chargeable to the county, but the officers who issue them in violation of law are made liable. The purpose of the legislature was to prevent the issuing of the warrants. If the county commis-

sioners, who are forbidden to issue them, may evade the statute and make the warrant so issued valid by simply inserting a false statement as to the amount of the levy, the purpose of the legislature is thwarted.

The case at bar is plainly distinguishable from *Speer v. Commissioners,* 88 Fed. Rep., 749. In that case "it was within the power of this board, and it was its duty, to determine the validity of the claims on which these warrants rested, and, if allowed, to issue warrants for their payment." Page 757. In the case at bar it was not the duty of the county board to issue these warrants. They were at that time prohibited by positive statute from issuing any warrant whatever upon this fund. In the case referred to it is said (p. 758): "The statute * * * visits the penalty for its violation upon its violators, the members of the board, and not upon the purchasers of their warrants; and it is not the province of the court to extend the punishment to the innocent." In the case at bar, the statute visits the penalty for its violation upon its violators, the members of the board, and also upon anyone who presumes to purchase or rely upon the warrants. It plainly provides that the warrants shall not be chargeable against the county. In that case it is said (p. 758): "A corporation which, by the regularity of the execution of evidences of its debts, which is apparent upon their face, induces lenders or borrowers to loan money upon or to buy them, is thereby estopped from denying their validity or effect on the ground that, in their execution or in the preliminary proceedings which warranted their execution, its officers failed to comply with some law or rule of action relative to the mere time or manner of their procedure with which they might have complied, but which they carelessly or negligently disregarded." In the case at bar, the objection to the validity of the warrants is not that the officers failed to comply with some law or rule of action relative to the mere time or manner of their procedure with which they might have complied; but the objection is that the officers could not by any manner of procedure issue any valid warrants against

the fund in question. They were absolutely prohibited by statute from so doing. *State v. Colfax County*, 10 Nebr., 29; *State v. Richardson County*, 10 Nebr., 198; *Walsh v. Rogers*, 15 Nebr., 309.

It is contended that the proof is insufficient to support this defense. The answer pleads the amount of the original levy for the general fund, and also the unlawful attempts of the county board to transfer to the general fund the levies mentioned, and alleges that without such transfers the general fund was already overdrawn. The reply is evasive on all of these issues, and contains a general denial. By this denial the amount of the original levy for the general fund as stated in the answer is denied, but there is nothing in the reply to show what the original levy in fact was. Of course, such a denial does not tender any issue as to the amount of the original levy for this fund. The reply expressly alleges that transfers were made to the general fund, and "denies that there was no money or funds in either the road fund, insane fund or bridge fund or other funds of said county which could be legally transferred by said board of county commissioners to the general fund thereof on or about the fourth day of January, 1893." There is no allegation "that there was any county money from whatever source that remained on hand in the county treasury and was no longer required for the purposes for which the same was levied." No facts are pleaded from which it could be found that the conditions existed that would authorize these transfers. Such a denial does not put in issue the facts pleaded in the answer, but puts in issue the legality of the proceedings of the county board as shown by the facts stated in the answer. The reply is very voluminous, and a large amount of evidence was taken. It can not be quoted in this opinion. Upon the issues tendered and tried the evidence was amply sufficient to support the finding of the trial court. For these reasons, the several causes of action set forth in the plaintiff's petition, numbered from 1 to 22, inclusive, and from 48 to 62, inclusive, being predicated

upon warrants drawn in excess of eighty-five per cent. of the respective levies against which the warrants were drawn, are not sustained by the evidence, and the judgment of the trial court thereon is correct.

2. As to the remaining causes of action set forth in plaintiff's petition, the sole defense is the statute of limitations. The allegations of the answer in that regard are: "That more than five years have elapsed since a right of action accrued on each of said alleged warrants, or instruments in writing, as the same are set out in said petition, and the commencement of this action; that a cause of action accrued on each of said alleged warrants, or instruments in writing, at the time that the same were presented for payment to the treasurer of said county, payment thereof demanded, and the same registered by said treasurer, and payment thereof refused, as said plaintiff alleges to have done on each of said alleged warrants, as the same is set out in each of the said causes of action." This allegation was clearly insufficient, for the reasons stated in *Bacon v. Dawes County, supra.* The plaintiff should have been allowed to recover upon these warrants.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

WILLIAM PRESTON V. NORTHWESTERN CEREAL COMPANY, WILLIAM A. DE BORD, RECEIVER, APPELLEE, IMPLEADED WITH FOURTH NATIONAL BANK OF CADIZ, OHIO, APPELLANT.

FILED JANUARY 8, 1903. No. 11,048.

Commissioner's opinion, Department No. 1.

1. **Accommodation Indorsement:** CORPORATION: ULTRA VIRES. An accommodation indorsement by a manufacturing and trading corporation is *ultra vires.*

2. ——: ——: ——: EVIDENCE: FINDING. Evidence examined,

Syllabus by court; catch-words by editor.

and *held* to sustain finding that loan was made to the signer and first indorser of note, and the indorsement of the corporation, of which he was president, appearing on the note, was made and accepted as an accommodation indorsement, and created no liability.

APPEAL from the district court for Douglas county by the Fourth National Bank of Cadiz, Ohio, from an order made by said court on the 11th day of May, 1899, disallowing a claim (based on a promissory note) against the appellees. Heard below before DICKINSON, J. *Affirmed.*

Edward J. Cornish, for appellant.

Howard H. Baldrige and *William A. De Bord, contra.*

HASTINGS, C.

This case presents an appeal from the disallowance of a claim of the appellant, the Fourth National Bank of Cadiz, Ohio, against the Northwestern Cereal Company and its receiver on a promissory note. The note is as follows:

"5,000 no-100. "OMAHA, Jan. 29th, 1896.

"Four months after date we promise to pay to the order of Wm. Preston five thousand & no-100 dollars at National Bank of Commerce, Omaha, Neb. Value received with interest at the rate of eight per cent. per annum, from maturity until paid. WM. PRESTON & CO."

Indorsed on back: "Wm. Preston. Northwestern Cereal Co., Wm. Preston, Pres't. For collection and remittance to the Fourth Nat'l Bank of Cadiz, Ohio, J. M. Schreiber, Cashier."

Written across face: "Protested for non-payment. Omaha, Neb., June 1-96. Lee W. Spratlen, Notary Public."

It was a renewal of another note of the same form dated in October, 1895, which was in turn a renewal of a like one of April 24, 1895. By the terms of the paper and its indorsements it would be a note made to Wm. Preston, sold by him to the cereal company, and by it sold and indorsed for value to the claimant. It is, however, conceded that

the transaction was in fact a loan by the claimant, and the receiver resisted on the grounds: First, that there was no consideration for the cereal company's indorsement; second, that the company's name was indorsed without authority from the corporation; third, that the indorsement was *ultra vires* of the corporation. At the argument it was conceded that if the cereal company's indorsement was not for value but merely for the accommodation of Wm. Preston, there was no liability. It is claimed, however: First, that the loan was in reality made to the company, and that it got the money, and if it did not retain it the loss was by its own fault; second, that it fully ratified the transaction; and third, that under the circumstances of this loan the company is estopped to deny its liability.

There seems to be very little question as to the facts. On April 10, 1895, William Preston, Walter G. Preston and one August S. Knabe organized the Northwestern Cereal Company "for the manufacture, purchase and sale of all kinds of cereals and cereal products." Its place of business was Omaha, Nebr. Its capital stock was to be $300,000, $150,000 of which was to be delivered to Wm. Preston for the cereal plant and business he then owned and was conducting under the name of Wm. Preston & Co., at Omaha. April 23, 1895, Bostwick & Nixon, loan brokers, who had previously made loans to Wm. Preston for the Cadiz bank, which had been paid, received from the bank a telegram saying it would loan him $5,000 for six months at 8 per cent. per annum, on same collateral as before. On inquiry the brokers learned that the loan was desired. This note was drawn and delivered to Bostwick & Nixon, and their check issued on April 24 to Wm. Preston or order for $4,766.11, proceeds of the loan. The check was indorsed to the cereal company by "W. G. Preston, attorney in fact," and was paid through the clearing-house April 25, 1895. Mr. Bostwick says that his conversation in regard to the loan soon developed that the cereal company had been organized and had absorbed the busi-

ness of Wm. Preston & Co., and he then told Mr. Walter Preston that the negotiations could not go forward unless the financial strength of that business was represented in the new paper by indorsements or otherwise. Walter replied that his father's authority, as president, must be obtained, and in some way the matter was arranged, and Walter represented that he had authority to indorse the cereal company's name on the note. Walter Preston says that the check was given him by Wm. Preston, and deposited by him with other money to the credit of the cereal company at the First National Bank of Omaha, on April 24; that about an hour later Mr. Bostwick telephoned to the office for Wm. Preston, who shortly after came in and went to Mr. Bostwick's office, where at Bostwick's request, he indorsed the cereal company's name on the note. Walter Preston gave Wm. Preston credit for the cash proceeds of the note, and on May 4, checked the amount, with a little additional, to the Council Bluffs Savings Bank to pay a private indebtedness of Wm. Preston, as Walter states. He also states that he knew at the time of the conversation over the telephone, and knew that night that the company's name was indorsed on the note. As above stated, it is conceded that no authority existed for an accommodation indorsement of the company's name on this paper. It seems clear from the statement of this evidence that it is ample to warrant the trial court in finding, as it did, that the transaction was, by the bank and its agents, understood to be a loan to Wm. Preston. In that case nothing short of an actual beneficial receipt and retention of money would seem to warrant any claim of estoppel against the cereal company or its representative. *Sturdevant v. Farmers & Merchants' Bank,* 62 Nebr., 472. It is claimed that the fact that the money was in the hands of the treasurer of the cereal company from April 24 to May 4, with knowledge that the indorsement had been made, amounts to a ratification of the act. Probably this is true. Under such circumstances, it is difficult to see how the company or its representative could object

that it had not authorized the indorsement. If it was intended to deny that the act was authorized, it should have returned the money. But this does not do away with the admitted difficulty that there was no authority anywhere to pledge the credit of the company for Preston's accommodation. An act which could not be authorized could not be ratified. The claim that the company at one time got this money, and, if it did not retain it, should have done so, and therefore can not be permitted to say that it was a few days later paid out for Preston's benefit, seems to ignore the finding that the loan was made by the bank to Preston. There is no showing that the lender or its agents knew that the check was deposited to the cereal company's credit, or, if they did, that they considered such deposit as anything more than an authorized disposition of the check by the borrower to whom it was made payable, Wm. Preston. How can the lender complain, if the cereal company pays it out for the benefit of the person to whom it had been loaned, to whose order the check was drawn a few hours before any indorsement by the company was contemplated? Counsel dwells upon the fact that the check was not paid until May 25, and payment could have been stopped on the check, then in the cereal company's possession, or placed to its credit in its own bank, if the indorsement had not been made. But it does not appear that any such fact was known when the indorsement was asked for, and if it had been, the leaving the transaction to stand as money paid to Wm. Preston on his obligation would seem to only establish more strongly that the loan was to him, and the indorsement a pledge of the company's credit for his benefit. If the lender was willing to have it so, and trust Wm. Preston on the strength of the indorsement alone, how can it complain that the cereal company did not retain the money?

It is recommended that the judgment of the trial court be affirmed.

DAY and KIRKPATRICK, CC., concur.

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

AFFIRMED.

PORTSMOUTH SAVINGS BANK ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

FILED JANUARY 8, 1903. No. 12,309.

Commissioner's opinion, Department No. 1.

1. **Repaving Streets**: PETITION: FOOT-FRONTAGE. A petition, in substantial compliance with the requirements of law, by the owners of a major part of the foot-frontage of lots abutting upon a street, which is proposed to be repaved, is a necessary prerequisite to any jurisdiction on the part of a city council to specially assess the abutting property to pay for such improvements.

2. **Authorized Signature of Wife by Husband Tantamount to Signature by Wife.** The signature of a wife's name to such petition, executed by her husband with her authority, and in view and hearing from the place where she was at the time, is equivalent to a signature by herself.

3. **Signatures by Executors and Trustees.** The signatures by executors and trustees of an estate to whom jointly it is devised "to be held and managed by them" during the lifetime of the testator's wife, with "full discretion in the management and control of said property with the view of increasing its value and deriving the best possible income therefrom," are the signatures of the "owners," in the meaning of the statute.

4. **Notice to Property Owners.** A notice to the property owners to select material for such paving, published for the required time and in the required manner, substantially in accordance with the requirements both of the statute and of the city ordinance, is not bad because not directed to the owners by name.

5. ———: STATUTE: JURISDICTION. The provision that whenever any repaving shall be declared necessary by the mayor and city council, and an improvement district created, notice to the property owners should be given to designate within thirty days the paving material to be used, does not make it jurisdictional that such declaration affirmatively appear of record in the council's proceedings, since other parts of the statute make such action mandatory when proper petitions are filed.

6. **Publication: SUNDAY: CONTINUOUS PUBLICATION.** That one of the

Syllabus by court; catch-words by editor.

days of publication is Sunday, is no objection to the sufficiency of the publication of notices for an equalization board meeting to be held on September 13, whose notices were published each day from the 6th to the 12th, inclusive.

7. City Board of Equalization: JUDICIAL ACT: COLLATERAL ATTACK. A city board of equalization, when regularly in session, with due notices published of matters to come before it, acts judicially upon matters within its jurisdiction, and such action is not open to collateral attack.

8. Finding: INJUNCTION. A finding that the property is benefited "to the full amount in each case of said proposed levies" is not so defective, in not finding the property assessed to be benefited proportionately to its frontage, as to warrant an injunction against collecting a tax levied on that basis.

9. Error: BRIEF: ORAL ARGUMENT: WAIVER. Matters not argued in the brief of counsel, nor urged in oral argument, are deemed waived.

APPEAL from the district court for Douglas county, from a decree dismissing a petition for injunction to prevent the collection of a special assessment. Heard below before ESTELLE, J. *Affirmed.*

Richard S. Horton and *Franklin J. Griffen,* for appellants.

James H. Adams and *Charles E. Morgan, contra.*

HASTINGS, C.

This is an appeal from a decree dismissing a petition for injunction. The plaintiffs in this action, Portsmouth Savings Bank, Omaha Brewing Association, Frank D. Brown, Clementine Brown, Herman Kountze, and Calvin H. Frederick, unite in asking an injunction against the city of Omaha and August H. Hennings, its treasurer, to prevent the collection of a special assessment of $2,927.43 for the repaving of a portion of Sherman avenue embraced in the city improvement district No. 614, so far as such assessment affected the premises of the plaintiffs.

It is complained in the first place that the petition for repaving was defective in not being signed by the owners of the majority of the foot-frontage on the street to be re-

paved. This contention rests upon the claim that W. S. Poppleton and Caroline Poppleton, who signed, representing 264 feet of the frontage, are not the owners of the property, being only executors and trustees, and that the signature of Mrs. S. J. Bryant was written by her husband, and not in her actual presence, and is not such signature as the statute requires, and that the owners of the majority of the frontage along the proposed improvement never signed the petition.

It is also complained because the notice to the owners, requiring them to select material for the paving within thirty days, was a general notice, not directed by name to any of the owners of real estate in the district.

It is complained further that the mayor and council never declared the repaving to be necessary.

It is complained that the petition, purporting to be signed by the owners of the property involved, that asphaltum be used for the entire repaving, was not signed by a majority of the owners, and that the ordinance, and its approval, providing for pavement with such material, was not authorized; that notice of the meetings of the council as a board of equalization for making the special assessment was insufficient because published in the Omaha daily papers from the 6th to the 12th of September, inclusive, while the meeting was held on the 13th; and because no names of any owners were in this notice; that no findings were made of any special benefits to the real estate in question, and the assessment was therefore unauthorized; and that the assessment was by taxing the costs of the proposed paving according to frontage against the property involved.

Complaint is also made because the repaving contract included a guarantee to keep the pavement in repair for five years, at an additional cost, in accordance with a provision of the city charter, which is claimed to be unconstitutional.

The answer on the part of the city, after admitting that the property described is situated in the improvement

district, that the ordinance set out in plaintiffs' petition was passed and that the city claimed a lien for special assessments as stated, denies the remaining allegations of the petition; alleges that all of the proceedings were taken with full knowledge on the part of the plaintiffs; admits that they are owners of the property claimed by them, and says that they are estopped from questioning the tax proceedings by having kept silent so far; that the brewery association is especially estopped because it became the owner of its property in the improvement district after the assessment was levied, and under a conveyance by whose terms it was to pay such assessments; admits the filing of the repaving petition, but alleges that the signatures were regular and sufficient; that no objection or exception was made, either to them or to the equalization of the assessment, and that neither can now be questioned in collateral proceedings; that plaintiffs should have saved their rights, if they had any by reason of irregularity in such assessment, by appeal or review in error.

It will be observed that the principal complaints against these special tax proceedings are that the original petition was not signed by the owners of a major part of the frontage; that the notice to select material was not directed to any owners by name; that the council made no declaration of necessity of repaving; that the notice of equalization and assessment proceedings was insufficient, and the equalization not complete, because there was no finding that benefits are proportional to the frontage of the several properties.

The first answer of the city is that these special tax proceedings can not be collaterally attacked. This claim it is sought to support by citations of cases relating to political rights from our own and other states. It can hardly be maintained as to ex-parte proceedings whose object is the subjecting of private property to public use. The general doctrine on this subject seems still to be that cited in Cooley, Taxation (1st ed.), p. 464: "The statute authority must be strictly pursued. This rule is

fundamental and imperative. Not that it must be literally followed, but the observance of every one of its substantial requirements must be regarded as a condition precedent to the validity of any assessment." It is a rule, as indicated in *Kahn v. Supervisors*, 79 Cal., 389, 21 Pac. Rep., 849, that where the statutes provide for a notice of the filing of such a petition, and a hearing as to its sufficiency, the determination reached at such a hearing is of the nature of a judgment and can not be assailed collaterally; but where, as in this state, the petition and hearing are entirely ex-parte, without notice to the owners of the property, such conclusiveness can hardly be attributed to it. The almost universal holding is that to render a determination *res judicata*, some kind of a notice to the parties directly interested must be provided. There seems no reason for changing the uniform holding of this court that a petition in substantial compliance with the statute is a jurisdictional prerequisite to a valid assessment of paving taxes. *Von Steen v. City of Beatrice*, 36 Nebr., 421; *Harmon v. City of Omaha*, 53 Nebr., 164; *State v. Birkhauser*, 37 Nebr., 521, 529; *Fullerton v. School District*, 41 Nebr., 593, 601; *Leavitt v. Bell*, 55 Nebr., 57, 58. It must be examined, then, as to whether or not the petition in this case complied with the statutory requirements and was signed by the owners of a major part of the foot-frontage on the proposed improvement.

With regard to the signature of Mrs. Bryant, the district court found that she was the owner of lots 3, 4 and 5 in block 12 in Kountze's place; that her name was signed to the petition by her husband, D. C. Bryant, and said signature was made by her consent, and was in law and in fact the signature of the owner of said property, as required by law; and that said property is regularly signed for upon said petition by its owner. There is evidence in the record to support these findings, and Mrs. Bryant says the signature to the petition was made by her husband while she was in an adjoining room; but she says it was with her consent, and in full view from the place where she was.

The question arising as to the signatures on behalf of the Poppleton estate presents more difficulty. The finding of the district court was: "The court further finds that lots 9 to 12, inclusive, in block 5 and lot 13 in block 6, in Sulphur Springs addition, signed for by William S. Poppleton and Caroline L. Poppleton, executors and trustees of the estate of Andrew J. Poppleton, are signed for in contemplation of the law by the owners of the said property and that the said signatures are valid and sufficient signatures of the owners of the same. The court further finds that the said property was the property of Andrew J. Poppleton prior to his death and that by the terms of the will of Andrew J. Poppleton, deceased, the title to said property passed to William S. Poppleton and Caroline L. Poppleton as executors and trustees of the estate of Andrew J. Poppleton, deceased, and by the terms of the said will said executors and trustees were specifically authorized to do any act in relation to said property for the improvement of the same, and the court finds that the repaving in improvement district No. 614 was such an improvement to said property as would come within the terms and provisions of said will and within the powers conferred upon the executors and trustees thereunder. The court finds that Caroline L. Poppleton had a life estate in the property" and that the signatures of herself and William S. Poppleton were lawful and valid signatures of the owners of the property. It is conceded that these premises were, in his lifetime, the property of Andrew J. Poppleton. At his death, by the seventh and eighth clauses of his will, this property was devised "to my wife, Caroline L., and my son, William S. Poppleton, jointly, in trust, to be held and managed by them during the life of my wife as follows: So much of the gross income from said property as may be necessary to pay the taxes and insurance thereon, and to meet all charges for keeping it in good condition without waste or deterioration, shall be applied for that purpose; the income in excess of that required for the payment of taxes and

necessary expenses shall be divided among my wife, Caroline L., and my three children, William S. and Elizabeth E. Poppleton and Mary L. Learned (formerly Poppleton) in the following manner to wit: My said wife is to receive the first seven hundred and fifty ($750.00) dollars per month of such net income, to be paid to her in as nearly monthly payments as practicable. The net income remaining after the payment to my wife of said sum of seven hundred and fifty ($750.00) dollars per month, shall be divided among my wife and my aforesaid three children in equal proportions, that is, one-fourth to each, the distributees and legatees of any deceased child to take the same share as such deceased child would have taken if living. In case the net income from said property after the payment of taxes and expenses should not exceed the sum of seven hundred and fifty ($750.00) dollars per month, then the whole amount thereof shall be paid to my wife. It is my will in this regard that said trustees shall have full discretion in the management and control of said property, with the view of increasing its value and deriving the best possible income therefrom. Eighth. Upon the death of my wife, the trust above created shall cease and determine, and all the property so held in trust shall be divided among my three children, William S. and Elizabeth E. Poppleton and Mary D. Learned, in fee-simple title, share and share alike. In case my son, William S. Poppleton, should die before my wife, all the powers vested in the two shall devolve upon my wife, and she shall continue to act as sole trustee in the manner above stated."

It is claimed that the conferring upon these trustees of "full discretion in the management and control of said property, with the view of increasing its value and deriving the best possible income therefrom," is a sufficient authority for their signing the petition in question, and that the district court was right in so holding.

In *Allen v. City of Portland*, 58 Pac. Rep. [Ore.], 509, 516, it was held that the widow, who possessed the life interest and had the management and control of real estate,

was the owner, and authorized to sign as such, under a similar statute; citing *Garland v. Garland,* 73 Me., 97; *Willard v. Blount,* 33 N. Car. [11 Ired. Law], 624. The authority and control in this Oregon case were derived solely from the life estate left to the widow. The Poppleton will gave the trustees full discretion in the management and control of said property, with the view of increasing its value and deriving the best possible income therefrom. The cases cited in this Oregon decision are merely examples of the well-known general rule that the payment of taxes is the duty of the party in receipt of the income from land. They have no particular relation to the question as to who is authorized to petition for improvements. Some Arkansas cases, and *Rakes v. Brown,* 34 Nebr., 304, are cited to the proposition that executors and administrators are not owners in such a sense as to enable them to petition for improvements. *Rakes v. Brown* is simply a holding that real estate descends to the heirs, and that they are the proper plaintiffs in whose name an action to recover real estate should be revived. *Rector v. Board,* 50 Ark., 116, is quoted to the same proposition, and *In re Higgins,* 15 Mont., 474, 39 Pac. Rep., 506, is cited to the proposition that where executors are also trustees, the latter function does not attach until distribution is ordered. In the present case, however, it does not seem important whether or not the trustees had entered upon their duties and were in charge as trustees of the property for which they signed the petition. Their control as executors would be temporary, and their rights under the will had accrued by their due qualification as executors. The right to petition for the improvement of these premises certainly remained in some one; appellants say, in the heirs of A. J. Poppleton. So long as the entire control of these premises and of their income remained, by the terms of the will, vested in the trustees, it would hardly seem that such power was in the heirs. If not, it was certainly in the trustees. We are not disposed to disturb the finding of the district court in this respect.

The objections to the notice to select material seem to be disposed of by the case of *Medland v. Linton,* 60 Nebr., 249. We do not find that the charter of the city requires any special form of notice, but simply provides that property owners shall be given thirty days' notice, which by ordinance the board of public works are directed to publish, requiring the property owners within the improvement district to notify the city council of their selection of material for paving within the thirty days provided for. The notice in this case seems to comply with the terms of the ordinance and will be deemed sufficient.

As to the requirement of a declaration that the work is necessary, an examination of section 110* of the city charter would seem to indicate that it never was intended by the legislature that this declaration should be jurisdictional. The section is as follows: "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 such 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 clerk. No repaving shall be ordered except upon the petition of the owners of a majority of the taxable front feet in any im-

*Compiled Statutes, ch. 12a.

provement district. * * * Whenever any of the improvements herein named, to wit, paving, repaving, macadamizing, curbing or guttering, singly or all together, shall be declared necessary by the mayor and city council and an improvement district shall have been created, then it shall be the duty of the mayor and council to give the property owners within such district thirty days from the date of approval and publication of the ordinance declaring such improvement necessary, to designate by petition the material to be used in the paving of the streets or alley or other grounds within said district."

This statute refers in the first instance to original paving within 3,000 feet of the court house; the second provision is relative to original paving outside that limit; and the third provision is that the mayor and city council shall order the work on a petition signed by persons representing the majority of the taxable front feet. It would seem that the ordering of the improvement is mandatory on the filing of the petition. The declaration of the necessity is not made in terms jurisdictional, and is a part of the later proceedings. It seems a quite different provision from that, for instance, of the drainage act, by which the commissioners are required to make a finding as to the necessity of the work, and that the proposed route is the best one, and file it of record, before proceeding further. A large number of cases are cited by counsel for appellants from different states, in which the statute requires that the council shall declare by resolution on their records the necessity of the proposed work. The distinction between such statutes and the one in question here, seems plain. A declaration, in fact, such as may be presumed, satisfies this statute. One of record is required in the other cases. We prefer in this matter to follow the authority of the supreme court of Massachusetts in *Commonwealth v. Abbott,* 35 N. E. Rep. [Mass.], 782. See 2 Dillon, Municipal Corporations [4th ed.], sec. 770.

With regard to the complaint as to equalization notices, they were published on September 6 to 12, inclusive, and

the meeting was held on the 13th. The statute requires notice to be published for at least six days. It is objected that one of these days was Sunday, and should not be counted. We are of the opinion that this objection is not well taken, and that the publication was for at least six days before the meeting. It has been held that the six days mentioned are the six days immediately before the meeting. *Leavitt v. Bell,* 55 Nebr., 57, 65. Unless the meeting was on Sunday, this would necessitate a publication on Sunday. The publication in this case seems sufficient.

A harder question is the effect to be given to the notices, and to the action of the equalization board taken pursuant to them. It has been often enough decided by this court that the statutes conferring powers upon boards of equalization are to be strictly construed. *Grant v. Bartholomew,* 58 Nebr., 839; *Merrill v. Shields,* 57 Nebr., 78; *Wakeley v. City of Omaha,* 58 Nebr., 245; *Medland v. Connell,* 57 Nebr., 10. It has been held that the board of equalization has no authority to assess special taxes, until it has first determined the amount to be assessed for special benefits. *Equitable Trust Co. v. O'Brien,* 55 Nebr., 735; *Medland v. Connell,* 57 Nebr., 10, 14; *Smith v. City of Omaha,* 49 Nebr., 883. In all of the above cases, however, the decision seems to turn upon the regularity and sufficiency of the notice of the meeting. It does not seem to be held anywhere that the proceedings of any board of equalization are absolutely void for informality in the findings as to special benefits. In the present case the finding made by the board of equalization recites, after stating that all complaints have been examined, that the board "have full and personal knowledge of the character of said improvements, respectively, and special benefits to the lots and real estate respectively, by reason thereof," and that due notice of the meeting had been given; therefore, "Resolved, that it is the final determination of the city council sitting as a board of equalization that levies of special taxes to cover the cost of the several improvements referred to in said notice and as shown by the plans

of proposed levies prepared by the city engineer and on file in the office of the city clerk, should be made in accordance with said plans, the several lots and pieces of lots and real estate therein described being specially benefited to the full amount in each case of said proposed levies." This seems to us a sufficient, if somewhat informal, finding that the benefits are proportional to the frontage. If the benefits are in each case equal to the amount levied, then they must be proportional to the frontage, for the levies are made on that basis. To be sure, the finding does not say, in terms, that the benefits are in no case more than this amount levied, but it would not seem that any presumption of such a fact should be indulged. Moreover, these proceedings were not ex-parte. They were held on the regular quarterly date of such meetings, and after notice to property owners as to just what property was involved, and what was proposed to be levied. They were held, too, under a statute which provides, "and all such assessments and findings of benefits shall not be subject to review in any legal or equitable action, except for fraud, gross injustice or mistake." Compiled Statutes, ch. 12*a*, sec. 161.* Section 164† of the same chapter of the Compiled Statutes provides: "No court shall entertain any complaint that the party was authorized to make, and did not make to the city council sitting as a board of equalization." The proceedings of the board of equalization are subject to review on error. *Sioux City & P. R. Co. v. Washington County*, 3 Nebr., 30, 41; *Webster v. City of Lincoln*, 50 Nebr., 1. If the finding as to benefits was informal, it could have been corrected either at the time or on review. So long as such is the case, this defect can hardly be ground for an injunction. It is true that in *John v. Connell*, 64 Nebr., 233, this court sanctioned the proposition that a finding that benefits were equal and uniform was jurisdictional. In that case, however, the main objection was want of any legal session of the board, and, of course, there was not

* Cobbey's Annotated Statutes, sec. 7629.
† Cobbey's Annotated Statutes, sec. 7633.

only no finding, but no possibility of one. The statutes above mentioned were not examined, but we do not think there is anything in that case, necessarily, in conflict with the proposition that the equalization board, when properly in session, with due notice given, acts judicially, and its action within its jurisdiction is not open to collateral attack. Such seems to be the plain import of the statutes above cited. In *French v. Barber Asphalt Co.*, 181 U. S., 324, a statute authorizing the levy of special taxes for improvements directly upon the property, according to frontage, without a finding of benefits, is held to be not prohibited by anything in the federal constitution. No ground for objecting to the constitutionality of our statutes as to the conclusiveness of the action of the board of equalization has been pointed out to us or is perceived.

No reason for holding that inclusion of a guarantee to maintain the pavement for five years in the cost of construction vitiates the proceedings, has been given, and that point must be deemed waived.

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

KIRKPATRICK and LOBINGIER, CC., concur.

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

AFFIRMED.

DAKOTA COUNTY V. W. T. BARTLETT.

FILED JANUARY 8, 1903. No. 12,468.

Commissioner's opinion, Department No. 1.

1. **Action Against County**: SUMMONS IN ERROR: ISSUANCE: SERVICE: WAIVER. A county attorney has authority to waive issuance and service of summons in error in a case against a county in which he has appeared for it at the trial.

2. **County Clerk**: TESTIMONY: CONCLUSION: GENERAL-FUND LEVY: PRESUMPTION AS TO OFFICIAL CONDUCT. Mere testimony by a county clerk to the conclusion that prior to a certain time the

Syllabus by court; catch-words by editor.

general-fund levy of that year was exhausted, and the last warrant drawn on it bore date about a month before the one sued on, does not require a reversal of a finding that the latter is valid. Such a conclusion does not overcome the presumption that officers do their duty.

3. County: ALLOWANCE OF CLAIM: DRAWING WARRANT: ADVERTISING FUND: GENERAL FUND. Allowance of a claim and drawing a warrant for its payment against the "advertising fund" of a county will be deemed, in an action on such warrant, equivalent to allowance of the claim, and drawing a warrant against the county general fund. Such so-called "advertising fund" is legally only a part of the general fund, known by a term which designates its source.

4. ——: ——: ——: WARRANT: SIGNATURES: SEAL: OBJECTION. Where the record contains a general admission that county warrants were "issued" by and signed by the proper county authorities, a subsequent objection to them, and motion to strike them from the record because not bearing the county seal, is too late.

ERROR from the district court for Dakota county. Action upon county warrants. Tried below before GRAVES, J. *Affirmed.*

William P. Warner, for plaintiff in error.

Sullivan & Griffin and *M. C. Beck, contra.*

HASTINGS, C.

This is an action begun by W. S. Bartlett in the county court of Dakota county to recover from that county the sum of $515 and interest, alleged to be due upon three warrants for the sum of $200 each, all of the same date and in the following form:

"$200. Amount levied 189-- $——
"Amount issued $848.70
"County Warrant.
"State of Nebraska. Treasurer of Dakota County.
"DAKOTA CITY, Dec. 4, 1895.
"Will pay W. T. Bartlett or bearer two hundred dollars and charge to account of county.
"No. 4.
"T. V. BRANNAN, THOS. SULLIVAN, JR.,
"County Clerk. Chairman County Commissioners.
"Advertising fund."

The original petition simply alleged the execution and delivery to plaintiff at their date of these warrants; that $85 had been paid upon them, and payment of the remainder refused. A demurrer was sustained to the petition, and an amendment was then made, setting forth that the warrants were issued and delivered to the plaintiff in payment of the publication of the tax list of the county of Dakota for the year 1895; that such publication was made in pursuance of a valid contract with the county; and that at the time the warrants were drawn and delivered to the plaintiff there were ample funds in the general fund of the county to meet them; and that the words "advertising fund," on the margin of each of said warrants, were placed there after their issuance by some person without authority. Another demurrer was filed to the petition as thus amended, and this demurrer was sustained by the county court and the plaintiff elected to stand upon his amended petition. It was dismissed. The amendment was filed in the county court February 7, 1900. From the judgment of dismissal plaintiff, Bartlett, took error to the district court, alleging error in sustaining the demurrer, error in dismissing the action, and error in the taxation of costs. This petition in error was sustained and the case was set down for trial in the district court. A petition was filed by plaintiff, Bartlett, in the same terms as in the county court, and the defendant answered, alleging that the petition did not contain facts sufficient to show a cause of action, and second, that the warrants, if issued, were void, and that the said warrants, if issued, were issued against the advertising fund of said county for advertising the delinquent taxes, and could only be a charge against that fund, and could not become a charge against the county general fund. Plaintiff denied the allegations of the answer, and an amendment was then made to it, setting out that the district court had no jurisdiction over the defendant, because no error summons was ever served upon the county, and no notice or service of notice of this proceeding given, as required by law.

Trial was had to the court, which found for the plaintiff, Bartlett, in the sum of $716.32. Motion for new trial was overruled, and judgment entered for that amount and costs. From this judgment the county brings error under fourteen assignments: Error in sustaining the original petition in error of Bartlett from the judgment of dismissal in county court; error in retaining the cause for trial over defendant's objection; error in trying said action when the record disclosed that no summons in error had been served upon the county; error in overruling the county's objection to the jurisdiction for that reason; error in overruling the county's objection that there is no cause of action stated in the petition; error in receiving the three alleged warrants in evidence; error in receiving evidence of the county board's order that the delinquent tax list for the year 1895 be printed in the *Jackson Criterion* at the rate provided by law; that the finding and judgment are not supported by and are contrary to the evidence and contrary to law; and that the finding and judgment are excessive. The questions raised are simply as to the failure to serve summons in error and as to the sufficiency of these warrants to constitute a cause of action, when aided by the allegations of money in the general fund and of a contract to publish the delinquent tax list.

Plaintiff in error alleges that there was no jurisdiction in the district court, for the reasons that no summons in error was ever served upon the county and its issuance and service was waived by the county attorney. Counsel cites and relies upon the case of *Chicago, B. & Q. R. Co. v. Hitchcock County,* 60 Nebr., 722, and its holding that an attorney has no authority to waive service of summons and enter a voluntary appearance in an action on behalf of a municipal corporation simply by reason of his powers and functions as an attorney. The summons in this case, however, was not the commencement of an action, and the statute makes the service of summons upon the attorney good, whether he still retains any authority from his principal or not, if he appeared at the trial. The right to serve sum-

mons upon him depended, not upon his authority at the time of such service, but depends upon his having made an authorized appearance at the trial. It seems clear that none of the arguments as to his want of authority to waive this issuance and service are good. He is made a proper person to serve by the terms of the statute, and he is by the further terms of the same statute given authority to waive such issuance.

The only question in the matter is the interpretation to be given to section 585 of the Code of Civil Procedure. That section is as follows: "The summons mentioned in the last section shall, upon the written precipe of the plaintiff in error, or his attorney, be issued by the clerk of the court in which the petition is filed to the sheriff of any county in which the defendant in error or his attorney of record may be; and if the writ issue to a foreign county, the sheriff thereof may return the same by mail to the clerk, and shall be entitled to the same fees as if the same had been returnable to the district court of the county in which such officer resides. The defendant in error, or his attorney, may waive in writing the issuing or service of the summons." It seems clear that "his attorney," referred to in the last clause of this section, means the same party as "his attorney of record" in the early part; that is, that it is only necessary that the party served, and waiving service, shall have been his attorney at the time of the trial as to which a complaint is made. The objection to jurisdiction was properly overruled.

It remains to consider the sufficiency of these warrants to constitute a cause of action when coupled with the allegations that they were delivered in payment for the publication of the county's delinquent tax list for 1895 under a valid contract, and that when the warrants were drawn there was money in the county's general fund sufficient to meet them, and that they are unpaid. There is an allegation in the petition that the words "advertising fund," at the bottom of the warrants, were added subsequently to their issuance and without authority, but

no such proof was tendered. The claim was allowed against the "advertising fund," and the warrants were so drawn. There is nothing to show they have been changed, and plaintiff admits they have not been since they were delivered to him so far as he knows.

There is a question as to the fact in reference to there being general funds of the county from which they might have been paid at the time. The county clerk swears that the levy of 1895 was exhausted in November, and the last warrant drawn on it was in that month. This general conclusion clearly seems insufficient to do away with the presumption that the officers did their duty, and if these are to be considered as general fund warrants, the claim of lack of authority to issue them can hardly be sustained. In *State v. Weir,* 33 Nebr., 35, 37, a precisely similar statement, only in a form of a certificate, is held to be a mere conclusion, and no sufficient evidence of a lack of funds at a given subsequent time. It is hard, too, to see how the expense of publishing the tax list is any more an indebtedness incurred by the county board than is the salary of the clerk. Such salary in the case last cited is held not to be subject to the limitations permitting no incurring of indebtedness, nor allowance of claims in excess of the levy, and forbidding warrants in excess of eighty-five per cent. of the levy in the absence of funds.

The real difficulties in the way of plaintiff's recovery are three: The claim of plaintiff was not allowed generally against the county and its general fund, but against the "advertising fund"; the warrants are drawn against an "advertising fund"; they bear no seal. Plaintiff cites *Kane & Co. v. Hughes County,* 81 N. W. Rep. [S. Dak.], 894. as conclusive of the proposition that allowance against the advertising fund is equivalent to an allowance against the general fund. Such is the holding in that case. The statute in South Dakota, however, provides in terms, for a payment by the county, in the first instance, for the publication of the delinquent tax list. That is the sole difference in the statutes that is pointed out.

In *State v. Lincoln County,* 35 Nebr., 346, and *State v. Dixon County,* 24 Nebr., 106, it is held competent for the board to enter into contracts for the doing of this work, but not obligatory to let such contracts to the lowest bidder. It is clearly the duty of the county board to provide for such publication. Compiled Statutes, sec. 109, ch. 77. That the Nebraska statute does not in express terms provide that the county shall pay for it, would seem unimportant. How else is it to be procured to be done? We are satisfied with the reasoning of the South Dakota court that as the general fund is the only lawful source of payment and there is no advertising fund known to the law, an allowance and a warrant drawn against the latter, are equivalent to such action against the general fund.

These warrants are not in the form prescribed by law and are without a seal; but it is admitted in the record that they were issued by the proper county authorities. We suppose the seal is attached merely to authenticate that fact. While the county seal is expressly required by section 33, chapter 18, Compiled Statutes,* to be applied in issuing a county warrant, it would seem that the broad admission in the record that the warrants were issued by the proper county officers, and presented and marked "Not paid for want of funds," authenticates them sufficiently, even without the county seal.

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

KIRKPATRICK and LOBINGIER, CC., concur.

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

AFFIRMED.

* Cobbey's Annotated Statutes, sec. 4451.

CITIZENS' STATE BANK OF NEWMAN GROVE v. LARS I. NORE.

FILED JANUARY 8, 1903. No. 11,893.

Commissioner's opinion, Department No. 1.

1. **Negotiable Instrument:** CONSTRUCTION OF STATUTE: BONA-FIDE PURCHASER. In this state a statute will not be construed so as to make a negotiable instrument void in the hands of a bona-fide purchaser, unless the act specifically so declares.

2. **Promissory Note:** CONSIDERATION: UNLICENSED PRACTITIONER. A note given for medical services by an unlicensed practitioner may be recovered on by a bona-fide purchaser, notwithstanding the provisions of chapter 55 of the Compiled Statutes, prohibiting the practice of medicine without a license.

ERROR from the district court for Boone county. Action by innocent purchaser upon promissory note given for medical services. Plea that payee was not a legally qualified physician. Note held void. Tried below before THOMPSON, J. Judgment for defendant. *Reversed.*

Needham & Doten, for plaintiff in error.

H. C. Vail, contra.

LOBINGIER, C.

This is an action on a promissory note, payable six months after date, given by the defendant in error to one F. N. Brett for medical services rendered to the former's wife. At the time of the excution of the note, and as a part of the same transaction, Brett executed and delivered to defendant in error the following instrument:

"AMERICAN MEDICAL AND SURGICAL INSTITUTE,
"For the Treatment of All Chronic, Private and Nervous Diseases, both Medical and Surgical.
"ALBION, NEBR., Sept. 7, 1898.

"Received of L. Nore twenty-two dollars, for which I hereby agree to treat L. Nore's wife for three months until cured. To furnish medicine and apparatus deemed neces-

Syllabus by court; catch-words by editor.

sary by me to bring about the best possible results. And to return note at end of specified time if no cure is effected and to give an extension of time if needed.

"$22.00. F. N. BRETT."

On the day after its receipt Brett went to the banking-house of plaintiff in error at Newman Grove and negotiated a sale of the note, through the cashier, at a discount of ten per cent. Brett was a stranger in the town and the cashier had seen him only once before, but there is no evidence that the cashier or any of plaintiff in error's officers or agents had any knowledge or notice of the purpose for which the note was given. The note not being paid at maturity, plaintiff in error brought this action thereon, and defendant in error answered, alleging that Brett was not a licensed physician, that the execution of the note had been induced by fraud, and that the consideration had failed. On the trial the county clerk testified that his office contained no record, as provided by chapter 55, article 1,* of the Compiled Statutes, of any certificate authorizing Brett to practice medicine, and no evidence was offered indicating that such certificate had ever been issued. After the introduction of evidence, plaintiff moved for a peremptory instruction, which was refused. The jury returned a verdict for the defendant, upon which judgment was rendered, and plaintiff brings the case here by petition in error.

Defendant in error relies principally on *Larson v. First Nat. Bank of Pender*, 62 Nebr., 303. In that case the statute under which a bona-fide purchaser was denied recovery on a note provided that any conveyance of lands allotted to the Indians, "or any contract made touching the same * * * shall be absolutely null and void."† In the case at bar the statute contains no express declaration of this kind. The legislation which defendant in error invokes to support his position may be summarized as follows: Chap-

* Compare Cobbey's Annotated Statutes, sec. 9416 *et seq.*

† U. S. Statutes at Large, vol. 24, p. 389, ch. 119, sec. 5.

ter 55, article 1, of the Compiled Statutes, makes it the duty of all persons desiring to practice "medicine, surgery or obstetrics" in this state to obtain a certificate from the state board of health and to file the same with the clerk of the county in which they desire to practice. Section 15 provides: "No person shall recover in any court in this state any sum of money whatever for any medical, surgical or obstetrical services unless he shall have complied with the provisions of this act and is one of the persons authorized by this act to be registered as a physician." Section 7 declares it to be unlawful for any person to practice in any of these lines without first obtaining and registering such certificate; and section 16 makes it a misdemeanor to so practice, and imposes a fine therefor. It will be seen that none of these provisions declares a contract for medical services by an unlicensed practitioner to be void. Indeed, while section 15 provides that "no person shall recover," the latter part of the section indicates that this prohibition is limited to the practitioner himself.

It is urged that by making the unlicensed practice of medicine a crime, the legislature has by implication declared void all contracts growing out of such practice, and we are cited to *Snoddy v. Bank,* 88 Tenn., 573. There a contract to deal in futures was held to be included within the statute against gaming, and the court said (p. 576): "By the great weight of authority, notes given in consideration of a contract against morals, public policy, and public statutes are void in any hands," and then added, "Perhaps there are no exceptions when, in addition, the transaction is also criminal." But in *Sondheim v. Gilbert,* 117 Ind., 71, and *Crawford v. Spencer,* 92 Mo., 498, the gaming statute was held not to apply to such transactions. There are, indeed, authorities elsewhere which tend to support the contention of defendant in error. More than two centuries ago, Lord Holt said, in the leading case of *Bartlett v. Vinor,* Carthew [Eng.], 251, 252: "Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though

the statute itself doth not mention that it shall be so." In *Cope v. Rowlands*, 2 M. & W. [Eng.], 149, 157, Baron Parke observes: "It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect." See, also, *Columbia Bank and Bridge Co. v. Haldeman*, 7 W. & S. [Pa.], 233; *Holt v. Green*, 73 Pa. St., 198; *Johnston v. McConnell*, 65 Ga., 129; *Conley v. Sims*, 71 Ga., 161.

Were the question *res nova*, therefore, in this jurisdiction, we might be inclined to regard defendant in error's argument as entitled to great weight. But the question is not *res nova* here. The precise question was before this court in *Smith v. Columbus State Bank*, 9 Nebr., 31, and decided adversely to that contention. The case last cited was an action on a note whose consideration was the compounding of a crime, an act forbidden and made a misdemeanor by section 177 of the Criminal Code. It was contended there, as here, "that when a statute inflicts a penalty for doing an act, such act is unlawful, though not in terms prohibited or declared to be illegal, and any contract, the consideration of which is founded upon the doing of such an act, is void." This court, however, adopted the contrary view, and in doing so overruled on that point, *Kittle v. DeLamater*, 3 Nebr., 325; and COBB, J., in delivering the opinion, said: "In my view of the law, in order to prevent a recovery in the case stated in the above exception, the case must come within some statute expressly declaring notes given for such consideration void." This case was cited and followed in *Wortendyke v. Meehan*, 9 Nebr., 221, and has not since been qualified or overruled. Indeed, we are not asked to overrule it now, nor would we be inclined to do so. After having stood for almost a quarter of a century as the law of this state, we think it far better to adhere to its doctrine than to unsettle the law by adopting a different rule, even though it might be more in accordance with the weight of authority elsewhere.

Much is said concerning the policy of the statute and the evils which are likely to result from allowing contracts to be enforced which are contrary to its purpose and spirit. We fully recognize the importance of such legislation as the medical act. It embodies a fixed and time-honored policy, of the most vital concern to the state and its people. But it may well be questioned whether the evils consequent upon the free circulation of notes given for services of unlicensed practitioners could be more serious than the derangement of business resulting from a rule that would make all such notes void in the hands of innocent purchasers. It must be remembered that instruments like these have no earmarks, and when once it is understood that a limited and indistinguishable class of them is deprived of the virtues of negotiability, a step is taken toward casting the taint of suspicion upon all. Moreover, the medical act has never, so far as we have been able to ascertain, been construed to have that effect upon negotiable paper. Legislation of this character is not recent or even modern. As early as 1511, parliament passed an act* requiring practitioners of surgery in London and vicinity to be examined and licensed by the college of surgeons, and imposing a penalty for non-compliance. In *Gremaire v. Le Clerc Bois Valon* (1809), 2 Camp. [Eng.], 143, this ancient statute was set up as a defense to an action for surgical services, but it was held insufficient, even as between the parties, and recovery was allowed. From the standpoint of public policy, as well as that of *stare decisis,* we are of the opinion that the medical act furnished no defense as against plaintiff in error in this action. And since the other defenses were such as would be valid only between the original parties, we think the court should have directed a verdict as asked, and we recommend that the judgment be reversed and the cause remanded for further proceedings according to law.

HASTINGS and KIRKPATRICK, CC., concur.

* 3 Henry VIII., ch. 11, sec. 1.

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 according to law.

REVERSED AND REMANDED.

NOTE.—*Unlicensed Physicians—Right to Recover for Services.* The statutes of the following states expressly provide that any physician practicing unlawfully shall not be permitted to recover for services: Georgia, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Nebraska, North Carolina, Rhode Island, Vermont, Virginia and Wisconsin.

The courts of the following states have declined to aid unlicensed physicians in recovering fees for services: Alabama, California, Louisiana, Massachusetts, North Carolina, New York, Tennessee and Texas. This is upon the principle that no recovery can be had in a court of justice for performing an act which is unlawful, or which is prohibited by statute. *Roberts v. Levy*, 31 Pac. Rep. [Cal.], 570, not published in California reports; *Dickerson v. Gordy*, 5 Robinson [La.], 489, but it is held in this case that, the defendant having employed plaintiff, the burden is upon him to show that plaintiff was not licensed; *Spaulding v. Alford*, 1 Pick. [Mass.], 33; *Fox v. Dixon*, 12 N. Y. Supp., 267; *Haworth v. Montgomery*, 91 Tenn., 16, 18 S. W. Rep., 399; *Kenedy v. Schultz*, 6 Tex. Civ. App., 461. Alabama and Kansas have held that an unlicensed physician could not even recover for medicines furnished. *Harrison v. Jones*, 80 Ala., 412; *Underwood v. Scott*, 43 Kan., 714, 23 Pac. Rep., 942.

A court of Missouri has held that an unlicensed physician may recover for services. That court points to the distinction between offenses *mala in se* and *mala prohibita*, placing the practicing by an unlicensed physician in the latter category. *Smythe v. Hanson*, 61 Mo. App., 285. Chief Justice Ruffin of the supreme court of North Carolina severely criticises this distinction as unsound. *Sharp v. Farmer*, 4 Devereux & Battle [N. Car.], 122. The courts are divided on the question of what effect, if any, the repeal of the disqualifying act has upon the physician's right to recover for services unlawfully performed before the repeal. One theory is that the law was not designed to prevent the debt from accruing, but to prevent the enforcement of the obligation; in other words, it pertains not to the contract but to the remedy; and so when the statute is removed, the unlicensed physician may recover. *Hewitt v. Wilcox*, 1 Metcalf [Mass.], 154. Other states have held such contracts void in their inception. *Puckett v. Alexander*, 102 N. Car., 95, 3 L. R. A., 43, 8 S. E. Rep., 767; *Bailey v. Mogg*, 4 Denio [N. Y.], 60; *Nichols v. Poulson*, 6 Ohio, 306; *Warren v. Saxby*, 12 Vt., 146; *Quarles v. Evans*, 7 La. Ann., 543.—W. F. B.

PETER BERLET V. EDWIN D. WEARY.

FILED JANUARY 8, 1903. No. 12,480.

Commissioner's opinion, Department No. 1.

1. Summons: MEMBER OF THE LEGISLATURE. The law of this state makes no distinction as to the service of summons between members of the legislature and other persons.

2. ———: ———. A member of the legislature may, in a proper case, be served with summons while at the seat of government for the purpose of attending the legislative session.

ERROR from the district court for Lancaster county. Action on account for goods sold and delivered. The defendant pleaded, *inter alia,* his privilege and immunity from civil process, as a member of the legislature of the state. Tried below before FROST, J. Judgment for plaintiff. *Affirmed.*

Jefferson H. Broady, Paul F. Clark and *Charles S. Allen,* for plaintiff in error.

Love & Frampton, contra.

LOBINGIER, C.

This action was commenced in the district court for Lancaster county, December 31, 1900, on an account for merchandise alleged to have been sold by plaintiff to defendant. The latter filed objections to the jurisdiction and a motion to quash the service, alleging that he was a member of the Nebraska state senate, which convened on January 1, 1901, and that he was in Lancaster county on the day previous for the sole purpose of attending the legislative session. The motion and objections were overruled and defendant then answered, again claiming privilege from service in Lancaster county, admitting the purchase of most of the merchandise, but not from plaintiff, alleging that the items charged in the account were "unreasonable, unjust and exorbitantly high" and that part

Syllabus by court; catch-words by editor.

of the goods were damaged when received. The answer also contained a general denial. There was a trial to a jury which found for the plaintiff, but the only evidence contained in the bill of exceptions relates to the matters set forth in the objections to jurisdiction and motion to quash, and the petition in error from the judgment rendered on the verdict is restricted in its assignments to the same matters.

Defendant contends that he was not voluntarily in Lancaster county on the day when he was served, but was there in pursuance of official duty; that his presence might have been compelled by a call of the house; and that while he might have been served at his home in Nemaha county, the service in Lancaster county was unauthorized and invalid. This contention calls for an investigation as to the extent of a legislator's immunity from judicial process. It is conceded that there are no constitutional or statutory provisions in this state which exempt a legislator from the service of civil process, and the exemption here claimed, if it exists at all, must be derived from the common law. We are first to inquire, then, what was the common-law rule.

From time immemorial members of parliament were privileged from arrest during the sessions of that body and for a reasonable period before and after, so as to permit them to attend and return home. The privilege appears to have originated in the necessity of maintaining the independence of the legislature as against the aggressions of the crown and of preventing the coercion of members by the use or abuse of criminal process. The privilege was not, however, restricted to such process, but extended to all cases where the member's person might be taken into custody. So long, therefore, as imprisonment for debt was in vogue, the peers and commons were exempt from this also, and from such of the civil writs as were executed by seizing and confining the person of the defendant. Thus, as late as 1841, it was held to be irregular to issue a *capias ad satisfaciendum* (which was executed by imprisoning the

defendant until the debt and costs were paid) against a member of the house of commons in an action of assumpsit. *Cassidy v. Steuart,* 2 M. & G. [Eng.], 437.

The freedom of members from process of this kind, whether criminal or civil, rests upon the highest grounds of public policy. As was said by Lord Denman, C. J., in *Stockdale v. Hansard,* 9 Ad. & El. [Eng.], 1, 114: "The proceedings of parliament would be liable to continual interruption at the pleasure of individuals, if every one who claimed to be a creditor could restrain the liberty of the members." Another ground, as pointed out by a learned constitutional historian, is "the supreme necessity of attending to the business of parliament, the king's highest court." Stubbs, Constitutional History of England, vol. 3, sec. 452, p. 512. But this immunity and the reasons therefor appear to have existed only as to process which required the detention of the person. After a diligent search we have been unable to find a single English case which decides that a member of parliament or other legislative officer is exempt from the service of a mere summons at any time. That such exemption was sometimes claimed by the members themselves is true, but we find no instance where it was recognized and enforced by the courts. And as was said by the eminent chief justice in the case last cited (p. 114): "When this privilege was strained to the intolerable length of preventing the service of legal process, or the progress of a cause once commenced against any member during the sitting of parliament, or of threatening any who should commit the smallest trespass upon a member's land, though in assertion of a clear right, as breakers of the privileges of parliament, these monstrous abuses might have called for the interference of the law, and compelled the courts of justice to take a part." Mr. Justice Wylie, in his learned and exhaustive opinion in *Merrick v. Giddings,* McArthur & Mackey [D. C.], 55, mentions two cases (*Doune v. Welsh* and *Ryver v. Cosins*) in the reign of Edward IV. (1461-1483) where "it was held that the privilege from arrest during the session of

parliament did not protect him [the member] from being impleaded, but only that he should not be arrested." In *Benyon v. Evelyn,* Orlando Bridgman's Judgments, 324, decided about the middle of the seventeenth century, it was declared to be "lawful to sue out an original writ against a member of the house of commons although parliament is sitting." It is true that some of the text-writers appear to announce a different rule as applicable to this period. In 4 Coke's Institutes, 24, there is a passage where the author, in speaking of a member of parliament, says "the serving of the citation did not arrest or restrain his body, and the same privilege holdeth in case of subpœna." This passage, however, has been much criticised and declared to be unwarranted from the record on which the author relies. "The truth is," observed Chief Justice Bridgman in *Benyon v. Evelyn,* Bridgman's Judgments, 324, "that Lord Coke's treatise of the jurisdiction of parliament is a posthumous work; and though I shall attribute as much to his learning in the law as to any sages in the law whatsoever, yet there not being that freedom in former times of having copies of the records at large as hath been since, when he comes to cite them he is guided by abstracts, which occasions miserable mistakes, and by the *modus tenendi Parliamentum,* which, as to the time of making it, was most certainly a counterfeit piece. So that there are a multitude of errors in his chapter concerning parliaments, and in particular both those records are grossly mistaken." See also Hatsell, Precedents, p. 6; *Merrick v. Giddings,* McArthur & Mackey [D. C.], 55, 59. So in Stubbs, Constitutional History of England, vol. 3, sec. 452 *et seq.,* the author speaks of members of parliament as privileged "from being impleaded in civil suits, from being summoned by subpœna or to serve on juries," etc.; but, while he mentions many cases of exemption from criminal process, he refers to no instance of immunity from the mere service of civil process, and it is evident that he is here speaking of privileges claimed by the members, rather than those recognized and enforced by the courts.

But whatever may have been the law at this time and whatever the claims of the members, parliament itself at an early period undertook to restrict the exemption to process which restrained the liberty of the member. In 1649 the house of commons ordered that in case of a legal proceeding against a member he should receive written notice of its pendency and that then "the member is enjoined to give appearance and proceed as other defendants in case of like suits or actions ought to do, or in default thereof, both their estates and persons shall be liable to any proceedings in law or equity as other members of the Commonwealth." See Journal of House of Commons * quoted in *Hoppin v. Jenckes,* 8 R. I., 453, 457. In 1700 parliament passed an act providing for the commencement of actions and the issue and service of process against members of parliament "at any time from and immediately after the dissolution or prorogation of any parliament, until a new parliament shall meet, or the same be reassembled and from and immediately after any adjournment of both houses of parliament for above the space of fourteen days, until both houses shall meet or reassemble."† In 1769 a statute was enacted which provided that: "Any person or persons shall and may, at any time, commence and prosecute any action or suit in any court of record, or court of equity, or of admiralty, and in all causes matrimonial and testamentary, in any court having cognizance of causes matrimonial and testamentary, against any peer or lord of parliament of Great Britain, or against any of the knights, citizens, and burgesses, and the commissioners for shires and burghs of the house of commons of Great Britain for the time being, or against their or any of their menial or any other servants, or any other person entitled to the privilege of parliament of Great Britain; and no such action, suit, or any other process or proceeding thereupon, shall at any time be impeached, stayed, or delayed, by or under colour or pretence of any privilege of parliament."‡

* April 14.
† 13 William III., ch. 3, sec. 1.
‡ 10 George III., p. 359, ch. 50.

Thus the law stood at the separation of the colonies from the mother country. If, as has been declared in some jurisdictions, the English statutes enacted prior to the separation are to be treated as part of the common law (6 Am. & Eng. Ency. Law [2d ed.], p. 279; Sedgwick, Statutory Construction, 14; *Ex parte Blanchard,* 9 Nev., 101), it is plain that the common law of the United States affords no immunity to legislators from the service of ordinary civil process. This, at least, appears to be recognized in the authorities.

In *Peters v. League,* 13 Md., 58, where a member of the Baltimore city council claimed exemption from the service of an attachment while in the discharge of his duties, the court said (p. 64): "It is worthy of remark, that peers and members of parliament were liable at common law to be sued though they could not be arrested on writs of *capias.* Here the process was an attachment, with a summons to the party as garnishee; therefore the supposed analogy between members of the Baltimore city councils and of parliament would not aid the appellant."

Judge Cooley, in his Constitutional Limitations [5th ed.], p. 161,* says: "By common parliamentary law, the members of the legislature are privileged from arrest on civil process during the session of that body, and for a reasonable time before and after, to enable them to go to and return from the same. By the constitutions of some of the states this privilege has been enlarged, so as to exempt the persons of legislators from any service of civil process."

It was the view of this eminent commentator, therefore, that the common-law privilege needed to be "enlarged" before it could include exemption from the service of ordinary civil process. Among the states in which the privilege was thus "enlarged" were Connecticut, South Carolina and Virginia, and under these remedial statutes were decided the cases of *King v. Coit,* 4 Day [Conn.], 129; *Tillinghast v. Carr,* 4 McCord Law [S. Car.], *152; *M'Pherson v. Nesmith,* 3 Gratt. [Va.], 227, though in the

* 6th ed., p. 160.

last named, it was held that an exemption from all other process whatsoever would not prevent the issue of the writ, but merely suspend the service during the privilege. Under the constitutions of most of the other states, as well as of the federal government, however, the common-law rule as parliament had left it by the statute of 1769, was re-enacted. See 1 Stimson, American Statute Law, p. 68. From the earliest constitutions of the older states it has been carried forward until it has reached our own, where it appears as section 12 of article 3. And in *State v. Elder,* 31 Nebr., 169, 184, this court, in construing and commenting on that clause, declares that "the provision of the constitution is merely a reenactment of the common law."

We are cited to *Bolton v. Martin,* 1 Dall. [U. S.], 296, where the court of common pleas of Philadelphia county held that a member of the convention called for the purpose of ratifying the federal constitution, was exempt from the service of a summons during the session of that body. The opinion does not profess to follow any English case, but relies upon a passage in Blackstone's Commentaries, the status of which is thus explained in the instructive opinion heretofore quoted in *Merrick v. Giddings,* MacArthur & Mackey [D. C.], 55, 63: "At that time seven, perhaps eight, editions of Blackstone's Commentaries had been issued. The two first editions were issued prior to the year 1770; the first was issued in 1765 from the Clarendon Press, Oxford. So, also, was the second. Both of these contain the passage as cited by Judge Shippen and quoted above; but after the passage by parliament of the act of 10th of George III., ch. 50, in the year 1770, Mr. Justice Blackstone with his own hand struck out that passage, and changed its reading to the present form, which is as follows: 'Neither can any member of either house be arrested and taken into custody, unless for some indictable offense, without a breach of the privilege of parliament,' omitting the words, 'or served with any process,' on which Chief Justice Shippen relied for his decision in *Bolton v. Martin,* eighteen years after the change had been made, and

after numerous large editions of the work, with the passage corrected, had been given to the world. Nor was this the whole of the change made by the eminent commentator at that time, for immediately succeeding the sentence on which we have been remarking, he inserted an additional paragraph which is too long to quote. * * * It is but a reasonable exercise of charity, however, to presume that Chief Justice Shippen, in making up his decision in that case, relied upon a copy of one of the early editions of the Commentaries which he had probably studied in his youth and believed to be as unchanged and unchangeable as the Koran."

We are also referred to a statement in the opinion in *Geyer v. Irwin,* 4 Dall. [U. S.], 107, that "a member of the general assembly is, undoubtedly, privileged from arrest, summons, citation or other civil process, during his attendance on the public business confided to him." Upon examination, it will be found that this passage is a mere *dictum,* for no such question was presented in the case. A legislator's attorney had confessed judgment in an action pending in the former's home county, and the supreme court of Pennsylvania, on appeal, said that the action could not have been forced to trial in the member's absence, but that his attorney, by confessing judgment, had waived the privilege. No other point was involved in the case. The court nowhere referred to *Bolton v. Martin,* 1 Dall. [U. S.], 296, and even the *dictum* that the member's absence entitled him as a matter of right to a continuance, was disapproved in *Nones v. Edsall,* 1 Wall. Jr. [U. S. C. C.], 189. The doctrine of *Bolton v. Martin,* above referred to, was, however, applied to members of the legislature in the subsequent nisi-prius cases of *Gray v. Sill,* 13 Weekly Notes of Cases, 59, and *Ross v. Brown,* 7 C. C. Rep. [Pa.], 142.

In 1840, the territorial supreme court of Wisconsin decided, in *Doty v. Strong,* 1 Pin., 84, that the immunity from arrest guaranteed to members of congress by the federal constitution included also exemption from

the service of ordinary civil process, and applied to a delegate from that territory. The writer of the opinion states that the only "authority" which he has been able to find on the subject, is *Geyer v. Irwin,* 4 Dall. [U. S.], 107, which, as we have seen, did not involve or decide the question at all. There was a dissenting opinion by the chief justice. The following year, in *Anderson v. Rountree,* 1 Pin., 115, the same court announced the same construction of the territorial statute which exempted members of the legislature from arrest. The opinion is written by the same judge (Miller) as in *Doty v. Strong,* and in the interval he seems to have found a reference to *Bolton v. Martin,* 1 Dall. [U. S.], 296, which, as we have seen, was based upon a misapprehension of Blackstone's Commentaries. Judge Miller does not appear even to have seen a report of the case, but merely to have read a reference to it in Story's Commentaries on the Constitution. The construction of the word "arrest," so as to include the service of summons, seems to be peculiar to this territorial court and to be without support elsewhere. Judge Cooley (Constitutional Limitations [5th ed.], p. 161, note) says that exemption from arrest is not violated by the service of citations or declarations in civil cases. That the construction was a strained and unnatural one, not likely to endure the test of time, seems to have been recognized even then in Wisconsin; for when the state was admitted, seven years later, the framers of its constitution appear to have thought it necessary, in order to make it the law of that jurisdiction, to insert in that instrument an express provision that members of the legislature should not "be subject to any civil process during the session." Constitution, Wisconsin, art. 4, sec. 15. In *Miner v. Markham,* 28 Fed. Rep., 387, the circuit court sitting in Wisconsin decided that a member of congress was privileged from service of a summons while on the way to the seat of government. The court conceded that the cases were not harmonious, but adopted the state court's construction, which had existed from territorial

times, and which, as we have just seen, was embodied in the first constitution.

The foregoing are all of the cases which we have been able to find, either from the aid of the briefs of counsel or otherwise, which lend any support to the doctrine that a legislator is privileged from the service of a summons. It will be seen that there is among them only one court (and that a territorial one) of last resort which has actually so decided, that its conclusion was reached with little or no opportunity for investigation of the authorities, and that its construction of the word "arrest" is unprecedented and unsound. On the other hand, the doctrine that a member of the legislature, like other citizens, is amenable to the service of a summons, finds ample support in the authorities.

In *Catlett v. Morton,* 4 Litt. [Ky.], 122, the court held that despite the constitutional guaranty of privilege from arrest, members of the legislature "are subject to the execution of any other process, as other citizens are." This case was decided nearly eighteen years before the Wisconsin cases above referred to, and though directly opposed to their conclusions, is not noticed in either of them. The doctrine was reaffirmed in *Johnson v. Offutt,* 4 Met. [Ky.], 19, though there had meanwhile been a change in the statute.

In *Gentry v. Griffith,* 27 Tex., 461, a similar constitutional guaranty was construed with similar conclusions, and the court used the following language, which might well be applied to the reasoning of the Wisconsin case: "It would be difficult to distort any of these definitions so as to make them applicable to the simple service of citation, or giving notice to answer in a civil action."

Rhodes v. Walsh, 55 Minn., 542, 23 L. R. A., 632, is also an instructive case, where the court, in an able opinion, holds that there is no exemption from ordinary process for members of the legislature.

The Wisconsin decisions as to the immunity of members of congress also seem to stand alone. The contrary

was held in *Merrick v. Giddings,* McArthur & Mackey [D. C.], 55, and *Howard v. Citizens' Bank & Trust Co.,* 12 App. Cases [D. C.], 222, and exhaustive opinions are written in both. In *Bartlett v. Blair,* 68 N. H., 232, the court, while declining to construe the federal constitution in advance of an adjudication by the supreme court, refused to quash the service of a writ at the residence of a member of congress who was absent in attendance upon a session of that body.

But if the weight of authority were not so pronounced as it thus appears to be and we felt at liberty to adopt the rule announced in the Pennsylvania and Wisconsin cases, we could not even then find sufficient support for plaintiff in error's contention that, though amenable to civil process, it could only be served upon him in his home county. None of the cases relied upon by him and none of those above reviewed so hold; nor do they, in our view, lend any support to his theory of the case. So far as they touch the question at all, they decide that the legislator is absolutely privileged from service,—not that he is privileged in one place and amenable in another. Thus in *Gray v. Sill,* 13 Weekly Notes of Cases, 59, the member was served while at home during the recess of the legislature. Under the rule contended for by plaintiff in error this would have been a valid service; but it was not so held. We see no room for any middle ground between the Pennsylvania and Wisconsin cases on the one hand and the authorities elsewhere on the other. Either the member is exempt from service or he is not. And if he is not exempt, he is amenable to the provisions of section 60 of the Code, which, as always construed, authorizes him to be summoned in any county where he may be found. Moreover, we think that not only do the authorities relied on by plaintiff in error fail to assist him in his precise contention, but that also some of the authorities above referred to decide the exact point against him. *Johnson v. Offutt,* 4 Met. [Ky.], 19, is declared in plaintiff in error's reply brief to involve "nothing but whether the constitution

prevents any suit anywhere against a member of the legislature." But as we read the case it involves an additional point, and that the precise one which plaintiff in error urges here. The defendant in that case was served in Franklin county, wherein is situated Frankfort, the seat of government, and defendant, in the language of the opinion, "moved to quash the service of summons, upon proof that he was a citizen and resident of Scott county, and representing that county as a member of the house of representatives when the suit was brought, and the summons served and at the time of said motion, and that the legislature was then in session." This was the identical course pursued by plaintiff in error in the case before us, except that he could not show, as did the defendant in the case cited, that the legislature was in session at the time of the service. The overruling of his motion seems to us to determine the question which plaintiff in error raises here. Again, in *Rhodes v. Walsh*, 55 Minn., 542, the defendants were members of the legislature from various counties in Minnesota. The action was brought against them at St. Paul, in Ramsey county, during the session of the legislature, and each defendant sought to quash the service. It is true that it does not appear that any of these defendants conceded that they might have been served in their home counties, but there was quite as much room for the contention as exists here, and if there had been any support in the authorities for such a distinction, it seems not a little singular that the point was not suggested either in argument or opinion.

In all our search we have found but one jurisdiction where the precise rule contended for by plaintiff in error obtains, and that is in Ohio, where it exists by virtue of the following section of the Code: "A member of the senate or house of representatives, or an officer of either branch of the general assembly, shall be privileged from answering to any suit which may be instituted against him in a county other than the one in which he resides, upon a cause of action which accrued ten days before the first

day of the session of the general assembly of which he is an officer or a member; and all proceedings in actions to which any such person is a party shall be stayed during such session, and during the time necessarily employed in going thereto and returning therefrom." Bates, Annotated Revised Statutes of Ohio, sec. 5031. In pursuance of an earlier but similar statute, one of the nisi-prius courts of Ohio held, in *Orth v. McCook,* 2 Ohio Dec., 624, 4 West. Law Month., 215, that a member of the legislature could not be served at the seat of government, even though joined with other defendants who were served at their homes. As our own Code was borrowed from Ohio, the omission of the section above quoted seems doubly significant. We can not here establish by judicial decision a rule which appears to have required legislative enactment in Ohio, especially when our own legislature has failed to adopt it.

But it is urged in plaintiff in error's briefs that the exemption of legislators rests upon grounds analogous to those which afford immunity to witnesses and suitors while in attendance upon judicial proceedings, and that considerations of public policy require us to adopt the same rule as to legislators. The immunity of witnesses in such cases is, in this state, expressly provided by statute. Code of Civil Procedure, sec. 363. So the immunity of suitors constitutes an ancient and well-recognized rule of the common law. In *Cole v. Hawkins,* 2 Strange [Eng.], 1094, decided in 1738, it was held to be contempt to serve a suitor with process while he was in attendance upon a cause, and the court said: "The privilege was designed * * * to prevent any interruption of the business of the court." This is probably not the earliest case on the subject but it illustrates the antiquity of the rule, which appears to prevail in all jurisdictions where the common law is in force. See *Palmer v. Rowan,* 21 Nebr., 452. But the doctrine has never, so far as we are able to find, been extended to legislators. Even in the two jurisdictions where the immunity of legislators from the service of summons has been de-

clared, it rests upon grounds entirely different from their supposed analogy to parties and witnesses. Indeed, while we are cited to *Jacobson v. Hosmer,* 76 Mich., 234, on the point that a party has a right to be sued at his own domicile, if we were to adopt strictly the Michigan rule and construe plaintiff in error's rights according to the analogy of parties, we would be obliged to hold that he was not in any event exempt from service while merely waiting for the legislative session to begin; for in that state a party is amenable to service while waiting for his case to be called. *Case v. Rorabacher,* 15 Mich., 537. Moreover, if we were, by judicial legislation, to extend to senators and representatives that exemption from the service of summons which is enjoyed by parties and witnesses, we would be logically bound by the same reasons and arguments to extend it also to the executive branch. In this state that department consists of eight officers (Constitution, art. 5, sec. 1), who remain at the seat of government at least two, and often four, years. Are we to hold, then, that each of these officials is exempt from the service of summons in the county where he is usually found during all of this period? And if we extend the doctrine at all, why should we stop with state officers? Why do not the arguments made as to legislators apply with equal force to local executive officers, like sheriffs? Are not such officials entitled, to the same extent as members of the legislature, to immunity from civil process while attending to the public business outside of their own counties?

We do not say that it would not be desirable to adopt such a rule for all public servants. We are simply pointing out that no such rule exists, either at common law or by statute. But it may well be doubted whether the halfway doctrine contended for by plaintiff in error would at all meet the objection urged against the policy of allowing service upon legislators during the session. The objection usually made is that it diverts the attention of the member from legislative business to private matters. And this would be equally true if service were allowed at home.

Indeed, the distraction would seem to be less in the case of an action pending at the seat of government where the member could give it some attention without necessarily absenting himself from the legislative session. And, as was well said in *Catlett v. Morton,* 4 Litt. [Ky.], 122, 124: "It has been argued that considerable inconvenience might result from this doctrine to the members of the general assembly, because thereby they might be compelled to litigate their controversies at the capital, instead of in their proper counties. It may be replied, that every citizen who visits Frankfort, and all the other officers of government who do not reside here, are liable to the same inconvenience."

But, if the legislature deems it for the best interests of the state to exempt its members from the service of summons at the seat of government during its sessions, the remedy is entirely in its hands. It may enact into law the rule contended for by plaintiff in error without the aid or consent of either of the co-ordinate branches of the government, and its action in this regard would be legitimate and proper. But for us to announce that rule in advance of such action, and in the face of the authorities above reviewed, would, it seems to us, be little short of revolutionary. 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.

NOTE.—*Constitution—Privilege—Dubois Case.*—In *Greenleaf v. People's Bank,* 133 N. Car. (1903), 292, 300, Chief Justice Walter Clark, discussing a question similar to that involved in the principal case, says: "The numerous and uniform authorities that such privilege from arrest does not exempt from service of process without arrest are collected in a very recent and able opinion (1903) in *Berlet v. Weary* [Nebr.], 60 L. R. A., 609."

The state constitution provides: "Members of the legislature in

all cases except treason, felony or breach of the peace, shall be privileged from arrest during the session of the legislature, and for fifteen days next before the commencement and after the termination thereof." Art. 3, sec. 12. MAXWELL, J., in construing the foregoing, said: "A constitution, like a contract or statute, must be construed together and every part thereof given effect if possible. The provision of the constitution is merely a re-enactment of the common law. The privilege of the member is not the privilege of the house merely, but of the people, and is conferred to enable him to discharge the trust confided to him by his constituents. In other words, the privilege is conferred to enable the member to discharge his legislative duties. Where, however, the constitution has imposed on the member purely ministerial duties, this exemption does not apply. These duties are to be performed at the beginning of the session, so that the parties elected may enter upon the duties of their respective offices and the people have the benefit of their services. The presumption is that the legislature will perform its duty, and declare the result.* But suppose, through a mistake of the law, it should not perform its duty in that regard; is there no remedy either on behalf of the persons elected to office or of the public? If not, then the boast of the common law that here is no wrong without a remedy is without foundation." *State v. Elder*, 31 Nebr., 169, 184.

See the comments of Frank N. Prout, attorney general, upon this case, in the 64th Nebraska Reports, at pages 690 and 691.

In 1856 a case of homicide occurred in the District of Columbia in the presence of the Dutch Minister Dubois. The slayer was indicted. The attorney for the government deemed M. Dubois' testimony necessary for a conviction. The minister was privileged. William L. Marcy, the then secretary of state, requested him to appear at the trial. But, after consultation with the other ministers, Dubois refused to appear. Mr. Marcy thereupon instructed the United States minister at the Hague to bring the matter to the attention of the government of the Netherlands. This having been done, the Holland government declined to authorize M. Dubois to appear as a witness, but consented that he might give an ex-parte declaration under oath, but out of court. M. Dubois then addressed a note to Mr. Marcy offering to make a statement at the Department of State, but refusing to submit to cross-examination. This was, of course, useless and incompetent under the sixth amendment to the constitution of the United States. There is a good and sufficient reason for not subjecting certain public functionaries to the annoyance of judicial process. But the conduct of M. Dubois appears to have been hardly less than outrageous.

Courts will not take judicial notice of the privilege of a member of the legislature. As it may be waived, it must be claimed; and it can only be claimed by plea or motion made or tendered at the proper time. Where a member has allowed a judgment to be ren-

*Of the state election of executive officers.

dered against him during the existence of his privilege, and during the proceeding has sought no abatement or suspension, he can not be allowed the writ of *coram nobis* to reverse such judgment. *Prentis v. Commonwealth*, 5 Randolph [Va.], 697, 16 Am. Dec., 782.

It is not trespass to arrest a person privileged from arrest. 1 Cooley, Constitutional Limitations [6th ed.], 161, note.—W. F. B.

MUTUAL BENEFIT LIFE INSURANCE COMPANY, APPELLEE, v. JOHN H. DANIELS ET AL., APPELLANTS.

FILED JANUARY 8, 1903. No. 12,396.

Commissioner's opinion, Department No. 1.

1. **Promissory Note:** EXTENSION OF PAYMENT: RATE OF INTEREST. Where a note provides for ten per cent. interest after maturity, and an extension agreement is entered into between the maker and holder, extending the time of payment and providing for six per cent. interest thereon during the period of extension, after the expiration of the period of extension, the note will again draw interest at ten per cent.

2. **Mortgage:** FORECLOSURE: TAXES. Where, in the foreclosure of a mortgage, plaintiff prays judgment for taxes by him paid for the protection of his security, and offers in evidence tax receipts for the sums so paid, such receipts are prima-facie evidence of the payments of such taxes.

APPEAL from the district court for Douglas county. Foreclosure of mortgage. Heard below before FAWCETT, J. Judgment for plaintiff. *Affirmed.*

Charles W. Haller, for appellants.

Warren Switzler and *Charles C. St. Clair*, *contra.*

KIRKPATRICK, C.

This is an appeal from the judgment of the district court for Douglas county in an action brought by the Mutual Benefit Life Insurance Company against John H. Daniels and Eliza F. Daniels and others upon a note and mortgage. There was judgment for plaintiff and defendants appeal. The facts in the case need be but briefly

Syllabus by court; catch-words by editor.

stated: On September 1, 1890, appellants, being husband and wife, made and delivered to one William B. Meikle, to whom they were indebted, their promissory note in the sum of $3,000, agreeing therein to pay Meikle $3,000 September 1, 1895, with interest from date till paid at six per cent., payable semi-annually. A mortgage was executed upon certain property to secure the note. Among the conditions of the mortgage was one requiring appellants to pay all taxes and assessments against the property, and in their default so to do, the mortgagee might pay the same and recover the amount from appellants with interest at ten per cent. The mortgage was filed September 13, 1890, and on or about September 11, 1890, appellee became the owner thereof and of the note by purchase from Meikle. In addition to the facts above stated the court found that on January 31, 1891, appellee paid taxes and assessments which had been levied, but unpaid, upon the premises, amounting to $412.68. There was an agreement in the note that the principal sum should bear interest after maturity at the rate of ten per cent. per annum. An extension agreement was entered into between appellants and appellee September 23, 1895, in which appellants agreed to pay the principal sum September 1, 1900, "and also the interest thereon at the rate of six per cent. per annum, in semi-annual payments, during said period of extension, according to the tenor and effect of the extension coupons hereto attached." Receipts from the city treasurer for taxes paid were introduced by appellee, showing payment for the sums claimed on account of taxes. Appellants had defaulted in the payment of taxes. The court found that there was due to appellee on the mortgage indebtedness $3,294.16, and for taxes paid $423.68, or a total of $3,717.84, with interest at the rate of ten per cent. from the 6th day of May, 1901.

Appellants contend that the judgment of the court is wrong in allowing an interest of ten per cent. on the principal sum of the loan, basing this contention upon the theory that the interest rate must be controlled by the new

agreement,—the extension agreement of September 13, 1895,—which, it is said, does not provide for interest at ten per cent. on the principal under any circumstances. We do not think the decree vulnerable for the reason stated. The agreement was for "interest thereon [the principal sum] at the rate of six per cent. per annum in semi-annual payments during said term of extension." The intention of the parties to this contract is plain, namely, that during the period of extension, granted under agreement, the provision in the antecedent agreement for ten per cent. upon principal after default should be inoperative; and it must be assumed that it was intended that after default occurring upon the expiration of the extension period, the principal should drawn interest at ten per cent. In other words, the extension agreement had for its sole purpose the postponement of the date of maturity of the original contract.

In *North v. Walker,* 66 Mo., 453, it is said: "Where a note called for ten per cent. interest after maturity, and the time of payment was extended by agreement for a certain time at the rate of nine per cent., *held,* that after the expiration of the extended time the note would bear interest at the rate of ten per cent."

It does not appear from the agreement under consideration that the parties understood or intended that the rate of six per cent. during the extension should extend beyond that period, when construed in connection with the subsisting contract when the extension was granted.

Appellants say that the court should not have allowed anything for alleged taxes and assessments paid by appellee, because the only proof in the record is the tax receipts of the treasurer. In *Ure v. Reichenberg,* 63 Nebr., 899, it is held that receipts for taxes, prior and subsequent, paid on certificate of tax sale, are prima-facie evidence of the validity of such taxes. But whether the tax receipt in the hands of a mortgagee is ordinarily presumptive evidence of the regularity of the taxes paid is not expressly determined therein. This question, however, seems

not necessary to a decision of the question here under consideration. In the case at bar the mortgage contains provisions in the language following: "First party to pay all taxes and assessments now due or which may become due on said premises before the same become delinquent. * * * And should said party of the first part neglect or fail to pay said taxes or assessments * * * said party of the second part, his heirs, successors or assigns may do so, and recover of the party of the first part the amount paid therefor with interest at the rate of ten per cent. per ann. and this mortgage shall stand as security therefor." Under the terms of this mortgage it became the duty of the mortgagors to pay the taxes assessed upon the property at their maturity or before, and failing, the mortgagee was expressly authorized to do so, and recover, with ten per cent., upon foreclosure. We think appellee had a right under this agreement to pay the taxes which were due, and having done so, a receipt of the treasurer was sufficient to establish *prima facie* the validity of the taxes and the amount paid and the right of the mortgagee to recover therefor. The rule is settled that a receipt for money is ordinarily prima-facie evidence of its payment, and we are unable to see why the rule should not be applied to the payments of taxes made by a mortgagee for the protection of his security.

Appellee failed to introduce any evidence tending to overthrow the presumption that the taxes were paid as alleged and that the taxes were valid, and it follows that the trial court's judgment is right, and it is recommended that the same be affirmed.

HASTINGS and LOBINGIER, CC., concur.

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

AFFIRMED.

FRANK CINFEL V. W. J. MALENA ET AL.

FILED JANUARY 8, 1903. No. 12,453.

Commissioner's opinion, Department No. 2.

1. **Partnership Property:** REPLEVIN. The joint owners of partnership property, being all joined as plaintiffs, can maintain replevin to recover the possession of their personal property, against a stranger who claims an interest therein and detains it from the possession of any one of them.

2. **Replevin:** ACTION: DISMISSAL: BAR. The commencement of a suit in replevin which was immediately dismissed without prejudice, and the property in question returned to the officer, to be delivered by him to the defendant, will not operate as a bar to the bringing of a subsequent action.

3. ——: ——: ——: ——. In such a case the property will not be considered to have been in plaintiff's possession at the time the subsequent action was commenced.

4. **Conflicting Evidence.** The verdict of a jury based on conflicting evidence will not be set aside unless we can say, upon an examination of all of the testimony, that it is clearly wrong.

5. **Joint Action in Replevin.** Where a joint owner of personal property who, without being consulted by the others, is made a plaintiff with them jointly in an action in replevin to recover the possession thereof, makes no objection to the use of his name in the prosecution of the suit, the defendant can not object for him, and thus defeat the action.

ERROR from the district court for Stanton county. Replevin action, commenced originally in county court. Tried below before GRAVES, J. Judgment for plaintiffs. *Affirmed.*

William Wallace Young and *George A. Eberly*, for plaintiff in error.

John A. Ehrhardt, contra.

BARNES, C.

This action was originally commenced in the county court of Stanton county, by W. J. Malena, Frank Trojan and Joseph Kabas, who claimed to be joint owners of a

Syllabus by court; catch-words by editor.

certain threshing machine and horse power, to recover the immediate possession thereof from Frank Cinfel and others. From a judgment of the county court an appeal was taken to the district court, and the cause was there tried to a jury. The result of the trial was a verdict in favor of the plaintiffs, and judgment was entered thereon. From that judgment the defendant Frank Cinfel prosecutes error to this court.

The claims of the respective parties, and facts developed upon the trial, are substantially as follows: It was claimed on the part of the plaintiffs in the court below that on the 20th of June, 1897, Joseph Malena, the father of the plaintiff W. J. Malena, together with one John Kabas and one Anton Cinfel, purchased the threshing machine and horse power in question in partnership, and became the joint owners thereof, each owning a one-third interest therein. It appears that these parties ran the machine during that year, and the year following, and it is contended that each of them received one-third of the profits which accrued from its use. In 1898 Joseph Malena sold and conveyed his one-third interest therein to his son, W. J. Malena, one of the plaintiffs in the court below. It also appears that John Kabas, one of the original purchasers of the machine, sold and conveyed his one-third interest therein to his son, Joseph Kabas, who is also one of the plaintiffs in the lower court. It further appears that in the month of May, 1899, the one-third interest in the property, which it is claimed was owned by Anton Cinfel, was sold under an execution issued on a judgment of the district court for Stanton county against the said Anton Cinfel and in favor of the Aultman-Taylor Machinery Company, and the same was purchased by Frank Trojan, who thus became the other joint owner thereof. It is claimed that the plaintiffs in the court below in that manner obtained their title to and ownership of the property in question. A great deal of testimony was introduced to substantiate these claims, and we can say, after a careful examination of the record and bill of exceptions herein,

that they were sustained by sufficient evidence. On the other hand, it was contended that at the time of the original purchase of the property in question, John Kabas bought a two-thirds interest therein, that the other one-third was purchased by Joseph Malena, and that Anton Cinfel never had any interest therein. It was further claimed that John Kabas sold and conveyed one-half of his interest in the property to Frank Cinfel, who is his son-in-law, for the sum of $125, on the 23d day of August, 1898. It appears that Frank Cinfel did not take possession of the property, or make any claim to his alleged one-third of it, during that year; that at the end of the threshing season the machine was stored in a shed on the premises of Joseph Malena, which was constructed out of material purchased and paid for by Malena, Kabas, and Anton Cinfel. It was further shown by the testimony that at the beginning of the threshing season in 1899, W. J. Malena, Frank Trojan and Joseph Kabas jointly took possession of the machine and commenced work with it. After threshing some days Frank Cinfel sent word to his brother-in-law, Joseph Kabas, to come over and do his threshing. Thereupon the machine was moved to the premises occupied by Frank Cinfel, who informed them that he was not quite ready to thresh. The machine was left there on his premises for two or three days, during which time it rained, and the weather was unsuitable for threshing, and when Frank Trojan went to the premises to begin work he found the machine running, and was told that Frank Cinfel claimed to be the owner of a one-third interest therein. Cinfel excluded Trojan from the use of the machine, and refused to deliver the possession of it to him and the other joint owners thereof. Thereupon a suit was commenced in the county court to recover possession of the property, but upon finding that there was a defect of parties, the action was dismissed, and the property returned by the officer and others to the possession of Frank Cinfel, and was placed on his premises where it was situated before the commencement of the action. This action was

afterwards commenced in the name of W. J. Malena, Frank Trojan and Joseph Kabas, as plaintiffs, against Frank Cinfel and others, defendants. It is impossible to quote the testimony or to give even a summary statement of it, because it is very voluminous. It is sufficient to say that the evidence was conflicting on the questions in dispute, but was amply sufficient to sustain the findings of the jury, which necessarily included the fact of the former ownership of one-third of the property by Anton Cinfel, the fact of the sale of his interest to Frank Trojan, and the further fact that Frank Cinfel had no interest whatever therein.

1. It is first contended by the plaintiff in error that the defendants were mistaken in their remedy; that an action in replevin would not lie to determine the right of possession to and the ownership of an undivided one-third interest in the property in question. It must be conceded that a partner or joint owner of personal property can not maintain replevin against his copartner, or another joint owner, to recover his undivided interest therein. This case, however, is not within that rule. This is a suit where all of the partners or joint owners of the property seek to obtain the possession of the whole of it from one whom they allege is a stranger and has no interest therein. Such an action can be maintained. Cobbey, Replevin, sec. 227. Indeed, no good reason can be found why such action in replevin will not lie. If the plaintiffs establish their joint ownership, and the fact that they are entitled to the immediate possession of the property, they will recover; while, on the other hand, if the defendant shows that he is the owner of the part interest therein, which is claimed by him, he will defeat the plaintiffs' action. We hold that plaintiffs in the court below did not mistake their remedy, and their action was properly maintained.

2. Counsel for the plaintiff in error contends that when this action was commenced in the county court of Stanton county the property in question was in plaintiffs' possession, and for that reason replevin would not lie. We have

examined the evidence upon that question and find that it discloses, beyond question, that the former action in replevin was dismissed and the property was returned to the actual possession of the plaintiff in error. In fact, it was taken back to his premises and was placed by the officer, and the others in charge of it, exactly where it was found when they took it. They thereupon demanded the possession of it from him and he refused to deliver it to them. This much he admits in his own testimony. But even if this were not the fact, when the former replevin action was dismissed and the property was turned back to the sheriff to be delivered to the defendant therein, from that moment he was in constructive possession of it, and replevin would lie. *Teeple v. Dickey*, 94 Ind., 124; *Louthain v. Fitzer*, 78 Ind., 449; *Hadley v. Hadley*, 82 Ind., 75; *Walbridge v. Shaw*, 7 Cush. [Mass.], 560. The contention of plaintiff in error upon that point can not be sustained.

3. It is claimed that the verdict in this case is not sustained by the evidence. As we have said in the statement of the case, for want of space we are unable to quote the testimony or any considerable portion of it. An examination of the bill of exceptions shows us that the evidence was conflicting as to whether or not Frank Cinfel had any interest in the property. The preponderance of the evidence was against him. In fact, the jury would not have been justified in returning any other verdict. It appears beyond question that Anton Cinfel was the owner of one-third of the property in question at the time it was sold under the execution hereinbefore mentioned. It seems to be equally well established that Frank Cinfel, who was a relative of his, entered into an arrangement with his father-in-law, John Kabas, and Anton to cover up Anton's interest in the property. For that purpose John Kabas claimed that when the property was bought he owned two-thirds of it, and sold one-third of it to Frank, and that Anton never had any interest therein. While these three parties testified to that fact in substance, yet the testimony of the other witnesses and the facts and cir-

cumstances surrounding the transaction fairly overwhelmed them, and exposed the falsity of their claim. The jury having determined this question upon conflicting evidence, the verdict should not be set aside.

4. Lastly, it is claimed that the action could not be maintained because Joseph Kabas was an unwilling plaintiff. It is sufficient to say in answer to this contention that Joseph was made a party plaintiff, and made no complaint in relation to it. He seems to have been somewhat indifferent in the matter; so much so that he did not ask to be discharged by the court. Neither did he make any application to be indemnified against the costs of the action, as he might have done if he so desired. His testimony upon that question is as follows:

Q. Did they ever ask you if they could use your name?

A. No, sir, they did not.

Q. Did you ever tell them they could use your name as a party plaintiff?

A. No, sir.

Cross-examined by Mr. Ehrhardt:

Q. Did you ever tell them they could not use your name?

A. No, sir.

Q. You never said anything to them about it?

A. No, sir.

Q. You never said anything to Frank Trojan and W. J. Malena about using your name in that lawsuit?

A. No, sir.

Joseph Kabas having been properly made a plaintiff in the action, and having himself taken no exceptions thereto, the defendant could not avail himself of the indifference or lack of interest in the matter exhibited by him. This disposes also of the assignment that the court erred in sustaining an objection to a question propounded to Frank Trojan, by which it was sought to show that Joseph Kabas wanted the property left with Frank Cinfel. No particular objections are made to the instructions in this case, or any of the other matters that transpired upon the trial. The case appears to have been fairly tried. The

verdict of the jury is a just one, and it being fully sustained by the evidence, we recommend that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

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

AFFIRMED.

F. C. AUSTIN MANUFACTURING COMPANY v. COUNTY OF COLFAX.

FILED JANUARY 8, 1903. No. 12,491.

Commissioner's opinion, Department No. 2.

1. **Action for Goods**: PURCHASE PRICE: DELIVERY: PROFFER OF DELIVERY. No action can be maintained for the purchase price of goods, unless a delivery or a proffer of the delivery of the same is alleged and proved.
2. **Indebtedness**: COUNTY: CONTRACT: CURRENT YEAR: TAX LEVIED. It is unlawful for the county board of any county in this state to make any contracts for or incur any indebtedness against the county in excess of the tax levied for county expenses during the current year.

ERROR from the district court for Colfax county. Action for goods sold and delivered. Tried below before HOLLENBECK, J. Judgment for defendant. *Affirmed.*

George W. Wertz, for plaintiff in error.

George H. Thomas, contra.

OLDHAM, C.

This was a suit to recover from the county of Colfax the sum of $1,200 for the purchase price of a road grader. The account was originally filed with the board of county commissioners and rejected by such board. An appeal was taken from the order of the board to the district court. New pleadings were filed. A jury was waived, and the

Syllabus by court; catch-words by editor.

case submitted to the court. The issues were found in favor of the defendant county, and plaintiff brings error to this court.

The facts underlying this controversy, briefly stated, are that in March, 1896, the members of the board of county commissioners of Colfax county entered into a contract with the plaintiff for the delivery on trial of a road grader for the agreed price of $1,200; $200 of which was to be taken by plaintiff in exchange for old graders then owned by the county, and $1,000 was to be paid in three payments from the tax levies of 1897, 1898 and 1899. In pursuance of this alleged contract, a road grader was sent to plaintiff's agent for the purpose of making the trial; but it appears from the evidence that the board of county commissioners was restrained from taking any part in this test by an injunction of the district court at the suit of some taxpayer. Just what disposition was finally made of this injunction we are not fully informed. In any event, no test of the road grader was ever had, and there is no evidence in the record tending to show either an actual or proffered delivery of the road grader to the defendant county. It is elementary that plaintiff would not be entitled to recover for the purchase price of the machine without a delivery or a proffered delivery of it to the county.

It further appears from the record that at the time this alleged contract was entered into the levy for the year 1895 had been wholly and entirely exhausted, and there was no cash on hand against which warrants could be drawn for the purpose of paying for the machine. The alleged contract was therefore an attempt to escape the limitations imposed upon the power of the board of county commissioners by section 34, article 1, chapter 18, Compiled Statutes,* and particularly that portion thereof which says that it shall not "make any contracts for or to incur any indebtedness against the county, in excess of the tax levied for county expense during the current year, nor shall any

*Cobbey's Annotated Statutes, sec. 4452.

expenditure be made or indebtedness be contracted to be paid out of any of the funds of said county in excess of the amount levied for said fund."

It follows that for either of the above reasons the judgment of the district court should be affirmed. We so recommend.

BARNES and POUND, CC., concur.

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

AFFIRMED.

LUSETTA J. SOLT ET AL., APPELLEES, V. LEWIS C. ANDERSON, APPELLANT.

FILED JANUARY 8, 1903. No. 9,457.

Commissioner's opinion, Department No. 2.

1. **Judgment**: PLEADINGS: RECORD: ERROR. A judgment must be in accordance with the pleadings and record as a whole; and if the plaintiff's pleadings, taken together, show that he is not entitled to recover, a judgment in his favor is erroneous, though it would be sustained by the petition and answer.

2. **Real Estate**: SALE: CONVERSION: HOMESTEAD: EXCEPTION: VENDOR'S INTEREST: PERSONAL REPRESENTATIVE: LEGAL TITLE: SECURITY. As a sale of real property is in equity a conversion of the land into money, except in case of a homestead, the vendor's interest passes to his personal representative on his death, and the legal title is considered to be held as security for payment of the purchase money.

3. **Personal Representative**: RIGHT OF ACTION: SPECIFIC PERFORMANCE. The personal representative of a deceased vendor may maintain a suit for specific performance of the contract under section 335*a*, chapter 23, Compiled Statutes, 1901.*

4. **Homestead**: PERSONAL REPRESENTATIVE: ALLEGATIONS: FRAUD AND COLLUSION. Unless the property is a homestead, the allegations of the personal representative in such a suit, at least in the absence of fraud and collusion, are binding upon all persons interested in the estate.

5. **Allegation of Personal Representative.** An allegation by a personal representative in such a suit that the property is a home-

Syllabus by court; catch-words by editor.

* Cobbey's Annotated Statutes, sec. 5185.

stead, is for the benefit of the heirs and can not be said to prejudice them.

6. **Character of Purchase Money.** Ordinarily, the purchase money recovered in such a suit is personalty and is to be distributed as such; but where the land in question is a homestead, so that the proceeds would stand as exempt and in lieu of the land, the purchase money, not exceeding $2,000, is not to be regarded as personalty, but should be turned over to those to whom the homestead would have descended by operation of law.

7. **Heirs at Law:** PARTIES: DECREE: PERSONAL REPRESENTATIVE: RECOVERY OF PURCHASE MONEY. In such case, as the statute requires the heirs at law to be made parties, the decree should provide that they, and not the personal representative, recover the purchase money.

8. **Homestead:** CONTRACT FOR SALE: VENDOR: WITHDRAWAL BEFORE EXECUTION AND DELIVERY. The vendor in a contract for sale of a homestead which has not been acknowledged properly, may withdraw at any time before a deed has been executed and delivered, or the homestead right abandoned pursuant thereto.

9. ———: ———: ———: ———: DEATH BEFORE ABANDONMENT: RIGHTS OF VENDOR'S SUCCESSORS. If he dies before conveyance or abandonment of the homestead pursuant to the contract, those who succeed to his rights under the statute may refuse to complete the sale.

10. ———: ———: ———: ———: ———: ———: MINORS. In case such persons or some of them are minors, it would seem that there is no way in which such a contract can be carried out. Hence it seems that specific performance of a contract to convey a homestead, not properly executed and acknowledged, will not be granted at suit of either party.

11. **Admission in Answer.** Admission in an answer that a contract for the sale of land was "executed," in the absence of anything to restrict the meaning of that term, admits that it was duly acknowledged when acknowledgment was necessary to make the contract valid and enforceable.

12. **Meaning of "Executed."** But the meaning to be given the term "executed" may be restricted by the context, and will then cover such acts as the pleader obviously intended to refer to.

REHEARING of case reported in 63 Nebr., 734.

APPEAL from the district court for Hamilton county. Action by administratrix to enforce specific performance of contract made with her intestate. Heard below before

SEDGWICK, J. Judgment for plaintiff. *Judgment below reversed and dismissed.*

John M. Day, for appellant.

Hon. Eugene J. Hainer, J. H. Smith and *Daniel A. Scovill, contra.*

POUND, C.

This cause has given the court a great deal of trouble, because of the condition of the pleadings and the many questions to which the peculiar course by which the issues were made up has given rise. Briefly restated, the case is this: Lusetta Solt, widow and administratrix of Jacob Solt, brought this suit against Anderson, joining the heirs at law of the intestate, as required by section 335*a*,* chapter 23, Compiled Statutes, setting up a contract "entered into" between said Jacob Solt, in his lifetime, and said Anderson, for the sale of certain land held by Solt, and praying for specific performance thereof. Nothing appears in the petition to show whether the contract was or was not acknowledged, and the copy attached shows nothing beyond signature and witnesses. Anderson answered, admitting due "execution" of the contract, and setting up, together with several other defenses not now material, that a perfect title could not be given because of certain judgment liens. Replying to this, the plaintiff alleged that the property was the homestead of said Jacob Solt and was not subject thereto. Upon trial on these pleadings, a decree of specific performance was rendered, awarding the money to the widow and heirs at law of the vendor. From this decree Anderson appeals.

The questions argued arise solely upon the pleadings. Appellant contends that the plaintiff's pleadings show that the land was a homestead and that the contract for sale thereof was not acknowledged, by reason whereof plaintiff is not entitled to specific performance. He contends also that the decree awarding specific performance

*Cobbey's Annotated Statutes, sec. 5185.

and giving the purchase money to the widow and heirs at law is at variance with itself under the pleadings, since, if the property was not a homestead, so that an unacknowledged contract for conveyance may be enforced specifically, the purchase money belongs to the personal representative, and is liable for the vendor's debts, while if the purchase money is for the widow and children, and not for the personal representative, it can only be because the property was a homestead, as alleged in the reply, which would bar specific performance unless the contract was properly acknowledged. The appellee contends that the reply stands as denied, and, in the absence of any proof that the land was in truth a homestead, is not to be taken as establishing that fact; that the allegations of the reply can not bind the heirs who are defendants and the parties who recover the purchase money; that the homestead right is solely for the benefit of those entitled thereto, and if they choose to waive it they should have specific performance, though not bound absolutely by the contract of sale; and that the failure of the petition to allege that the contract was acknowledged is cured by admissions in the answer which, it is claimed, admit such to have been the fact.

So long as the petition fails to show that the contract was acknowledged, we think it clear that unless the petition is aided from some other source, taken in connection with the reply it will not sustain the decree. The judgment must be in accord with the pleadings and record as a whole. It is not rendered on the petition and answer only, but on the plaintiff's pleadings, those of the defendant, and the findings of the court. Although the judgment would be sustained by the petition and answer, it is erroneous if the plaintiff's pleadings, taken together, show that she is not entitled to recover, unless the defect is supplied in the pleadings of the defendant. While the affirmative allegations of a reply are deemed to be controverted, so that they must be proved by plaintiff, and evidence in avoidance or denial thereof on the part of the defendant is admissible,

such allegations are as binding upon the plaintiff and as much a part of the case made by his pleadings as allegations of his petition traversed in the answer.

Whether the allegations in the pleadings of the personal representative of a deceased vendor in a suit for specific performance are binding upon the heirs and other persons interested in the estate must depend upon whether the land is or is not a homestead. The principle upon which such cases turn is expressed in the maxim that equity regards that as done which ought to have been done. Accordingly, the interest of the estate of a deceased vendee in a contract for sale of land is regarded as realty. Compiled Statutes, ch. 23, sec. 94.* In like manner, as a sale of real property is in equity a conversion of the land into money, except in case of a homestead, the vendor's interest passes to his personal representative on his death, and the legal title is considered to be held as security for payment of the purchase money. *Bender v. Luckenbach,* 162 Pa. St., 18, 29 Atl. Rep., 295; *Hyde v. Heller,* 10 Wash., 586, 39 Pac. Rep., 249. Accordingly, section 335*a*, chapter 23, Compiled Statutes, leaves it to the personal representative of the deceased vendor to determine whether he will insist upon specific performance by the vendee. This conflicts in no way with *In re Reed,* 19 Nebr., 397, because the legal title is in the heirs, subject to the vendee's rights under the contract, and the heirs, who have the full beneficial ownership in case the contract is not enforceable, have a real and substantial interest in a suit to enforce the contract against the estate, in order to contest its validity. Without regard to the character of the land, whether homestead or not, the personal representative of a deceased vendor may maintain a suit against the vendee for specific performance of the contract under section 335*a*, chapter 23, Compiled Statutes. The heirs or the persons entitled to the homestead right in succession to the vendor are fully protected by the requirement of the statute that they be joined as parties defendant. If the property is not a home-

*Cobbey's Annotated Statutes, sec. 4968.

stead, the purchase money recovered is personalty, and is to be distributed as such. Hence the personal representative who is recovering for himself as such representative, not merely bringing a suit, under provisions of the statute, for the benefit of those entitled to the proceeds of a homestead with which the estate has no concern, must be able, in the absence of fraud or collusion, to bind all persons interested in the estate by the allegations of his pleadings. On the other hand, where the land contracted to be sold is a homestead, under the provisions of section 16, chapter 36, Compiled Statutes,* the purchase-money stands in lieu of the homestead, as a fund wherewith to procure a new home. *Prugh v. Portsmouth Savings Bank*, 48 Nebr., 414. It is exempt from debts and liabilities of the estate, and the personal representative has nothing to do with it. Hence such money is not to be regarded as personalty, but should be turned over to those to whom the homestead would descend by operation of law. In such case the personal representative, by whom the action is to be brought under the provisions of the statute, is a nominal party only, and the real plaintiffs are those whom the statute requires to be joined as defendants. An allegation of the nominal plaintiff adverse to the interests of these substantial parties in interest ought not to be held fatal in case their pleadings make a proper case. But it must be obvious that an allegation that the land is a homestead is in reality a disclaimer by the personal representative of substantial interest in a suit. It is for the benefit of the heirs, since it makes the suit and its proceeds theirs, and it can not be said to prejudice them.

In view of these principles, we think appellant's contention that the decree is at variance with the pleadings and with itself, in that it awards the purchase money to the heirs and not to the administratrix, is not well taken. The statute requires the heirs to be made parties, and if, as the pleadings allege, the land was a homestead, it was not merely permissible but proper that they, the substan-

* Cobbey's Annotated Statutes, sec. 6215.

tial parties in interest, to whom the money belonged, should recover it, so long as they were in court. Had not the pleadings shown the property to be a homestead, the administratrix, to whom the money would have belonged, should have recovered it; but as the record stands, the decree follows the pleadings in this particular.

This brings us to the question whether specific performance can be awarded properly under the pleadings. With respect to the contention of appellee that a vendor of a homestead, who is not bound by the contract of sale, by reason of its defective execution, may, if he choose, waive a right intended solely for his benefit and have specific performance, we agree in all things with the opinion of HASTINGS, C., in *Solt v. Anderson*, 63 Nebr., 734. Not being bound by the contract, the vendor may withdraw at any time before a deed has been executed and delivered, or the homestead right abandoned pursuant thereto. If the vendor dies before conveyance or abandonment of the homestead pursuant to the contract, those who succeed to his rights under the statute have the same power. They are not bound by the contract, on account of its defective execution, and unless they convey or abandon the homestead, they can not be deprived of it. It would seem that in case such persons, or some of them, were minors, as must often happen, there would be no way in which the contract could be carried out; and to enforce specific performance of a contract to which one party is bound, while the other, or his successors, may speculate on the course of events and abide its terms or not as circumstances dictate, would be grossly inequitable. Hence it seems to us that specific performance of a contract to convey a homestead, not properly executed or acknowledged, should not be granted at suit of either party.

It is urged, however, that the pleadings do not disclose a defective contract, for the reason that any defect in the petition is obviated by the answer, under the rule that an omission of essential averments in a petition may be cured by admissions in the answer which supply the facts

whereon the right to relief depends. *Hargreaves v. Tennis*. 63 Nebr., 356. The answer repeatedly admits that a written contract was executed by the parties. "Executed" is a word of wide import. In *Brown v. Westerfield*, 47 Nebr., 399, it was held to include "all acts essential to the completion" of an instrument. And in *Wells v. Lamb*, 19 Nebr., 355, it was held to include delivery of an instrument within the time required by law for its validity. In case of ordinary conveyances, which do not require acknowledgment, an allegation of execution would not embrace a step not essential to validity and effect. *Brown v. Westerfield, supra*, 403. But in case of conveyance of a homestead, it is obvious that the instrument could not be "executed" so as to be of any effect without acknowledgment. Hence, in the absence of anything in the pleadings to restrict the meaning of that term, the admission that a contract for the sale of a homestead was duly "executed" would probably admit that it was duly acknowledged. *Le Mesnager v. Hamilton*, 101 Cal., 532, 35 Pac. Rep., 1054. In this case, however, the admission was made with reference to an ordinary tract, at a time when the record did not disclose that the land was a homestead, and the pleader could not have supposed that he was admitting anything not required in a complete conveyance of the usual type. The plaintiff alleged that the parties had entered into the contract set out in the petition, and the defendant, in all probability, intended only to admit that such contract had been signed and delivered. That was the extent of his admission at the time it was made. The meaning of the term "executed" may be restricted by the context, and will then cover such acts as the pleader obviously intended to refer to. *Le Mesnager v. Hamilton, supra*. In this case it is clear that he referred to the state of facts disclosed by the petition, and his admission ought not to be changed to an affirmation by a subsequent pleading of the adverse party setting up facts of which he had no thought when the answer was drafted.

For these reasons we agree entirely with the judgment

at the last hearing, and recommend that the decree be reversed and the suit dismissed.

BARNES 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 action is dismissed.

REVERSED AND DISMISSED.

LENORA S. BRONSON V. ALBION TELEPHONE COMPANY ET AL.

FILED JANUARY 8, 1903. No. 12,497.

Commissioner's opinion, Department No. 2.

1. **Public Street**: POLES AND WIRES: ABUTTING OWNERS: ADDITIONAL BURDEN: COMPENSATION. Poles and wires which permanently and exclusively occupy portions of a public street or highway, constitute an additional burden for which the abutting owner is entitled to compensation in case he is damaged thereby.
2. ———: ———: ———: ———: TELEPHONE COMPANY: DESTRUCTION OF AND INJURY TO TREES. Where an abutting owner has planted trees along the street adjacent to his property, under the terms of a city ordinance pursuant to statutory provisions, a telephone company which removes, destroys or injures such trees in erecting poles and wires under its franchise, is liable for the resulting damage, even though no unnecessary injury is inflicted.
3. **Damages**: INJURY IN INCIDENTAL RIGHT: REMEDY AT LAW: INJUNCTION. In case property is not taken directly by a public undertaking, but an owner suffers some injury in an incidental right growing out of his peculiar situation or position, so that ordinary condemnation proceedings and payment of damages in advance are not practicable, the owner will be left to his remedy at law and is not entitled to an injunction, unless upon proof of insolvency or some other special circumstance.
4. **Corporation**: FRANCHISE: POSSESSION: RIGHT: DIRECT PROCEEDING. It is sufficient for a corporation which seeks to defend upon the ground of a franchise to show that it is actually possessed of the franchise. Whether such franchise was acquired or is held rightfully, is to be determined only in a direct proceeding to oust the corporation or in a proceeding to which some one who claims a better title is a party.

Syllabus by court; catch-words by editor.

ERROR from the district court for Boone county. Action to obtain a perpetual injunction against the commission of an alleged trespass threatened. Heard below before PAUL, J. Judgment on demurrer for defendant. *Affirmed.*

J. A. Price, for plaintiff in error.

Michael W. McGan, contra.

POUND, C.

The plaintiff applied for an injunction to restrain defendant, a telephone company, from mutilating or injuring certain trees which she had planted in the street along and adjacent to her property. The trees had been planted under the provisions of a municipal ordinance and were rightfully in the street by virtue of sections 3-7, article 4, chapter 2,* and subdivision 24, section 69, article 1, chapter 14, Compiled Statutes.† The company was erecting poles and wires under a franchise from the city. Upon demurrer to the petition, the district court held that no cause of action was stated, and dismissed the suit.

The right of an abutting owner to maintain shade trees upon or overhanging the sidewalk is general and well recognized. In many jurisdictions it is customary; with us it has the sanction of express legislation. But this right is subject to all proper uses of the street for the primary purposes for which it was dedicated or condemned. Hence, although a telephone or telegraph company is undoubtedly liable for unnecessary or wanton injury to such trees in erecting its poles and wires, liability for injuries, even amounting to removal or destruction of the trees, which are necessary or proper in the due carrying out of the public undertaking, must depend upon the much-mooted question whether use of a street or highway for poles and wires is an ordinary use within the contempla-

* Cobbey's Annotated Statutes, secs. 3057-3061.

† Cobbey's Annotated Statutes, sec. 8736.

tion of the parties when it was dedicated or condemned, or is a new and additional burden, for which the abutting owner is entitled to compensation in case of injury. The authorities are very evenly divided upon the question whether a telephone or telegraph company is liable to the owner of the trees where the injury does not go beyond what is necessary in the reasonable prosecution of the work. Such liability is affirmed in *Daily v. State,* 51 Ohio St., 348, 37 N. E. Rep., 710; *Board of Trade Telegraph Co. v. Barnett,* 107 Ill., 507; *Bradley v. Southern New England Telephone Co.,* 66 Conn., 559, 34 Atl. Rep., 499; *Clay v. Postal Telegraph-Cable Co.,* 70 Miss., 406, 11 So. Rep., 658; *McCruden v. Rochester R. Co.,* 28 N. Y. Supp., 1113. It is denied in *Wyant v. Central Telephone Co.,* 123 Mich., 51, 81 N. W. Rep., 928; *Southern Bell Telephone Co. v. Francis,* 109 Ala., 224, 19 So. Rep., 1; *Southern Bell Telephone Co. v. Constantine,* 61 Fed. Rep., 61; *Dodd v. Consolidated Traction Co.,* 57 N. J. Law, 482, 31 Atl. Rep., 980. All of the cases first cited are from jurisdictions where poles and wires which permanently and exclusively occupy portions of the street or highway are held to constitute an additional burden. Of those last cited, *Wyant v. Central Telephone Co.* is from a jurisdiction wherein it is held that there is no additional burden in such cases. On the other hand, *Dodd v. Consolidated Traction Co.* was decided in a jurisdiction where telegraph and telephone poles and wires are not regarded as ordinary uses of the highway; and in *Southern Bell Telephone Co. v. Francis* it is held that the right to remove trees in whole or in part, in the proper prosecution of such an enterprise, does not depend upon the question whether there is an additional burden, but follows from the paramount right of the public, to which the right to maintain the trees is subject, of removing such trees when necessary for public uses.

If this proposition is maintainable, we need not consider how far the poles and wires are an ordinary use of the street. But, in our opinion, it is not sound. The right to

maintain the trees confers an additional value upon the abutting property. This value can not be cut off without due compensation. When the public conferred it, a valuable property right was created. Relying on the statutes and municipal ordinances pursuant thereto, owners have expended time and money in improving their property. This grant can not be resumed and the property thereby depreciated in value without compensation. Undoubtedly the grant in the first instance was subject to all ordinary uses to which the street might be put. But to say that it was subject to all public uses, whether ordinary or not, which might be deemed convenient thereafter is going entirely too far. It becomes necessary, therefore, to decide whether telegraph and telephone poles and wires which permanently and exclusively occupy portions of a public street or highway constitute an additional burden, for which the abutting owner is entitled to compensation in case he is damaged thereby. The text-writers are pretty well agreed that they do. Dillon, Municipal Corporations [4th ed.], sec. 698*a;* Elliott, Roads & Streets [2d ed.], secs. 705, 706; Lewis, Eminent Domain, sec. 131; Randolph, Eminent Domain, sec. 407. But Mr. Keasbey thinks it too soon to predict which view will prevail ultimately. Keasbey, Electric Wires in Streets & Highways, sec. 102. The adjudicated cases are ranged not very unequally on both sides. The following cases, among others, support the view that there is an additional burden: *Eels v. American Telephone & Telegraph Co.,* 143 N. Y., 133, 38 N. E. Rep., 202, and other decisions in New York; *Daily v. State,* 51 Ohio St., 348, 37 N. E. Rep., 710; *Callen v. Columbus Edison Electric Light Co.,* 66 Ohio St., 166, 64 N. E. Rep., 141; *Board of Trade Telegraph Co. v. Barnett,* 107 Ill., 507; *Postal Telegraph-Cable Co. v. Eaton,* 170 Ill., 513, 49 N. E. Rep., 365; *Halsey v. Rapid Transit Street R. Co.,* 47 N. J. Eq., 380, 20 Atl. Rep., 859; *Nicoll v. New York & New Jersey Telegraph Co.,** 42 Atl. Rep. [N. J.], 583; *Western Union Telegraph Co. v. Williams,* 86 Va., 696, 11 S. E. Rep., 106;

* Does not appear in 63 N. J. Law.

Cheaspeake & Potomac Telephone Co. v. Mackenzie, 74 Md., 36, 21 Atl. Rep., 690; *Stowers v Postal Telegraph-Cable Co.,* 68 Miss., 559, 9 So. Rep., 356; *Krueger v. Wisconsin Telephone Co.,* 106 Wis., 96, 81 N. W. Rep., 1041; *Pacific Postal Telegraph Co. v. Irvine,* 49 Fed. Rep., 113; *City of Spokane v. Colby,* 16 Wash., 610, 48 Pac. Rep., 248; *Kester v. Western Union Telegraph Co.,* 108 Fed. Rep., 926. The opposite view is supported by *Pierce v. Drew,* 136 Mass., 75 (decided by a divided court); *Julia Building Ass'n v. Bell Telephone Co.,* 88 Mo., 258, and other cases in Missouri; *People v. Eaton,* 100 Mich., 208, 59 N. W. Rep., 145; *Cater v. Northwestern Telephone Exchange Co.,* 60 Minn., 539, 63 N. W. Rep., 111; *Magee v. Overshiner,* 150 Ind., 127, 49 N. E. Rep., 951; *Hershfield v. Rocky Mountain Bell Telephone Co.,* 12 Mont., 102, 29 Pac. Rep., 883; *Irwin v. Great Southern Telephone Co.,* 37 La. Ann., 63; *Hewett v. Western Union Telegraph Co.,* 4 Mackey [D. C.], 424. The question has been threshed over so many times that it would subserve no useful purpose to enter into an exhaustive review of these decisions. As Mr. Keasbey puts it very aptly, the crucial point is "whether the rights and privileges of the abutting owner in the use and maintenance of the street as such are affected." Keasbey, Electric Wires in Streets & Highways, sec. 102. At one time there was a tendency to attach some weight to the ownership of the fee of the street or highway. But it is becoming well settled, for obvious and convincing reasons, that that question is immaterial. *Eels v. American Telephone & Telegraph Co.,* 143 N. Y., 133; *Theobold v. Louisville, N. O. & T. R. Co.,* 66 Miss., 279, 6 So. Rep., 230; Keasbey, Electric Wires in Streets & Highways, secs. 83, 102; Dillon, Municipal Corporations [4th ed.], sec. 698*a*. And this court is in accord with that view. *Jaynes v. Omaha St. R. Co.,* 53 Nebr., 631. The case last cited involved an analogous question, and in passing thereon this court cited, with apparent approval, the decisions which hold telegraph and telephone poles and wires an additional burden. While the two cases are not in all respects the

same, we think the position taken in *Jaynes v. Omaha St. R. Co.*, would be sufficient to turn the scale in this jurisdiction, if we were in doubt. We are of opinion on independent grounds, however, that such is the sounder view. When we recall the forest of poles with their clumsy appurtenances and the net work of wires and even cables with which some of our city streets are incumbered, it seems hard to say that an owner whose light is cut off, who has the safety of his buildings and their occupants in case of fire endangered, and access to his property impeded by these permanent obstructions, is less entitled to complain than one whose easement by adjacency is impaired by a steam railway. Of course, in the greater number of cases the poles and wires work no substantial injury, and the owner has no ground of objection. But because the damage in most cases is trivial or nominal, we should not be blind to the substantial and considerable damage that often exists.

It does not follow, however, that the plaintiff is entitled to an injunction. In case property is not taken or injured directly, so as to dispossess or otherwise immediately disturb the owner, but he suffers some injury in an incidental right growing out of his peculiar situation or position, so that ordinary condemnation proceedings and payment of damages in advance are not practicable, the owner should be left to his remedy at law, which in such event is entirely adequate, and is not entitled to an injunction unless upon proof of insolvency or some special circumstance. Such is the practice in cases where the construction of a railway causes damage to abutting owners. The abutting owners are not made parties to condemnation proceedings, nor can they enjoin construction of the road; but their remedy is in an action at law for damages. *Republican V. R. Co. v. Fellers*, 16 Nebr., 169; *Chicago, K. & N. R. Co. v. Hazels*, 26 Nebr., 364, 368, 370; *Atchison & N. R. Co. v. Boerner*, 34 Nebr., 240. The same remedy is employed where a city, in improving a street, impairs the easement of the abutting owner. *City of Omaha v.*

Flood, 57 Nebr., 124. And it was adopted in *Jaynes v. Omaha St. R. Co., supra.* To hold otherwise would probably prevent many useful public improvements, since the legislature has never made provision for condemnation of rights incidentally affected. Where nothing is actually taken, and there is merely an injury to the rights which the abutting owner has by reason of his situation, the courts generally refuse to grant an injunction in the absence of some special circumstances. *Lorie v. North Chicago City R. Co.,* 32 Fed. Rep., 270, and cases cited; *Maxwell v. Central District & Printing Telegraph Co.,* 41 S. E. Rep. [W. Va.], 125. In the case at bar, we see no reason why damages will not afford an adequate remedy. We do not think public utilities of this kind ought to be suspended until every abutting owner upon the streets or highways to be used has been duly appeased. If he has been substantially or appreciably injured, an action at law will ordinarily afford him full compensation. If he has not, no opportunity for extorting an unreasonable settlement should be afforded him.

The petition alleges that the franchise under which the defendant is operating was granted by the city council to the mayor and one of the councilmen, by whom it was transferred to the company; and for this reason it is claimed that the grant is against public policy, fraudulent and void. If the franchise was wholly void, so that injury to plaintiff's property was threatened by mutilation of her trees without any warrant of law and by mere trespassers, a case for an injunction might be presented. But the most that can be said under the allegations of the petition is that the circumstances might possibly afford ground for revocation or for ousting the company in a direct proceeding for that purpose. The company is possessed of the franchise. Whether the franchise was acquired or is held rightfully is to be determined only in a direct proceeding to oust the company or in a proceeding to which some one who claims a better title is a party. 4 Thompson, Corporations, sec. 5340.

We therefore recommend that the decree be affirmed.

BARNES and OLDHAM, CC., concur.

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

AFFIRMED.

NOTE.—*Eminent Domain.—Condemnation.—Compensation.—Franchise.—Corporation Tenant of the State.—Telephone Company.—Irreparable Injury.—Injunction.—Quo Warranto.*

Eminent domain is the power of the state to apply private property to public purposes on payment of just compensation to the owner. *Charles River Bridge v. Warren Bridge*, 11 Peters [U. S.], 419, 641. It is an incident to sovereignty. *United States v. Jones*, 109 U. S., 513.

The liability to make compensation for private property taken for public uses, is a constitutional limitation of the right of eminent domain. *United States v. Jones*, 109 U. S., 513.

Joseph Bonaparte—ex-king of Naples and of Spain and elder brother of the great Napoleon—came to the United States in the month following the defeat at Waterloo, where he remained continuously for seventeen years. By a special act of the legislature of New Jersey he was enabled to hold land in the state; and he purchased two thousand acres adjoining Bordentown, upon which he placed $300,000 in improvements. In 1830 a railroad company incorporated, by an act of the assembly of the state, for building a line from Camden to Amboy, made a survey through the premises of Bonaparte. The latter commenced a proceeding in injunction, alleging, *inter alia*, that, by reason of the premises, he would suffer great and irreparable injury. The company answered, among other things, that the route through the complainant's land was the most practicable; that, in fact, no other route could be chosen without an additional expense of $100,000. The man who was defeated at Vittoria, conquered in this lawsuit, and the lawsuit was an epoch-maker, the most far-reaching historic event in the checkered career of Joseph Bonaparte. Railroading was then in its infancy; and, consequently, the case became a precedent. It was therein decided (1) that an alien resident in New Jersey, who holds land under a special law of that state, may maintain a suit in the circuit [federal] court relating to such land; (2) that an act incorporating a railroad company, providing for the assessment of damages for land through which it passes, is not unconstitutional; (3) that the right to take private property for public use, is an incident to all governments; (4) but that the obligation to make compensation is concomitant; (5) that a law divesting vested rights is not, *ipso facto*, void, but is so if the right is by contract, and compensation is not provided for; (6) that the constitutional provision protecting property against

arbitrary seizure and divesture, does not apply to legal procedure where compensation is given; (7) that the constitutional right to a trial by jury applies only to criminal cases, and civil cases where a right is to be tried at law—not to a mere collateral question of damages, no suit pending, where the right of each party is beyond dispute; (8) that the law can not authorize the taking of private property for private use; (9) that a road, canal and the likes of that are for public use when the public have a right of passage on paying a stipulated, reasonable and uniform toll, whether the road or canal or what-not is constructed by the state or a corporation; (10) that if the toll amounts to a prohibition, it is a monopoly and the road or canal or what-not is not public; (11) that the law is not void because it makes no provision for compensation or provides no method for ascertaining it; (12) that the provision last named can be made by a subsequent law; (13) that the execution of the law will be enjoined till such provision is made and the compensation paid; (14) that the payment must be simultaneous with the dissei-zin of the owner, and the appropriation of his property; (15) but that if the compensation is ascertained, the payment certain, the security undoubted and the means of collection summary, the construction of the road may be begun before actual payment. The case was held proper for injunction. Opinion by Baldwin, J., *Bonaparte v. Camden & A. R. Co.*, Baldwin [U. S. C. C.], 205. The writer has not been able to find a mention of the foregoing case in any biography of Joseph Bonaparte. Of such stuff is history made.

The foregoing case and others like it proceed on the theory that anciently a franchise was a part of the royal prerogative, granted by royal favor to the subject; that the state, under our system of government, takes the place of the king; that, with the royal grant, goes the right of eminent domain; that the railroad company in its occupancy is the mere tenant of the state.

For distinctions between injunction and quo warranto, see High, Injunctions, and High, Extraordinary Legal Remedies. As to the right of eminent domain in connection with telephone companies and as to their being common carriers of oral messages, see Cobbey's Annotated Statutes of Nebraska, vol. II., p. 3276, secs. 11464, 11465 and notes.—W. F. B.

BERTIN E. HENDRICKS, ADMINISTRATOR OF THE ESTATE OF JERRY H. REIGEL, DECEASED, V. FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY.

FILED JANUARY 8, 1903. No. 12,300.

Commissioner's opinion, Department No. 3.

Railroad: INJURY: TEAM: FRIGHT. A railroad company is not liable for injuries caused by a team taking fright at the ordinary operation of a train upon its road. *Chicago, B. & Q. R. Co. v. Roberts*, 3 Nebr. [Unof.], 425.

ERROR from the district court for Saunders county. Action by administrator for death—by wrongful act—of his intestate, brought under Lord Campbell's Act, *i. e.*, chapter 21 of Wheeler's Compiled Statutes. Tried below before SORNBORGER, J. Court directed a verdict for defendant. *Affirmed.*

Samuel J. Tuttle and *M. Newman*, for plaintiff in error.

Benjamin T. White, James B. Sheean, Edwin E. Good and *Charles H. Slama, contra.*

DUFFIE, C.

Jerry H. Reigel was killed on the 17th of March, 1899, by being thrown from the seat of his wagon in a runaway caused by his team being frightened by the train of the defendant in error. Hendricks, administrator of his estate, brought this action to recover damages on account of his death. After the plaintiff had introduced his evidence and rested, the court gave a peremptory instruction to the jury to return a verdict for the defendant. The plaintiff brings the case to this court on error, claiming that said instruction was unwarranted.

The facts disclosed by the record are that on the day of the accident the south-bound passenger train of the defendant in error, due at Wahoo about five o'clock P. M., did not arrive at the station until about six P. M.; that about the time it pulled out from the station, going south,

Syllabus by court; catch-words by editor.

the deceased was driving across its tracks some 340 feet from the depot; that the team took fright at the train, and Reigel was thrown from his seat, causing his death. Reigel was employed by the Standard Oil Company to distribute oil through Saunders county. He usually returned home about five o'clock in the afternoon, and it was his custom to wait, before crossing the track of the defendant company, until the five o'clock train had left the station. The evidence further tends to show that the station, and the train standing at the station, were obstructed from the view of a person approaching the crossing from the east until within some ten or twelve feet of the track. The negligence charged against the company is that it did not ring the bell or sound the whistle of the engine, and that Reigel's view of the train being obstructed, he drove upon the track, and the approaching train frightened his team and caused it to run away, thus causing his death.

While there is no direct evidence in the record that the crossing at which the team became frightened was a public street or highway, it was spoken of as Ninth street, and, for the purposes of this case, we may assume that it was a public street. The only question, then, that arises in the case is this: Assuming that it was negligence on the part of the company not to ring the bell or sound the whistle of its engine, was such negligence the proximate cause of the injury? The death of Reigel was undoubtedly caused by his being thrown from the wagon, and this was caused by the running of his team. We must also assume that the team would not run away unless frightened, but it is evident to anyone that a failure to ring the bell or sound the whistle was not a cause from which the team could be frightened. The team undoubtedly took alarm at the movement and noise of the approaching train; but it has been held in many cases that a railway company is not liable for injuries caused by a horse being frightened by the ordinary noise of an approaching train near the highway on which such horse was being driven. *Chicago, B. & Q. R. Co. v. Roberts,* 3 Nebr. [Unof.], 425, and authori-

ties cited. In *Walters v. Chicago, M. & St. P. R. Co.*, 104 Wis., 251, in which the facts were much the same as in the case at bar, the only difference being that the negligence charged was the neglect of the flagman stationed at the crossing to give a signal of the approach of a train, while here the negligence charged is that the coming of the train was not signaled by the bell or whistle, the court said: "The failure of the flagman at a street crossing to give warning of the approach of a train which stopped before reaching the street, would not render the company liable for injuries received by a traveler as the result of his team becoming frightened at the train."

In this case there is no pretext that the defendant's engine came in contact with the deceased's team or wagon. The evidence is conclusive that the distance between them was 200 feet or more, and that the accident occurred from the team taking fright at the ordinary operation of the train in the ordinary and usual manner. The authorities are uniform that a railroad company is not responsible for damages occasioned from such a cause.

We think that the order of the district court was right, and therefore 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.

ELLEN O'CONNOR V. ÆTNA LIFE INSURANCE COMPANY.*

FILED JANUARY 8, 1903. No. 12,325.

Commissioner's opinion, Department No. 3.

Mortgage: PAYMENT: LOAN: SURRENDER OF NOTE AND MORTGAGE: FORECLOSURE BY ASSIGNEE: LIMITATION. The plaintiff borrowed money to pay and discharge a mortgage on his farm, which was about to mature, giving his note secured by mortgage upon the

Syllabus by court; catch-words by editor.

* Rehearing allowed. See opinion, p. 129, *post*.

same premises for the amount borrowed. The lender undertook and agreed to use the borrowed money to discharge the first mortgage, and paid the same to the mortgagee without requiring a surrender of the note and mortgage. Afterward an assignee of the first note and mortgage commenced an action to foreclose the same and the court found that she was a bona-fide holder thereof and entered a decree foreclosing the mortgage. The borrower, after this decree had been affirmed in this court, and more than five years after payment had been made to the first mortgagee, brought suit against the party lending the money to recover damages on account of neglect of its agent in paying the money to the wrong party. *Held*, That the action was barred by the statute.

ERROR from the district court for Dodge county. Action by legatee to recover damages for failure to cancel mortgage given by testator. Plea of statute of limitations. Tried below before GRIMISON, J. *Affirmed.*

Frederick W. Button and *Frank Dolezal*, for plaintiff in error.

Courtright & Sidner and *Grant G. Martin* (*Samuel J. Tuttle*, on motion for second rehearing), *contra.*

DUFFIE, C.

The plaintiff in error, who describes herself as "the sole heir and legatee of Matthew O'Connor," brings this action to recover damages claimed to have been suffered on account of the failure of the defendant to satisfy and discharge a certain mortgage made by the plaintiff and her deceased husband to one C. H. Toncray.

The facts appear to be that the O'Connors in 1885 borrowed $450 from Toncray, securing their note therefor by real estate mortgage. Toncray sold the note and mortgage to Agnes S. Campbell, but no assignment of the mortgage was recorded, and the O'Connors had no knowledge of this sale or that Toncray was not the owner thereof, and they paid him the amount due on the interest coupons as they matured. Shortly before the maturity of this note they applied to one McVicker for a loan to pay it, and they

executed another note for $450, payable to the defendant, the Ætna Life Insurance Company, likewise secured by mortgage upon their farm; and their claim is that the defendant, through its agent, McVicker, agreed to use this loan in paying and discharging the Toncray note and mortgage, and that it failed to make such payment, to their damage in the amount sued for. There is no dispute that McVicker paid to Toncray the amount due on the note and mortgage made to him and that Toncray entered satisfaction of the mortgage on the margin of the record. He did not, however, have possession of the note, which afterward turned up in the hands of Mrs. Campbell, who brought suit to foreclose the mortgage. After the commencement of her foreclosure proceeding, but before the O'Connors had filed answer, the Ætna Life Insurance Company sold its note made by the O'Connors and assigned the mortgage securing the same to one Smith, who intervened in the foreclosure suit instituted by Mrs. Campbell, asking a foreclosure of his mortgage. A decree in that case was entered foreclosing both mortgages, which was affirmed by this court on appeal taken by the O'Connors. See *Campbell v. O'Connor,* 55 Nebr., 638.

The negligence complained of is that McVicker paid Toncray the amount due on the note and mortgage made to him without taking up the note and mortgage or ascertaining that he was the owner thereof. The defense is that McVicker was not the agent of the defendant in making the loan and paying the Toncray note and mortgage, and also the statute of limitations.

We do not think it would be profitable to spend the time necessary for an examination of the evidence relating to the defense made, that McVicker was not the agent of the defendant in making the second loan to the O'Connors and in paying the Toncray note and mortgage, for the reason that we think the action barred by the statute. That McVicker was negligent in making such payment without obtaining a delivery of the note, there can be no question. That the payment was fruitless and of no bene-

fit to the O'Connors the judgment of this court in *Campbell v. O'Connor, supra,* is ample evidence. Assuming, then, that McVicker was the agent of the defendant in that transaction and that the defendant was liable to the O'Connors for the damages suffered by his negligent conduct, when did the cause of action for such damages accrue? We are of the opinion that they might have maintained an action as soon as the money was paid, and beyond any doubt an action accrued to them as soon as it was discovered that payment was made to the wrong party; and that fact came to the plaintiff's knowledge as early as the institution of the suit by Mrs. Campbell to foreclose her mortgage, which was sometime in 1893. The defendant, if liable at all, is liable for its failure to perform what it undertook and promised to do, viz., to pay and discharge the Toncray note and mortgage. It paid the money to one not entitled to receive it, and of this fact the O'Connors had full and complete notice by the institution of a suit against them by the true owner.

The rule appears to be well established that an action on contract accrues to the plaintiff from the time a breach of the contract occurs, and that for a tort committed no action accrues to a plaintiff until he has suffered damage from the wrong-doing of the defendant. It is quite apparent from the plaintiff's petition, and from the evidence contained in the record, that the defendant owed no duty to the plaintiff in this action independent of its contract to apply the money borrowed by O'Connor to discharge the Toncray mortgage. The neglected duty was one enjoined by contract. The failure by the defendant to perform was a failure to discharge its agreement, and this is the negligence complained of and for which damages are claimed. The fact that the breach of contract arose from negligence on the part of McVicker in not ascertaining that Toncray was the real owner of the mortgage before paying the money to him, establishes nothing more than a breach of the contract in not using diligence to ascertain that the money was paid to the proper party.

In Wood, Limitation of Actions, section 179, it is said: "In actions for injuries resulting from the negligence or unskillfulness of another, the statute attaches and begins to run from the time when the injury was first inflicted, and not from the time when the full extent of the damages sustained has been ascertained. The gist of the action is the negligence or breach of duty, and not the consequent injury resulting therefrom."

In *Wilcox v. Plummer,* 4 Pet. [U. S.], 172, 181, the action was to recover damages because of the mistake of an attorney in his professional capacity in the institution and prosecution of a suit on a promissory note. The question in the case was whether the statute commenced to run from the happening of the damages or at the time the mistake was made. The court said: "The ground of action here, is a contract to act diligently and skillfully; and both the contract and the breach of it admit of a definite assignment of date. When might this action have been instituted? is the question; for, from that time, the statute must run. When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Perhaps, in that event, no more than nominal damages may be proved, and no more recovered; but on the other hand, it is perfectly clear that the proof of actual damages may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear the damage is not the cause of action."

That the full damages which may arise from a breach of the contract are not known and could not be known at the time the breach occurs, does not prevent the running of the statute in favor of the defendant. Whoever breaks a contract makes himself liable for at least nominal damages by his failure to perform, and the right to recover nominal damages gives the other party a right of action, and from the time the right of action accrues the statute is put in operation. Even where the breach is not known to the complaining party the statute is not tolled unless

the defendant fraudulently conceals the facts. As said by Storrs, C. J., in *Bank of Hartford County v. Waterman,* 26 Conn., 324, 329: "Ignorance of his right on the part of the person against whom the statute has begun to run, will not suspend its operation. He may discover his injury too late to take advantage of the appropriate remedy. Such is one of the occasional hardships necessarily incident to a law arbitrarily making legal remedies contingent on mere lapse of time."

Russell & Co. v. Polk County Abstract Co., 87 Ia., 233, contains an exhaustive and interesting discussion of the question here under consideration, and the conclusion was reached that in an action for breach of contract or from neglect to perform a duty arising from contract, the action accrues from the time of the breach.

That McVicker did not act fraudulently in the matter is admitted by a stipulation made between the parties and filed in the case, in which the following is set forth: "It is hereby agreed by and between parties hereto, that Matthew O'Connor, on November 28, 1885, executed and delivered to C. H. Toncray a note and mortgage for the sum of $450, payable to said C. H. Toncray, or order, due December 1, 1890, said mortgage being the one mentioned in the petition. About the time said note was due, said Matthew O'Connor borrowed $450 for the purpose of paying said Toncray note, and at the request of the lender executed note and mortgage to the defendant herein. Said loan was obtained through Robert McVicker as agent. The proceeds of last loan were paid promptly, and at or about the maturity of the Toncray note, payment being made December 17, 1890, to said Toncray for the purpose of paying said Toncray note, the said Robert McVicker, the said Matthew O'Connor and the lender at the time believing that a payment to Toncray would discharge the debt. But said Toncray had sold the note to Agnes S. Campbell, who later foreclosed on the Toncray note and mortgage, obtained a decree of foreclosure, and collected the same from said Matthew O'Connor on said decree."

The statute was not tolled, therefore, by any fraud committed by McVicker, who, with the O'Connors, "believed that a payment to Toneray would discharge the debt."

The plaintiff contends that the statute did not run in favor of the defendant, a foreign insurance company, for the reason that the defendant had not appointed an agent resident at the county seat, with authority to accept service of process under the provisions of section 23, chapter 43, of the Compiled Statutes of 1891.* A careful reading of that statute discloses that it relates to the transaction by foreign companies of an insurance business, proper, or, in the language of the statute, "to take risks or transact any business of insurance in this state"; and while the loaning of money and the investment of its surplus funds is a legitimate and necessary part of the business of an insurance company, it is not taking risks or transacting the business of insurance. During all the time from the payment made to Toneray to the commencement of this action, the defendant had an agent in this state, appointed under the provisions and as required by section 5, chapter 16, of the Compiled Statutes of 1891,† on whom service of process might have been made, and it was one of those agents on whom process was finally served and the defendant brought into court. There has been no interval since McVicker undertook to pay and discharge the Toncray mortgage that the defendant has not had a duly appointed agent in the state upon whom service of summons might have been had. The statute was not tolled, therefore, on account of its failure to comply with our statute, by reason of which service of process could not be had.

We think the district court was right in directing a verdict for the defendant, and recommend an affirmance of the judgment.

AMES and ALBERT, CC., concur.

*Cobbey's Annotated Statutes, sec. 6422.
†Cobbey's Annotated Statutes, sec. 6443.

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

AFFIRMED.

The following opinion on rehearing was filed May 18, 1904. *Judgment below reversed:*

Commissioner's opinion. Department No. 2.

1. **Contract to Pay and Discharge a Certain Note and Mortgage:** TIME AT WHICH RIGHT OF ACTION WAS MATURE. The defendant entered into a contract with the plaintiff's testator to pay off and discharge a certain note and mortgage executed by the latter to a third party, and to keep and save him harmless from and against the same. *Held*, (1) that the first clause is an absolute undertaking to pay the debt, and upon a failure of the defendant to pay the same within the time contemplated by the contract, a cause of action at once accrued in favor of the testator or his legal representatives; (2) that the latter clause is an undertaking to indemnify the plaintiff against such note and mortgage, and the defendant did not become liable and no cause of action accrued thereon to the testator or his representatives, until they had been damnified by reason of the paper against which the testator was indemnified.

2. **Evidence.** Evidence examined, and *held* sufficient to require the submission of the cause to the jury.

3. **Former Judgment Vacated.** Former judgment in accordance with an opinion reported *ante*, page 122, vacated.

ALBERT, C.

Most of the facts necessary to a proper understanding of this case are set out in a former opinion, reported *ante*, page 122. A rehearing was ordered, and the cause submitted to this department for an opinion.

The recommendation in the former opinion is based exclusively on the ground that the action was barred by the statute of limitations, and that conclusion is based on the theory that the action is for damages resulting from the negligent performance of a contractual duty. That theory, we are now satisfied, is untenable. The principal

Syllabus by court; catch-words by editor.

case cited in the former opinion in support of that theory is *Russell & Co. v. Polk County Abstract Co.*, 87 Ia., 233, 43 Am. St. Rep., 381. In that case the plaintiff had employed the defendant to furnish an abstract of title. A judgment lien was omitted from the abstract, and in consequence of such omission the plaintiff sustained damages for which the action was brought. The plaintiff's theory of the case was that his right of action did not accrue until he had been damaged by the mistake; the defendant's theory was that it accrued when the abstract was furnished. The court held with the defendant. But that case differs from this. In that case there was at least an implied undertaking on the part of the defendant to use due care and skill in making the abstract, and upon its failure to use such care and skill there was at once a breach of its undertaking. To say that the omission of the judgment from the abstract was negligence is only another way of saying that the defendant failed to keep and perform its undertaking to the plaintiff. In the case at bar the undertaking of the defendant, as set forth in the petition and shown by the evidence, was to pay off and discharge the Toncray note and mortgage, and "keep and save said Matthew O'Connor [the testator] and the plaintiff free and harmless of and from the same." It will be seen, therefore, that it was not an undertaking that the defendant would use due diligence in ascertaining the party to whom payment should be made, and in making payment to such party, but an absolute undertaking to make payment to the party entitled thereto, and to indemnify the O'Connors against the Toncray note and mortgage. In that view of the case, the question is not whether the defendant was negligent in the performance of its contractual duty, but whether it performed such duty, and the fact that the amount due on the Toncray note and mortgage was paid to Toncray, instead of to the lawful holder of the paper, has no bearing on the question as to the time when the breach of contract occurred.

As we have seen, the defendant engaged to do two

things, namely, to pay off and discharge the Toncray note and mortgage, and to indemnify the O'Connors against such paper. The undertaking does not differ in principle from that involved in *Wright v. Whiting,* 40 Barb. [N. Y.], 235. There, upon the dissolution of two firms, the defendant had entered into an undertaking with the plaintiff, who was one of the partners, to pay the debts of the two firms, and to save the plaintiff harmless from and against such debts. As to the first clause, the court held that it was an absolute and positive promise to pay the debts, and upon a failure of the promisor to keep and perform such promise, a right of action at once accrued in favor of the promisee, although he had paid none of the debts and had sustained no actual damage. The following cases are to the same effect: *Dye v. Mann,* 10 Mich., 291; *In re Negus,* 7 Wend. [N. Y.], 499; *Churchill v. Hunt,* 3 Den. [N. Y], 321; *Douglass v. Clark,* 14 Johns. [N. Y.], 177. But as to the second clause, the court held that the promisor was not liable, and no right of action accrued to the promisee, until the latter had paid the debts or some portion of them. In *Gregory v. Hartley,* 6 Nebr., 356, this court said (p. 361): "The rule is well settled that if a condition or promise be only to indemnify and save harmless a party from some consequence, no action can be maintained until actual damage has been sustained by the plaintiff." To the same effect are the following: *Forbes v. McCoy,* 15 Nebr., 632; *Honaker v. Vesey,* 57 Nebr., 413; *Chace v. Hinman,* 8 Wend. [N. Y.], 452, 24 Am. Dec., 39.

The construction placed on the contract in *Wright v. Whiting, supra,* commends itself to us, and there can be no doubt that it fits the contract involved in this case. The petition in the case at bar is sufficiently broad to cover both clauses of the undertaking, and to show a breach, both of the undertaking to pay, and of that to indemnify. But there is no need to concern ourselves about the first, because every item of actual damage which resulted by reason of the breach of the undertaking to pay the note is an element of the damages recoverable for a breach of the

undertaking of indemnity. It is clear, therefore, that if the plaintiff's right to recover for the latter breach is not barred, the fact, if it be a fact, that his right to recover for the former is barred, has no substantial effect on his right to recover in this action. As we have seen, a breach of the indemnity undertaking occurred as soon as the testator or the plaintiff made payment, in whole or in part, of that against which they were indemnified by the defendant. Such payment was made within less than four years before the commencement of this action, and then, and not before, did the plaintiff's cause of action for breach of the indemnity undertaking accrue. It follows, therefore, that the action was not barred by the statute of limitations, and that the former conclusion on that point is wrong.

It is urged that there is no evidence tending to show that McVicker, the agent who made the loan and undertook to discharge and pay off the Toncray note and mortgage, was acting for the defendant in that behalf. The evidence bearing upon that point runs through the greater part of a fair-sized bill of exceptions, and it is impossible to condense it in such a way as to indicate the weight that should be given it. The writer has gone over it, not once but many times, and is satisfied that it is amply sufficient to warrant the submission of the cause to the jury, and that it was error to direct a verdict for the defendant.

It is recommended that the former judgment of this court be vacated, and the judgment of the district court reversed, and the cause remanded for further proceedings according to law.

FAWCETT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is vacated, and the judgment of the district court reversed, and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

W. W. WOOD ET AL., APPELLEES, v. D. F. CARTER ET AL., APPELLANTS.

FILED JANUARY 8, 1903. No. 12,432.

Commissioner's opinion, Department No. 3.

1. **Chose in Action:** RIGHT OF ACTION: ASSIGNMENT. The right of action preserved by section 27 of the Code is assignable, together with the judgment therein mentioned, in like manner and with like effect as other choses in action.
2. ———: ———: ———: NECESSARY PARTY. An assignor of a chose in action is not a necessary party to an action upon it by the assignee.
3. **Joint and Several Liability:** SUMMONS. When one of two or more parties jointly and severally liable for the same debt, has been duly served with summons in one county in this state, a summons may be issued to and served in another county upon another party also so liable.
4. **Partnership Debt:** LIABILITY. Partners are jointly and severally liable for partnership debts.
5. **Res Judicata.** Matters once litigated and determined, will not be re-examined in a subsequent action between the same parties.

APPEAL from the district court for Sheridan county. Bill in chancery under section 27, Code of Civil Procedure. Heard below before WESTOVER, J. Judgment in favor of plaintiffs, Wood and another. *Affirmed.*

L. K. Alder, for appellants.

C. Patterson and *W. W. Wood,* for themselves.

AMES, C.

Abner D. Gallop bought some sheep from, as he alleged, a copartnership of Carter & Finney, composed of B. F. Carter and James B. Finney. He sued the firm and recovered a judgment for $800 for misrepresentation in the sale. W. W. Wood and C. Patterson, the appellees in this case, were attorneys for the plaintiff in that action and perfected liens on the judgment in the sum of $500 for

Syllabus by court; catch-words by editor.

their services. It was contended, as a defense in that suit, that the purchase was not made from the firm, but from Finney, in his individual capacity; but the court and jury found otherwise and no appeal was taken from their judgment. On account of the purchase Gallop had executed his note to Finney for the sum of $1,725. After the recovery of the judgment, Finney prosecuted an action against Gallop upon the note, alleging that he (Finney) was a member of the partnership and that Carter and Gallop were both insolvent, so that the plaintiff alone was responsible for the payment of the judgment, and praying that its amount should be set off against whatever judgment he would otherwise be entitled to recover on the note. To this action Wood and Patterson were made parties by intervention, and they asserted their attorney's lien thereon. Upon the trial the court upheld the attorney's lien as valid, and as superior to Finney's right of set-off, applied the residue of the judgment, $312.18, on the amount due on the note and rendered judgment against Gallop for a balance of $1,262.30. That judgment was affirmed by this court by a decision rendered at the last term and published in 2 Nebr. [Unof.], 480. That decision is conclusive upon the rights of the parties in the particulars: First, that Finney was a member of the corporation of Carter & Finney, and is individually responsible for the judgment recovered against it by Gallop; and second, that Wood and Patterson were the owners of the judgment, to the extent of their attorney's lien, free from any right of set-off in favor of Finney. This action was begun by Wood and Patterson in equity in the district court for Sheridan county to recover from Carter and Finney, as being individually liable, as former partners, for the amount due to the plaintiffs by reason of the foregoing premises. Carter was served with summons in that county but Finney was served in Brown county, where he then resided. Finney objected both by motion and answer to the jurisdiction of the court over him, on account of the service having been made out of the county in which the ac-

tion was brought. The objection was properly overruled. Partners are jointly as well as severally liable for partnership debts. Parsons, Partnership [4th ed.], sec. 249; *Stout v. Baker,* 32 Kan., 113. The action was, therefore, rightfully brought in Sheridan county, where one of the parties, properly a defendant thereto, was served with process, and this fact conferred the right to serve a summons therein on another person, also a proper defendant, in another county. *Miller v. Mecker,* 54 Nebr., 452; *Nebraska Mutual Hail Ins. Co. v. Meyers,* 66 Nebr., 657.

It was further objected that this action is brought under the authority of section 27 of the Code of Civil Procedure, and that that section confers the right upon the plaintiff in the former action alone and does not entitle the plaintiffs in this action to sue. Probably the plaintiffs are not obliged to look to that provision for a right to enforce a claim of which they have become the sole owners; but if they are, we think that the right of action conferred by that section, together with the judgment against the partnership, is assignable under the statute, like other choses in action. It was still further objected that Gallop, the original judgment creditor, is a necessary party to this suit, either as plaintiff or as defendant; but this contention can not be upheld, because, if for no other reason, his rights were extinguished by the judgment in Finney against Gallop, to which action all the parties to this suit were also parties.

Finally, it is insisted that the judgment in favor of the plaintiffs in this suit is not in proper form and is therefore not enforcible. If that were true, it would do the appellants no harm and furnish them no ground of complaint. We think, however, that although somewhat informal, it is sufficient. It finds the essential facts in favor of the plaintiffs and adjudges the liability of the defendants for the collection of the amount. This suffices for a decree in equity, in which the requirements of technical formality are not so stringent as in suits at law.

It is recommended 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, it is ordered that the judgment of the district court be

AFFIRMED.

ELIZABETH DUFRENE, EXECUTRIX OF THE LAST WILL AND TESTAMENT OF ALFRED R. DUFRENE, DECEASED, V. LEVERETT M. ANDERSON ET AL.

FILED JANUARY 8, 1903. No. 11,588.

Commissioner's opinion, Department No. 3.

1. **Fraudulent Conveyance.** On the facts stated, a conveyance of real estate by a debtor is *held* to have been in fraud of his creditors.

2. ———: FINANCIAL CONDITION OF GRANTOR: EVIDENTIAL FACT: PLEADING. In an action to set aside such conveyance, the financial condition of the grantor at the time of making the conveyance is merely an evidential fact bearing on the question of fraud, and need not be pleaded; *aliter*, his financial condition at the time of the commencement of such action.

3. **Statute of Limitations**: WAIVER: DEMURRER: ANSWER. The defense of the statute of limitations is waived unless interposed by demurrer or by sufficient averments in the answer.

4. ———: ANSWER IN FORM OF DEMURRER. An averment in the answer, couched in the language of a general demurrer to the petition, is a bare conclusion of law and insufficient to interpose the defense of the statute of limitations.

REHEARING of case reported in 2 Nebr. [Unof.], 813.

ERROR from the district court for Douglas county. Action to set aside a fraudulent conveyance. Tried below before FAWCETT, J. Judgment for defendants. *Judgment below reversed.*

Bernard N. Robertson, for plaintiff in error.

W. A. Saunders, contra.

Syllabus by court; catch-words by editor.

ALBERT, C.

On the 10th day of October, 1894, the defendant L. M. Anderson executed two conveyances, covering separate parcels of real estate belonging to him, to his son, the defendant Arthur L. Anderson. These conveyances were not filed for record until January 14, 1896. At and prior to the date of such conveyances, the grantor was indebted to Alfred R. Dufrene on a note secured by mortgage on other real estate. The mortgage was foreclosed in 1895, and a deficiency judgment rendered in favor of the mortgagee and against the mortgagor, in 1896, for $1,800. Afterward the mortgagee died, and in 1899 the judgment was revived in the name of his executrix, the plaintiff in this case. Afterward, on the 6th day of May, 1899, an execution issued on the judgment, and there being no personal property belonging to the execution defendant, nor real estate to which he held the legal title, whereon to levy, it was levied on the real estate, the legal title to which had been transferred by one of the conveyances hereinbefore mentioned and still stood in the name of the grantee under that conveyance. Afterward, on the 6th day of May, 1899, the plaintiff brought this action against the defendants named, and others having or claiming some interest in the property levied upon, to set aside the conveyance thereof hereinbefore mentioned, as having been made in fraud of the creditors of the grantor. The answers deny the charge of fraud, and aver that the conveyance was upon a valuable consideration. One of the answers, that of the grantee, avers that the consideration was the cancelation of a debt for $350, with interest from the 15th day of September, 1891, to the date of the conveyance, at ten per cent. per annum, due from the grantor to the grantee. The answers also contain the statement "that the facts stated in said petition do not constitute a cause of action." The replies to the answers may be said to amount to a general denial. The court found in favor of the defendants, and decreed accordingly. The plaintiff brings error.

This is the second hearing before this department. The former opinion, affirming the decree of the district court, is reported in 2 Nebr. [Unof.], 813. A further examination of the record in this case satisfies us that our former conclusion was wrong, and that the decree of the district court ought to be reversed.

The conveyance assailed was from father to son. It was withheld from record more than a year after it was executed. It is conclusively established that at the time the conveyance was made, the father was heavily indebted. It is true that all of his indebtedness, save one claim amounting to about $126, was secured by mortgages on real estate other than that in controversy. But the interest on the indebtedness and the taxes on the real estate were accumulating and delinquent, and upon a foreclosure of the mortgages the amount realized on the sales of the property was not sufficient to satisfy the decrees. Seven witnesses testified as to the value of the real estate in controversy. Not one estimated its value at the time of the conveyance in question at less than $4,200, save the grantee, whose estimate was $2,500. But aside from the fact that he knew the property and held the legal title to it, nothing is shown to entitle his opinion in the matter to weight. Opposed to his testimony is that of six witnesses acquainted with the property, and competent to form an opinion as to its value. All of them, save the grantor, whose estimate of the value was $8,000 when the conveyance was made, were disinterested. Taking into account the interest of the grantee, and the facts hereinbefore mentioned affecting the weight of his opinion, a finding that the property was worth but $2,500, would be against such an overwhelming weight of evidence that it could not be sustained. We think, then, that $4,200 is the lowest figure at which the value of the property, at the time of the conveyance, would be placed. It was subject to an apparent tax lien of some $1,600, which was subsequently adjudged invalid. The other property conveyed by the grantor to the grantee at the same time, according to their own esti-

mate, was worth about $2,700 over and above the incumbrances. It was conveyed without any valuable consideration whatever, unless upon the same consideration as the other conveyance, which the parties themselves allege was a debt due from the grantor to the grantee, and less than $500. Assuming that the parties at the time regarded the tax lien of $1,600 as valid, the property in question, at the time of the conveyance, was worth $2,600 over and above incumbrances. In other words, the only consideration for the transfer of property worth, in the aggregate, $5,300 above incumbrances, from the father to the son, was the cancelation of an alleged debt of less than $500, due from the former to the latter. The evidence in regard to the existence of such indebtedness is by no means satisfactory. That this action was brought to set aside but one of the conveyances, does not affect the evidential value of the facts concerning the other made at the same time. These conveyances practically divested the grantor of the legal title to all real estate owned by him, save his homestead, which was subsequently sold under one of the decrees hereinbefore mentioned. That the grantor at the time was in failing circumstances, is conclusively established by the evidence.

From the facts stated, but one reasonable inference is to be drawn, and that is that the conveyances were made in fraud of the creditors of the grantor; nor can it be said, in the light of those facts, that the grantee was innocent of a participation in the fraud.

The defendants contend that the decree of the district court should be affirmed, because the petition fails to state a cause of action. In this behalf, our attention is directed to the fact that the petition contains no allegation that the grantor was insolvent at the time of the conveyance. We do not deem such an allegation necessary in an action of this character. The financial condition of the grantor at the time of making the conveyance, is merely an evidential fact bearing on the question of fraud, and need not be pleaded. *Kain v. Larkin,* 36 N. E. Rep. [N. Y.], 9;

Banning v. Purinton, 75 N. W. Rep. [Ia.], 639. The insolvency of the grantor at the time of the commencement of the action, is one of the ultimate facts, and, as such, must be pleaded and proved, as it was in this case.

On the question of the sufficiency of the petition, it is next urged by the defendants that the petition, on its face, shows that the action is barred by the statute of limitations. But it has been repeatedly held by this court that the defense of the statute of limitations is personal to the defendant, and is waived unless pleaded. *Scroggin v. National Lumber Co.,* 41 Nebr., 195. This court has also held, however, that the defense may be interposed by a general demurrer where it appears on the face of the petition that the statute has run against the cause of action. *Merriam v. Miller,* 22 Nebr., 218. In the present case no demurrer was filed, nor were the facts showing the bar of the statute pleaded in the answers. In each of the answers, however, is a statement couched in the language of a general demurrer to the effect that the facts stated in the petition do not constitute a cause of action. We do not believe that by such pleading the statute of limitations was interposed as a defense. Section 99, Code of Civil Procedure provides that "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." In *Scroggin v. National Lumber Co., supra,* the answer averred that the suit was not brought within the time required by law, nor until after the lien had expired. This court held that such averments were mere conclusions of law, and that where the statute of limitations is relied upon as a defense in the answer, the facts, as distinguished from conclusions of law, must be pleaded. In this case the language of the answer now relied upon as raising the defense of the statute of limitations is the technical language employed in a demurrer to state a bare conclusion of law. It has

no place in a pleading which the law requires to state facts. Incorporated as it was in the answer, it should be treated as a part of the answer. Being a bare conclusion of law, it is of no issuable value, and is insufficient to interpose the defense in question. We have not overlooked the cases holding that, where the petition fails to state a cause of action, it may be assailed at any stage of the proceeding, and that it may be assailed for the first time in this court on appeal. But those are cases in which the plaintiff could not, as a matter of law, under any circumstances, recover on the state of facts pleaded. But this case is not of that character. The defense, we have seen, is one that is waived, unless properly and opportunely interposed. It was not thus interposed in this case; hence if it existed, which we doubt, it is waived.

It is recommended that the former judgment of this court be vacated, and the decree of the district court 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 former judgment of this court is vacated and the decree of the district court reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

STATE OF NEBRASKA V. UNION PACIFIC RAILROAD COMPANY.

FILED JANUARY 21, 1903. No. 11,271.

Stare Decisis. On the authority of the case of *State v. Missouri P. R. Co.*, 64 Nebr., 679, which is approved and followed, the action brought by the state against the defendant in the above entitled cause is dismissed.

ORIGINAL proceeding before this court, being an action

Syllabus by court; catch-words by editor.

brought by the attorney general to recover penalties for a violation of the Maximum Freight Rate Law. The action was commenced by Constantine J. Smyth. *Dismissed.*

Frank N. Prout, Attorney General, Norris Brown and *William B. Rose,* for the state.

Edson Rich, William R. Kelly and *John N. Baldwin, contra.*

PER CURIAM.

This cause originated in this court and was brought by the state against the defendant, the Union Pacific Railway Company, to recover a large sum of money claimed to be due on account of numerous alleged violations of the Maximum Freight Rate Law,—a law passed by the legislature, and approved April 7, 1893, entitled "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freights upon each of the railroads in the state of Nebraska and to provide penalties for the violation of this act." A demurrer to the petition was interposed, challenging the jurisdiction of the court to hear and determine the cause on the ground that the right to recover the penalties contemplated by the act was by an action criminal in its nature, rather than civil, and that this court was not possessed of original jurisdiction to hear and determine such criminal actions. The demurrer was heard and tentatively overruled, and the same objection raised by answer to the petition. After the issues were formed, referees were appointed to hear the evidence and report their findings of fact and conclusions of law. They, without going into the merits of the whole controversy, after a hearing on the question of the alleged unconstitutionality and invalidity of the act for various reasons urged by the defendant, have reported certain findings, and as a conclusion of law hold to the view that the act is inoperative and void because it is so far dependent upon the statute creating a state board of transportation, which by a decision of this court* has

* State v. Burlington & M. R. R. Co., 60 Nebr., 741.

been declared unconstitutional, as to render the former act incomplete and incapable of enforcement. Exceptions are taken to the report of the referees, and the cause has been submitted on such report and the exceptions thereto. We do not find it incumbent on us, nor advisable, to either disapprove or affirm the findings of the referees on which their conclusion recommending a dismissal of the action is grounded. Since the submission of this cause to the referees, the question raised by the demurrer interposed by the defendant, and the answer to the petition, in respect of the nature of the action and the authority of the court in the exercise of its original jurisdiction to try and determine the controversy, was again presented, in the case of *State v. Missouri P. R. Co.*, 64 Nebr., 679. After being fully considered, it is there held that an action such as is brought by the state in the case at bar can not be maintained, because of lack of original jurisdiction, and that the penalties provided for by the act in question could be enforced only in a criminal trial. On the authority of that case we must decline to further entertain jurisdiction of the case at bar. Hence, without passing on the findings of the referees, their recommendation to enter a judgment of dismissal will be sustained and the action dismissed.

JUDGMENT OF DISMISSAL ACCORDINGLY.

JAMES W. LOGAN, APPELLEE, V. JENNIE A. WITTUM ET AL., APPELLANTS.

FILED JANUARY 21, 1903. No. 12,226.

New Appraisement After Two Futile Attempts at Sale: NUMBER UNLIMITED. Section 495 of the Code of Civil Procedure authorizes a new appraisement of property whenever it is demonstrated, by two futile attempts to sell, that the preceding valuation was too high. The number of appraisements is not limited.

Syllabus by court; catch-words by editor.

APPEAL from the district court for Douglas county from confirmation of foreclosure sale. Heard below before DICKINSON, J. *Affirmed.*

George F. Wittum and *James W. Carr,* for appellants.

George A. Magney, contra.

SULLIVAN, C. J.

This is an appeal from an order of the district court for Douglas county confirming a foreclosure sale. The question raised by the record is novel, but not difficult. The property described in the decree, after having been twice appraised and twice advertised and offered for sale under each appraisement, remained unsold for want of bidders. A third appraisement was then made, and upon this appraisement is based the sale ratified by the order under review.

The contention of appellants is that the second valuation was final and conclusive, and the third one unauthorized and void. This conclusion is not fairly deducible from the statute. The sale of the land for the satisfaction of the mortgage is the sole end and only purpose of a foreclosure suit. The law aims to prevent a sacrifice of the debtor's property, but it intends, nevertheless, that the property shall be sold if a sale is necessary. No insuperable obstacle to the enforcement of the mortgage is contemplated. The judgment of the persons making the second appraisement can not stand as an absolute bar to the creditor's demand for satisfaction of his claim. Section 495 of the Code of Civil Procedure is as follows: "In all cases where real estate may hereafter be levied upon, by virtue of any execution or order of sale, and shall have been appraised, and twice advertised and offered for sale, and shall remain unsold for want of bidders, it shall be the duty of the officer to cause a new appraisement of such real estate to be made, and successive executions or orders of

sale may issue at any time in vacation, after the return of the officer 'not sold for want of bidders,' at the request of the plaintiff or his attorney." This section, as we interpret it, is not a limitation upon the power of the officer holding the execution or order of sale, but a direction to him to reappraise whenever property, after having been twice advertised and offered for sale, remains unsold for want of bidders. The thought which the legislature intended to express was that there should be a new valuation as often as it should be demonstrated, by two futile attempts to sell, that the preceding valuation was too high. *Burkett v. Clark,* 46 Nebr., 466, gives no countenance to the theory that the statute quoted is a limitation upon the officer's authority to make more than two appraisements.

The order appealed from is right and is

AFFIRMED.

ATLEE HART V. H. C. BEARDSLEY ET AL.

FILED JANUARY 21, 1903. No. 12,835.

1. **Aim and Object of the Appraisement Law.** The sole aim and object of the appraisement law is to prevent a sacrifice of the debtor's property by providing that it shall not be sold upon judicial process for less than two-thirds of the value of the debtor's interest as fixed by the appraisers.
2. **Jurisdiction of Appraisers: VALUE AND EXTENT OF DEBTOR'S INTEREST: CHARACTER OF TITLE.** The business of the appraisers is to fix the value of the debtor's interest, not to determine the extent of the interest, or character of the title, that will be offered for sale and transferred to the purchaser by the order of confirmation.
3. **Real Interest of Debtor Is Sold.** At an execution sale of lands and tenements the thing offered for sale and the thing actually sold and transferred to the purchaser is the real interest of the debtor in the property, not merely his interest as fixed and determined by the appraisers.
4. **Foreclosure Sale—What It Transfers to Purchaser.** A foreclosure sale of lands and tenements, unless the decree otherwise provides, transfers to the purchaser every right and interest in the property of all the parties to the action.

Syllabus by court; catch-words by editor.

5. **Appraisers: JUNIOR LIEN: GROSS VALUE: DEDUCTION.** Where appraisers of land about to be sold in execution of a decree of foreclosure deduct a junior lien in favor of one of the parties to the action from the gross value of the property, the error will be without prejudice unless it result in depriving the mortgagor of the specific right secured to him by the appraisement law.

6. **Wrongful Deduction of Junior Lien: TITLE VESTED IN PURCHASER.** And, notwithstanding such wrongful deduction, the foreclosure sale will, if confirmed, divest the junior lien and vest in the purchaser every right and interest in the property of all the parties to the action.

7. **Decree of Foreclosure: JUNIOR LIEN: SENIOR LIEN: JURISDICTION OF APPRAISERS.** Where a decree of foreclosure determines that a lien in favor of one of the parties to the action is a junior lien the appraisers have no jurisdiction or authority to adjudge it to be a senior lien.

ERROR from the district court for Dakota county. Action to foreclose a real estate mortgage. Tried below before GRAVES, J. Judgment of dismissal on the pleadings. *Affirmed.*

Robert E. Evans, for plaintiff in error.

Wilbur Owen and *Mell C. Beck, contra.*

SULLIVAN, C. J.

This was an action by Atlee Hart against H. C. Beardsley, Sarah J. Beardsley and George B. Owen, trustee, to foreclose a real estate mortgage. No evidence was taken at the trial, but upon the facts actually or constructively admitted by the plaintiff in his pleadings the court found in favor of defendants and gave judgment dismissing the petition. The case was submitted in this court on an agreed printed abstract which is in substance as follows:

December 31, 1894, H. C. Beardsley and wife executed to Geo. B. Owen, trustee, a mortgage for $1,800 on land in Dakota county, Nebraska, which mortgage recited that it was a first mortgage. This mortgage was drawn by the plaintiff in this case, Atlee Hart, the written portion being

in his handwriting, and was recorded on January 8, 1895. December 29, 1894, Beardsley and wife executed another mortgage for $500 to the plaintiff herein, Atlee Hart, which is the mortgage here in question. This mortgage was also drawn by Hart, is in his handwriting, and recites that it is "subject and second to a mortgage hereinafter to be given for eighteen hundred dollars," and it is alleged in defendants' answer, and not denied by plaintiff, that this clause referred and was intended to refer to the $1,800 mortgage given to Geo. B. Owen, trustee, and the plaintiff accepted his mortgage with that understanding; and after the $1,800 mortgage had been delivered to Owen, this second mortgage was also filed for record on January 8, 1895, but prior to the other mortgage. October 6, 1899. Owen filed a petition in the district court of Dakota county seeking a foreclosure of his mortgage for $1,800, making Hart a party defendant and alleging that he, the said Hart, had or claimed to have some lien upon or interest in the mortgaged premises, and that such lien or interest was junior and inferior to the lien of the plaintiff's mortgage. The prayer of the petition was that the $1,800 mortgage be adjudged to be a first lien, and for a decree of foreclosure. A summons was issued and served on Hart, who appeared, but failing to answer, was defaulted. Thereupon a decree was rendered, which recited that the mortgage of George B. Owen, trustee, was a first lien upon the premises here in question and "paramount and superior to any right, title, lien or interest in and to or against the same of any of the defendants" in said action; and also adjudged that in case the defendants in said cause should fail for twenty days from the entry of said decree to pay or cause to be paid to the said Owen the sum of $2,658, found to be due upon his mortgage, with interest and costs, the defendants, and all of them, should be foreclosed of all equity of redemption or other interest in the mortgaged premises, that said premises should be sold, and that an order of sale should be be issued to the sheriff commanding him to sell the premises and bring the proceeds into court. An order

of sale was issued by the clerk November 19, 1900, and the premises were valued at the sum of $3,200. The register of deeds in making his return to the sheriff certified the Hart mortgage as a prior lien, and the appraisers in making their appraisement deducted it, together with a tax lien amounting to $246, from the gross valuation, and appraised the "interest of the defendants" in the action at $2,454. Neither party sought to have the appraisement set aside, and the plaintiff, Owen, as trustee, bid in the mortgaged premises for $2,800, with full knowledge of the deduction of the Hart mortgage, but in reliance upon the decree as fixing the rights of the parties, and without making any deduction for, or taking into account, the Hart mortgage. The sale was confirmed by the court without objection by either party, and a deed executed to Owen, who was given credit upon his bid for the amount due upon his mortgage. Hart neither claimed nor received any part of the proceeds of the sale.

From these facts it clearly appears: (1) that the Hart mortgage was in truth a junior lien; and (2) that Owen bought the property without intending to assume the lien, and in the belief that it would be divested by the sale. It is contended by counsel for Hart that the $500 mortgage having been deducted by the appraisers from the gross value of the land, it is still, notwithstanding the sale, a valid and enforceable lien. It may aid us in determining the question thus raised to inquire what is the meaning of a judicial sale. What does the court undertake to sell and what does the purchaser expect and intend to buy? If the sale is conducted on the theory that the real interest of the debtor, and of all the parties to the action, is the thing offered for sale, then the purchaser gets that interest, whatever it may be. But if the meaning of the transaction is that the thing offered for sale is the interest of the debtor as fixed and determined by the appraisers, then it may, with reason, be asserted that the deducted lien represents purchase money which the vendee can not rightfully refuse to pay. At the common law the thing offered at an execu-

tion sale was the real interest of the debtor, and at a foreclosure sale the thing offered and sold, unless the decree otherwise provided, was every right, title and interest of all the parties to the action. Freeman, Executions, 301, 335; Jones, Mortgages, sec. 1654; Wiltse, Mortgage Foreclosures, sec. 577; *Tallman v. Ely,* 6 Wis., *244; *Ames v. Storer,* 74 N. W. Rep. [Wis.], 101; *Young v. Brand,* 15 Nebr., 601; 17 Am. & Eng. Ency. Law [2d ed.], 1010. In this state the rule of the common law upon this subject has not been changed. By section 499 of the Code of Civil Procedure it is provided that the sheriff or other officer selling realty on execution shall make to the purchaser "as good and sufficient a deed of conveyance of lands and tenements sold as the person or persons against whom such writ or writs of execution were issued could have made of the same, at the time they became liable to the judgment, or at any time thereafter." And in the next section it is further declared that the sheriff's deed "shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned as was vested in the party, at or after the time when such lands and tenements became liable to the satisfaction of the judgment." According to section 853 of the Code of Civil Procedure the effect of a deed given by a sheriff or other officer conducting a foreclosure sale is to "vest in the purchaser the same estate that would have vested in the mortgagee if the equity of redemption had been foreclosed"; and in said section it is further declared that "such deeds shall be as valid as if executed by the mortgagor and mortgagee, and shall be an entire bar against each of them, and all parties to the suit in which the decree for such sale was made." These statutory provisions have been in no manner modified by the appraisement law, which was designed to prevent a sacrifice of the debtor's property by providing that it should not be sold upon judicial process for less than two-thirds of the value of his interest as fixed by the appraisers. *Watson v. Tromble,* 33 Nebr., 450. An execution sale still vests in the purchaser the actual interest of the execution defend-

ant in the property sold; and a foreclosure sale, in the absence of any reservation in the decree, still transfers to the purchaser every right, title and interest of all the parties to the suit.

It has been uniformly held by this court that a wrongful deduction by appraisers is not prejudicially erroneous if the land sold for two-thirds of the real value of the debtor's interest. *Drew v. Kirkham,* 8 Nebr., 477; *La Selle v. Nicholls,* 56 Nebr., 458; *Bernheimer v. Hamer,* 59 Nebr., 733; *Peck v. Starks,* 64 Nebr., 341. These decisions go upon the assumption that the thing sold is the real interest of the debtor, and that it will bring whatever it is worth, regardless of the appraisers' estimate of its value. This is made plain by a simple illustration: A piece of land is valued by appraisers at $1,200. A judgment amounting to $800, void for want of jurisdiction, is deducted as a prior lien. The land is then sold for $800. According to the decisions just cited, the debtor is not injured by the appraisers' mistake, because it did not result in a violation of any right secured to him by the appraisement law. If the thing sold was merely the debtor's interest as fixed by the appraisers, the error would, of course, be very prejudicial, for it is evident that if the land would bring $800 when sold subject to an $800 lien it would, but for the lien, bring $1,600.

In the present case Owen, relying on the law and the decree of the court, made his bid and completed his purchase. He did not understand that the land was offered subject to the lien of the Hart mortgage. He assumed that it was the business of the appraisers to fix the value of the debtor's interest, and that it was not their business to determine the extent of the interest or character of the title which would be offered for sale and which would pass to the purchaser by the order of confirmation. He supposed the Hart mortgage would be divested by the sale and that the error made by the appraisers would be harmless if it did not deprive the mortgagor of the specific right secured to him by the appraisement law. To hold, under these cir-

cumstances, that the amount due upon the Hart mortgage is purchase money in the hands of Owen, impressed with a trust in favor of Hart, would be to ignore an obvious and conceded truth and to base our decision upon a palpable fiction. The parties to an action are, of course, conclusively bound by the adjudications of the court, but in this case there was nothing adjudged in favor of Hart and against Owen. There was no issue between them which the appraisers had jurisdiction or authority to decide. The function of the appraisers was to fix the value of Beardsley's interest in the mortgaged property, and they had no other duty, power or function.

The reasoning by which it is sought to prove that the mortgaged premises were sold subject to the Hart mortgage is altogether artificial and, as it seems to us, manifestly unsound. But it is said that some decisions of this court, such as *Koch v. Losch*, 31 Nebr., 625, and *Nye v. Fahrenholz*, 49 Nebr., 276, can not be reconciled with a decision affirming the judgment in favor of Owen. Whether this be so we will not now stop to inquire, but if it is true that the cases referred to by counsel are in conflict with the conclusion reached in this case, they are unsound and wholly indefensible.

The judgment is

AFFIRMED.

HOLCOMB, J., concurring specially.

I agree to the conclusion reached in the foregoing opinion and concur in a judgment of affirmance. I dissent, however, from the views expressed in the opinion which are in conflict with the principles deducible from the following authorities, which, in my opinion, must now be held to be the settled law of this state: *Kruger v. Adams & French Harvester Co.*, 9 Nebr., 526; *Skinner v. Reynick*, 10 Nebr., 323; *Bond v. Dolby*, 17 Nebr., 491; *Koch v. Losch*, 31 Nebr., 625; *Nye v. Fahrenholz*, 49 Nebr., 276; *Farmers' Loan & Trust Co. v. Schwenk*, 54 Nebr., 657; *Arlington Mill & Elevator Co. v. Yates*, 57 Nebr., 286; *Goos v. Goos*, 57 Nebr., 294; *Battelle v. McIntosh*, 62 Nebr., 647; *Curtis v. Osborne*, 63 Nebr., 837.

SEDGWICK, J., concurring.

I think that the many former decisions of this court, so far as they bear upon the question involved in this case, can be justified, if at all, only upon the principle that the purchaser of real estate incumbered by a mortgage is estopped to deny the validity of the prior mortgage if he deducts the amount of the mortgage from the purchase price, and agrees to pay the same. Unless there is an agreement, express or implied, to pay the prior lien, he is not estopped to deny its validity. The fact that he purchased the property at a foreclosure sale, under an appraisement in which the prior lien is deducted from the true value of the land in ascertaining the value of the defendant's interest, is to be regarded as evidence that he assumed the prior mortgage, and agreed to pay the same as part of the purchase price. The record may be in such condition that, together with such appraisement, it will, of itself, be sufficient evidence that the purchaser assumed and agreed to pay the prior incumbrance.

The proposition of law stated in the sixth paragraph of the syllabus is not inconsistent with this view. It is, by its terms, restricted to junior liens held by parties to the action whose rights have been adjudicated therein. If a purchaser at a judicial sale has purchased the property for a small fraction of its real value, and the appraisement under which he purchases shows that a prior lien has been deducted from the real value of the land in fixing the defendant's interest, the presumption will be that he assumed and agreed to pay the prior lien, there being nothing in the record of the proceedings to overcome this presumption. But when the decree itself shows that the sale was not made subject to a prior lien, but that a supposed lien, erroneously deducted by the appraisers, was in fact subject to the lien under which the sale took place, then no such presumption exists, but rather the record is conclusive that the purchaser did not assume and agree to pay the prior lien.

EVANS LAUNDRY COMPANY v. ORVA W. CRAWFORD.*

FILED JANUARY 21, 1903. No. 11,975.

1. **Servant:** ASSUMED RISK: NEGLIGENCE. A servant who engages in any employment is deemed as a matter of law to have contracted with reference to the ordinary hazards and risks incident thereto and to have assumed the same; and for any injury resulting therefrom, without negligence on the part of the master, the latter can not be held liable to respond in damages therefor.
2. **Assumed Risks:** RULE OF LAW: INFANTS. The rule of law as to the assumption of the ordinary risks incident to an employment, applies to infants as well as to adults.
3. **Master and Servant:** INJURY TO SERVANT: ASSUMED RISK: PLEADING: ANSWER. It is not required that the master who is sued by a servant for an injury received while engaged in the line of his employment, shall plead in his answer that the servant assumed the usual and ordinary risks and hazards incident to the service, in order to be entitled to an instruction to the jury as to the rule of law regarding such assumed risks.
4. **Assumption of Risk as a Defense Must Be Specially Pleaded.** Where the assumption of a risk not usually and ordinarily incident to the employment is relied on as a defense in an action against the master for negligence, such assumption of risk must be specially pleaded.
5. **Knowledge of Employer:** DUTY OF MASTER. If an employer has knowledge that the servant will be exposed to risks and dangers in any labor to which he is assigned, and knows or ought to know that the servant is for any cause disqualified to know, appreciate and avoid such dangers, the same not being obvious to the servant, then it becomes the master's duty to give such reasonable cautions and instructions as to reasonably enable the servant, exercising due care, to do the work with safety to himself; and a failure to do so renders the master guilty of a breach of duty, for which he would be legally responsible.
6. **Hazardous Employment:** INFANT SERVANT: DUTY OF MASTER. Likewise an infant engaging in a hazardous employment is entitled to warning from the master of dangers which, on account of youth and inexperience, he does not comprehend and appreciate; and if such warnings be not given, or if they be inadequate, the master is in fault and must answer for the consequences.
7. **Inexperience:** YOUTH: INSTRUCTIONS: MASTER'S DUTY. When, from

Syllabus by court; catch-words by editor.

*Opinion filed denying rehearing. See page 164, *post*.

inexperience or disqualifying causes, by reason of youth or otherwise, the duty devolves upon the master to give such reasonable instructions and cautions to the servant regarding dangers in the performance of his duties as will best avoid an injury by reason of such dangers, and the master has done so, then the servant is upon the same footing as any other employee and is deemed in law to have assumed the usual and ordinary risk incident to his employment.

8. **Instruction:** ACTS: PROXIMATE CAUSE OF INJURY: NEGLIGENCE: ASSUMPTION OF RISK. An instruction that before the jury could return a verdict against the defendant for alleged negligence, it must be found that the defendant was guilty of the acts of negligence, or some of them, alleged in the plaintiff's petition, and that such negligence was the proximate cause of the injury complained of, does not embody the principle of the assumption of ordinary risks, and render errorless the refusal of the trial court to give an instruction as to the assumption by the servant of the ordinary hazards and risks incident to the business.

9. **Instruction.** Instruction copied in the opinion *held* to state a correct rule of law, and the refusal to give the same prejudicial error.

ERROR from the district court for Lancaster county. Action in the nature of case by an employee against an employer for damages received from employer's alleged negligence in the operation of machinery. Tried below before HOLMES, J. Verdict for $6,833. Judgment on verdict. *Reversed.*

Stephen L. Geisthardt and *Addison S. Tibbets* (*J. W. Deweese,* on motion for rehearing), for plaintiff in error.

Halleck F. Rose, Wilmer B. Comstock and *D. J. Flaherty, contra:*

The duty of instructing the servant as to his duties was specially delegated to Bryant. The master, by delegating such authority, assumed repsonsibility for Bryant's acts.

A vice-principal, as the term is used in the law of fellow servants, is a servant who represents the master in the discharge of those personal or absolute duties which every master owes to his servants.

In Crawford's case it is not disputed that the servant about to assume new duties was inexperienced, and that it

was thought necessary by the master himself to undertake the new servant's proper tutelage and instruction. This duty the master, by his own statement, specifically delegated to Bryant. Crawford was placed in charge of Bryant. The demonstrations and oral instructions given by the latter to Crawford, therefore, bind the master as though performed by him personally.

The adjudged cases contain many instances where a mere employee, who is thus charged with the duty of properly instructing other employees, represents the master as vice-principal, and that the master is liable for the negligence of the servant in the discharge of that particular duty. *Pullman's Palace Car Co. v. Harkins,* 55 Fed. Rep., 932; *Burke v. Anderson,* 69 Fed. Rep., 814, 34 U. S. App., 132; *Ft. Smith Oil Co. v. Slover,* 58 Ark., 168; *Wheeler v. Wason Mfg. Co.,* 135 Mass., 294; *Brennan v. Gordon,* 118 N. Y., 489, 16 Am. St. Rep., 775; *Lebbering v. Struthers, Wells & Co.,* 157 Pa. St., 312, 33 Week. No. Cas., 99; *Burns v. Matthews,* 40 N. E. Rep. [N. Y.] (1895)], 731.

HOLCOMB, J.

This cause comes here by proceedings in error, prosecuted by the defendant in the court below, against whom a judgment was recovered by plaintiff on the ground of negligence. The negligence alleged was in respect of the operation of machinery used in connection with a steam laundry of which the defendant was proprietor, and also in relation to the manner of instructing the plaintiff how to operate such machinery; he having just prior thereto engaged himself as a servant in the employ of the defendant company for the purpose of assisting it in the conduct of its business. Several errors are assigned by the defendant company, which are in this court urged as reasons for a reversal of the judgment which plaintiff obtained in the trial court, from which, from an examination thereof, as well as of the entire record, we are of the opinion that to dispose of the case properly, we should confine ourselves to alleged errors relating to the giving and refusing to give

certain instructions to the jury for their guidance in deliberating upon the evidence submitted at the trial. The other errors assigned do not impress us as possessing much merit. To fairly understand the issues, brief reference to the pleadings seems advisable. In the plaintiff's petition it is alleged, in substance, that for a valuable consideration he entered into the defendant's employ to work and labor in and about its laundry; that among the machinery and its appliances used in the business was a machine called a wringer, with which clothes were dried, and when in use revolved at a high rate of speed; that it was an intricate and dangerous piece of machinery, requiring skilled and experienced workmen for its safe and proper operation, and skill and experience was also required to properly place clothes in the said wringer, to operate it safely, and to prevent wabbling in its rotary movements; that it was defective and out of repair and not supplied with a brake or other proper appliance necessary to the safety of the operator. The plaintiff, it is alleged, was at the time under the age of twenty-one years; had not been employed about machinery, was unskilled and inexperienced, and upon entering the employ of the defendant was immediately put to work operating and handling said wringer, without any instructions from the defendant as to how the same should be handled or operated, or how to place the clothes therein, and without being cautioned against the danger of operating the same; that the said machine, when put in rapid motion, revolved irregularly, so that some of the clothes hung out of the wringer; that, by reason of the premises, while plaintiff was attempting to operate said machine and to place the partially laundered clothes therein to be dried, and while endeavoring to stop the wabbling, in obedience to the instructions of the defendant that he should put his hand on top of the machine in case it wabbled, the said machine and clothes caught about the body of the plaintiff, and threw him violently to the ground, breaking his arm, one of his ribs and otherwise injuring him. The answer admits the employment of the plaintiff

and that he suffered an injury while so employed, and denies the other allegations of the petition, and charges the plaintiff with contributory negligence. The wringer, it appears from the record, was a large oval or bowl-shaped kettle, used for drying clothes, which, when put in rapid motion, revolves at the rate of about thirteen hundred revolutions per minute; the water in the clothes being extracted by the centrifugal force thus set in motion. It appears that at the time the plaintiff was a young man of ordinary intelligence, and was within a few days of twenty-one years of age. While he had had some experience with other kinds of machinery, he was without any previous experience in operating machinery such as was in use by the defendant company in the prosecution of its laundry business. He had been at work only about twenty-four hours when the injury was sustained of which he complains. The evidence does not seem to us to support the allegations in the petition to the effect that the machinery was defective and out of repair, and the controversy appears to have narrowed down to the charge that the defendant was negligent in instructing the plaintiff, when he began work, how best to discharge the duties assigned him without injury to himself by reason of the machinery he was using, and in properly cautioning him against the hazard and risks incident thereto. It was the contention of the defendant on the trial that all reasonable instructions and warnings were given to the plaintiff so as to advise him of the dangers of the machinery he came in contact with and how to avoid injury in the prosecution of the work for which he had been employed, and that the injury he suffered was the result of his own negligence.

At the trial of the cause the defendant requested the giving of the following instruction, which was refused by the court, and error is assigned because of such refusal: "Infants as well as adults assume the ordinary risks of the service in which they engage; but an infant engaging in a hazardous employment is entitled to a warning against dangers which a person of his age and experience would

not ordinarily comprehend. Therefore, if you find that the plaintiff Crawford was warned how he might be injured by the machine and that he was warned in such a way as would be sufficient to apprise an ordinary person of his age and experience of the danger, then he assumed the risk and the defendant would not be liable for the injury received from causes against which he was warned." The court gave no instruction covering and including the substance of the one above requested and refused. While it is argued by the defendant that the refusal to give this instruction was prejudicial error, the plaintiff meets the argument by advancing, first, the idea that the assumption of the risks ordinarily incident to any employment must be pleaded by a defendant before he is entitled to have the jury instructed thereon; second, that the instruction is not applicable in this case because of the duty of the master to properly instruct the servant as to the danger connected with the operation of the machinery in the line of his employment with reasonable caution as to how the same may be avoided, which it is alleged the defendant failed to do; and, third, that the instruction as formulated is not a correct exposition of the law. It is a rule we regard as almost elementary in character that a servant, when he engages in any employment, is deemed, as a matter of law, to have contracted with reference to the ordinary hazards and risks incident to his employment, and to have assumed the same, and for any injury resulting therefrom without negligence on the part of the master he can not be held liable. If it were otherwise, then the master would be an insurer against injury to the servant while engaged in the business for which employed. The rule as stated must, we think, be deemed to have been settled in this jurisdiction by the prior decisions of this court. *Chicago, B. & Q. R. Co. v. McGinnis,* 49 Nebr., 649; *Missouri P. R. Co. v. Baxter,* 42 Nebr., 793; *Malm v. Thelin,* 47 Nebr., 686; *Norfolk Beet-Sugar Co. v. Hight,* 59 Nebr., 100; *Omaha Bottling Co. v. Theiler,* 59 Nebr., 257. The rule of the assumption of the ordinary risks incident to an employment applies to in-

fants as well as adults. *Omaha Bottling Co. v. Theiler, supra; Pittsburg, C. & St. L. R. Co. v. Adams,* 105 Ind., 151, 162; *Rock v. Indian Orchard Mills,* 142 Mass., 522. See, also, Wood, Master and Servant, sec. 368. In support of the proposition that the assumption of ordinary risk by the servant must be pleaded affirmatively in order to warrant an instruction to the jury as to the law relating thereto, we are cited to cases where the servant, with knowledge of defective machinery or appliances, continued in his employment without objection, in which case it is held the assumption of the risk resulting in the injury must be pleaded as a matter of fact before the master would be entitled to an instruction predicated thereon. These cases are hardly in point, and apply only to those transactions between master and servant where it is admitted that negligence on the part of the master exists, and as a defense the plea is put forward that the servant continued in the employment with knowledge thereof and without protest, in which case, if found to be true, the law declares that the servant and the master stand on common ground in relation thereto, and that the servant has also assumed such risk in addition to those ordinarily incident to his employment. This distinction is recognized in *Missouri P. R. Co. v. Baxter, supra,* and *Thompson v. Missouri P. R. Co.,* 51 Nebr., 527, in each of which it is held that if the machinery, tools or appliances furnished the servant by his master are obviously defective and dangerous and the servant, notwithstanding, continues in the service, he thereby assumes the risks of any injury which he may sustain by reason of such defective appliances.

In a very recent case decided by the supreme court of Iowa (*Sankey v. Chicago, R. I. & P. R. Co.,* 118 Ia., 39, 91 N. W. Rep., 820) that court recognizes the distinction as to the pleadings required in such cases. The court says (p. 45): "The trial court did charge the jury as to the plaintiff's assumption of all risks which are naturally or necessarily incident to the service in which he was en-

gaged, and as to the bearing of his knowledge of the custom and practice of the company upon the question of contributory negligence, but this, we think, does not obviate the objection raised by appellant. The assumption of risk by virtue of his employment, is a matter which inheres in plaintiff's case, and the question is sufficiently raised by the defendant's denial of negligence; but assumption of the risk arising from defendant's negligence, if negligence be established, can only be raised by an affirmative plea, and defendant assumes the burden of its proof."

All ordinary risks incident to the employment are assumed, as a matter of law, and are deemed to have entered into the contract of employment. Where negligence is alleged against the master, which he denies, and on the trial of the issue the question of fact to be determined is the alleged negligence, the defendant is entitled to the benefit of an instruction to the effect that the ordinary risks incident to the employment are assumed by the servant, as a matter of law, and without any affirmative plea in respect thereof. Where, however, the defense is the assumption of a risk by the servant not ordinarily incident to the employment and this is relied on as a defense, then it becomes essential that a plea thereof be affirmatively made, in order that the question may be submitted to the jury, as triers of fact, under proper instructions by the court. The defendant in the case at bar, we are satisfied, ought not to be deprived of the benefit of the instruction requested on the ground that it did not plead affirmatively in its answer the assumption of such risk.

It is, however, contended further that because of the allegation in the petition that the servant was not properly instructed in the beginning of his employment as to the risk and hazards incident thereto, the danger of the machinery with which he was working, and cautioned as to how he might avoid injury,—he being young and inexperienced,—and the proof in support thereof, the master was thereby guilty of actionable negligence, and

the instruction prayed for is inapplicable. It is unquestionably true that on a servant engaging in a hazardous employment, and with dangerous machinery and appliances, with which he is unacquainted, and of which the master has knowledge, it becomes the master's duty to use reasonable care in cautioning and instructing the servant with respect to the dangers he will encounter, and how best to discharge his duty. *Louisville & N. R. Co. v. Miller,* 104 Fed. Rep., 124; *Brennan v. Gordon,* 118 N. Y., 489, 23 N. E. Rep., 810, 8 L. R. A., 818; *Sullivan v. India Mfg. Co.,* 113 Mass., 396; *Louisville, N. A. & C. R. Co. v. Frawley,* 110 Ind., 18, 9 N. E. Rep., 594; *Reynolds v. Boston & M. R. Co.,* 64 Vt., 66, 24 Atl. Rep., 134; *Hughes v. Chicago, M. & St. P. R. Co.,* 79 Wis., 264; *Texas & P. R. Co. v. Brick,* 83 Tex., 598; *Felton v. Girardy,* 104 Fed. Rep., 127. The rule, it seems, is grounded on the principle that if an employer has knowledge that the servant will be exposed to risks and dangers in any labor to which he is assigned, and knows that the servant is for any cause disqualified to know, appreciate and avoid such dangers,—the same not being obvious to the servant,—then it becomes the master's duty to give such reasonable cautions and instructions as should reasonably enable the servant, exercising due care, to do the work with safety to himself, and a failure to do so renders the master guilty of a breach of duty, for which he would be legally responsible. In *Omaha Bottling Co. v. Theiler, supra,* this court has said that an infant engaging in a hazardous employment is entitled to warnings of dangers which, on account of youth and the want of experience, he did not fully understand and appreciate. Says the author of that opinion, the present chief justice (p. 262): "The general rule is that infants, like adults, assume the ordinary risks of the service in which they engage. They are entitled, however, to warning of dangers which, on account of their youth and inexperience, they do not fully comprehend; and if such warning be not given, or if it be inadequate, the master is in fault and must answer for the con-

sequence." But this latter rule would not abrogate the former. It does nothing more than to qualify the general rule in the class of cases alluded to. That is, when from inexperience and disqualifying causes by reason of youth or otherwise, the servant does not comprehend and appreciate the dangers and risks of the employment in which he engages, and this is known to the master or ought to have been known, then the duty devolves upon him to give such reasonable instructions and cautions as will best avoid an injury by reason of such risks, and when he has done so, that is, has exercised such care and caution and given such instructions as a man of ordinary prudence and foresight would do under like circumstances, then the duty thus devolving on the master would be discharged, and the servant continuing in the employment, and having the benefit of such reasonable caution and instructions, would be upon the same footing as any other employee and would be deemed to have assumed ordinary risk incident to his employment. If, however, the master has failed to discharge the duty of giving reasonable caution and instructions as to dangerous machinery or appliances with which the servant is to conduct the business, when it is his duty so to do, and an injury results by reason thereof, a liability would arise on that account. Whether or not in the case at bar the defendant company was guilty of negligence in not giving to the plaintiff the instructions reasonably required, in order that he might appreciate and comprehend the risks usually pertaining to the work for which he was employed, was a disputed question of fact, and in the determination of the question at issue by the jury, the defendant was entitled to an instruction that if such instructions had been given, then the plaintiff assumed all ordinary risks incident to the business in which he was engaged. The denial of the requested instruction withdrew from the jury's consideration an essential factor in the case, and precluded the defendant from having its responsibility considered with respect to one phase of its contract of employment with the plaintiff which may have been all important to the jury in reaching a verdict.

It is also argued that the substance of the instruction requested was included in other instructions given and that therefore no prejudicial error resulted in the court's refusal to give the one requested. That is, it is said the trial court instructed the jury that before it could return a verdict against the defendant it must find that the defendant was guilty of the acts of negligence, or some of them, alleged in the petition, and that such negligence was the proximate cause of the injury, and that unless the jury so found, it should find a verdict for the defendant. The instructions, as a whole, we regard as conveying the idea that because the plaintiff was working with machinery (more or less dangerous, it is true), and suffered an injury, such injury was the result of negligence on the part of the defendant, as charged, or the lack of ordinary care exercised by the plaintiff in operating the machinery; and it was for the jury to determine wherein the negligence lay and return a verdict accordingly. By the instructions given, the jury were apparently to determine whether the defendant was negligent as alleged, which was the direct cause of the injury, or whether the plaintiff was guilty of contributory negligence, as charged. The tendency was to make the defendant an insurer against accidents unless contributed to by the negligence of the servant. The idea that the injury may have been the result of an accident, without culpable negligence on the part of either of the parties, appears to have been almost entirely overlooked. There was no middle ground recognized. The ordinary risks incident to the employment assumed by the servant when he engaged in the work were lost of sight of. The instruction requested is a very fair statement of a sound rule of law applicable to the evidence, which the defendant was entitled to have given the jury, and which it was prejudicial error to refuse. While the correctness of the instruction, as to the way it is framed, is challenged, we are of the opinion that it is substantially an accurate expression of the law and can not rightfully be rejected on that account.

Because of the error committed in refusing to give the

instruction requested, in a charge which in all other respects appears to us to have been a fair and correct submission of the case to the jury, the judgment will have to be reversed and the cause remanded for further proceedings, which is accordingly done.

REVERSED.

On motion for rehearing the following opinion was filed April 22, 1903. *Rehearing denied:*

PER CURIAM:

The defendant in error has filed a general motion for a rehearing. The plaintiff in error has filed a motion for rehearing for the purpose of modifying the language of the opinion, and upon these motions it is urged that it will be contended upon a retrial of the case that all questions involved, save one for which the case is reversed, have been resolved against the plaintiff in error. This was not the intention of the court and we do not think the opinion should be so considered. It was intended to say that it was not necessary to further consider other errors relied upon by plaintiff in error and not discussed by the court, since the case was remanded for a trial *de novo,* and the language used by the court should be so understood.

Both motions are overruled.

ALFRED MOLINE V. STATE OF NEBRASKA.

FILED JANUARY 21, 1903. No. 12,693.

1. **Felony**: INFORMATION: INDICTMENT: NATURE AND CAUSE OF ACCUSATION. A person accused of a felony must be charged by an information or indictment which discloses the "nature and cause of accusation" preferred against him.
2. ——: ——: ——: ——: OFFENSE: INTENDMENT: RECITAL: INFERENCE. Such indictment or information must charge explicitly all that is essential to constitute the offense. It can not be aided by intendment, nor by way of recital or inference, but must positively and explicitly state what the accused is called upon to answer.

Syllabus by court; catch-words by editor.

3. **Information.** Information examined, and *held* not to state facts and circumstances essential to constitute the crime of which the defendant was convicted.

ERROR from the district court for Phelps county. Prosecution under section 125 of the Criminal Code, for obtaining signature to a certain warranty deed. Tried below before ADAMS, J. Conviction. *Reversed.*

Hector M. Sinclair, John L. McPheely, S. A. Dravo and *William P. Hall,* for plaintiff in error.

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

In the first place we confess to the court that the state has rarely, if ever, met an attempt more able and more lawless to acquit a thorough scoundrel and cheat on purely technical grounds than the one confronting it in this case. The evidence is clear and conclusive of the absolute truth of every allegation in the information contained. In fact no pretense was made on the trial of the case that the complaining witness had been defrauded of anything less than his 160-acre farm.

The history of the crime may be briefly summarized as follows: Mr. Krapf was an old man, 66 years of age, owning the legal title, occupying and farming a quarter section of land in Phelps county, Nebraska, worth about $2,500. He was acquainted with Moline, the defendant, who was ostensibly a real estate dealer living in Holdrege, Nebraska, but operating in the wide fields of several states. Moline was the possessor of a written instrument purporting to be a warranty deed to certain lands located in the state of Indiana, made out in blank as respects the grantee and signed by one Miller. The deed was a fraud and a forgery. Miller was a fictitious person, or at least one having no title or interest in the Indiana land. The owner of the Indiana lands testified to his ownership thereof, producing a deed therefor. Moline conceived the idea

that to trade the Indiana deed to Krapf for a deed to his quarter section would be a profitable deal. To further this design, he induced one Anderson, by offering him $700 for his services, to pretend to Krapf that he, Anderson, owned the Indiana land and would trade it for Krapf's homestead. This Anderson did, but when it came to make the transfer his conscience awakened and he refused to trade, advising old man Krapf to keep his Phelps county farm. Moline was enraged, and applied vigorous and profane language to his co-conspirator. Krapf went home; but Moline was not to be so easily balked; his determination to carry out the original plan to steal a farm did not falter or hesitate; he pursued Krapf, and claiming to have gotten by a trade the Indiana farm himself, proposed that he would take Anderson's place in the transaction, provided the old man would give him $200 in addition to his land. Krapf finally consented, but executed his note for the $200, not having the cash. Krapf's name as grantee was written in the Indiana deed and Krapf and his wife executed and delivered a warranty deed of the Phelps county farm to Moline. Within a day Moline redeeded the Krapf land to a third party and Krapf was left homeless and landless because he got nothing when he accepted the Indiana deed. There is some evidence in the record that Moline had offered to reinvest Krapf with title to his purloined farm as evidence of his prior good faith in the trade; but the evidence shows that the offer was made after this prosecution had begun and on condition that the prosecution should end; Krapf was unwilling as well as unable to comply with the condition. The utter fraud and cheat of the transaction was confessed when in open court, upon the cross-examination of Krapf, the defendant tendered him deeds to his farm signed by both Moline and Moline's grantee. The record is pathetic at this point where the old man said, in reply to defendant's interrogatory, that he was willing to accept and keep the tendered deeds. It will be patent to the court when examining the testimony in this case that this "deed tendered" was a

grand-stand play, made for the sole purpose of bolstering the sham theory of the defense, that Moline had acted in good faith in the transaction and that as soon as he discovered the Indiana deed to be a fraud he had endeavored to give back the stolen farm. This claim is utterly false and deliberately so. If Moline had been acting in good faith, it would not have been necessary for him to invite Anderson's co-operation in the deal at an expense to himself of $700. If Moline was innocent of the character of the Indiana deed, why did he seek to have another than himself claim to possess and own it? Where did Moline get that deed? He claimed to witnesses before the trial to have gotten it from different persons and his explanation on that subject when he testified is far from removing the conviction that he got it from another co-conspirator made and executed for the very purpose to which it was afterwards devoted in victimizing Krapf. If there was ever a crime proved or punishment merited, it is proved and merited in this case. The question then is, are there technical reasons sufficiently substantial to vacate the finding of the jury and the sentence of the court so richly just?

An information is sufficient if it sets forth all the ingredients necessary to constitute the offense, though not in the language of the statute.

A statutory offense may be charged in language other than that employed in the statute, provided the language used sets out all the facts and ingredients necessary to constitute the offense defined by the statute. "Every material constituent of the offense," *Smith v. State,* 63 Ala., 55; "whatever is made by statute an essential part of the offense," *Conyers v. State,* 50 Ga., 103; "all the particulars that enter into the statutory description of the offense, either in the language of the statute or other equivalent language," *State v. Wright,* 52 Ind., 307; "the substance of the statutory definition of an offense," *United States v. Dickey,* 1 Morris [Ia.], *412; "need not designate it by the name employed in the statute," *State v. Rigg,* 10 Nev., 284; "facts which the statute requires to

constitute the offense," concluding *contra formam statuti*, *People v. Stockham*, 1 Parker Cr. R. [N. Y.], 424. "A criterion of the sufficiency of an indictment for a statutory offense is that the averments should make it certain that the act charged is an act forbidden by the statute, and so exclude any assumption that the indictment may have been proved and the defendant may still be innocent. This is all that is required." *State v. Melville*, 11 R. I., 417.

"In charging the commission of an offense in an indictment, it is not necessary that the exact words of the statute be used, provided the words employed are the equivalents in meaning of those contained in the statute." *Whitman v. State*, 17 Nebr., 224.

Following this case, the court has reaffirmed the above rule in *Kirk v. Bowling*, 20 Nebr., 260; *Hodgkins v. State*, 36 Nebr., 160; *Wagner v. State*, 43 Nebr., 1; *Bartley v. State*, 53 Nebr., 310; *Carrall v. State*, 53 Nebr., 439.

HOLCOMB, J.

The defendant was convicted and sentenced to the penitentiary for three years on the charge of having by false and fraudulent representations obtained the signature of one Frederick Krapf to a written instrument, viz., a warranty deed, of the value of more than $35, contrary to the provisions of section 125 of the Criminal Code. To secure a reversal of the judgment of conviction, he prosecutes error.

The criminal prosecution of the defendant has the appearance of having been instituted on the theory that under the provisions of the section mentioned he was guilty of a felony for having obtained by false and fraudulent representations title to and the possession of a quarter section of real estate of the alleged value of $2,500. On the trial, however, it seems that this theory was abandoned and the information construed as charging the crime of obtaining by false pretenses the signature of the owner of the land to a warranty deed, by which the transfer of title was effectuated. The reasons for the view we take of the record as just expressed will appear more clearly from

what follows. Section 125 of the Criminal Code, in so far as it is material to an intelligent discussion of the question now under consideration, is as follows: "If any person, by false pretense or pretenses, shall obtain from any other person, * * * any money, goods, merchandise, credit or effects whatsoever with intent to cheat or defraud such person, * * * or if he shall obtain the signature or indorsement of any person to any promissory note, * * * or any other instrument in writing, fraudulently or by misrepresentation, if the value of the property, or promissory note, or written instrument * * * fraudulently obtained or conveyed as aforesaid, shall be thirty-five ($35) dollars, or upwards, such person so offending shall be imprisoned," etc.

The information, after charging sufficiently the facts constituting the alleged false and fraudulent pretenses, continues in the following language: "That relying upon and believing in said false pretenses and representations of the aforesaid Alfred Moline then and there made the aforesaid Frederick Krapf was induced to give up his property to the said Alfred Moline and then and there traded, conveyed and delivered by warranty deed to the aforesaid Alfred Moline the southeast quarter (S. E. ¼) of land in section twenty-four (24), town five (5), north of range twenty (20), west of 6th P. M., in Phelps county, Nebraska, of the value of $2,500."

On the submission of the cause to the jury at the trial, after the evidence was heard, among other instructions given them the following language was made use of: "The prosecution in this case, seeks a conviction under that part of section 125, which says: 'If he shall obtain the signature * * * of any person, * * * to any other instrument in writing, fraudulently and by misrepresentation, he shall be imprisoned,' etc. The state has not in specific terms charged that defendant, by false and fraudulent representations, obtained the signature of the complainant to any instrument in writing, but does charge that by reason of such false and fraudulent representations, the said Krapf

conveyed by warranty deed, the land situated in Phelps county, Nebraska, to the defendant."

In the next instruction it is said: "You are instructed that the word 'deed' as used in the information and in these instructions, in itself imports a written instrument, and should come within the term, 'any other instrument in writing,' as used in said section 125 of the Criminal Code. You are also instructed that the language used in the information, to wit: 'That said Frederick Krapf was induced to give up his property and then and there conveyed and delivered by warranty deed to the aforesaid Alfred Moline, the southeast quarter of section 24, township 5, range 20, in Phelps county, Nebraska,' would fairly import that said Moline obtained the signature of the complainant to an instrument in writing such as is contemplated in section 125 of the Criminal Code aforesaid."

It is now earnestly insisted by counsel for the accused that the allegations of the information are not sufficient to charge the offense of which he stands convicted. In other words, the contention is that the information does not charge explicitly and positively and with sufficient precision that by false and fraudulent representations defendant obtained the signature of the said Krapf to a written instrument of the value of $35 or over. It is argued that it is charged with sufficient certainty and precision that the real estate described was obtained fraudulently, which, if warranted by statute, would constitute a good charge of obtaining property fraudulently, but that, without indulging in inferences and conjectures unwarranted by any sound rule of the criminal law, it can not be said that the offense of obtaining one's signature to a written instrument of the value mentioned, by false and fraudulent pretenses, is charged in the information. It is asserted that the defendant has not had the opportunity of being confronted with an information disclosing the "nature and cause of accusation"* against him, and a copy of such information furnished, as is guaranteed to him by the

*Constitution, art. 1, sec. 11.

constitution. The object of the constitutional guaranty is doubtless for the purpose of having the accused informed of the precise offense for which he must answer, and thus enable him to meet and defend against that particular accusation, when judicially called upon to do so. Speaking of the purpose of such constitutional provisions and guaranties it is observed by a well-known author on criminal jurisprudence: "Standing beside the presumption that the defendant is innocent, they have compelled from the prosecuting power such a statement of the nature and cause of the accusation as would impart to him, who is supposed to know nothing of it outside of the written words, reasonable information of what he is to encounter at the trial; thus enabling him to collect his proofs, and avoid the injury of a surprise. Therefore the wisdom of the past—the rules which the common law has established for the indictment—should, as respects the substance of the accusation, be the chief guide to what this constitutional provision permits or forbids." Bishop, New Criminal Procedure, sec. 110. The following authorities are also pertinent: *People v. Olmstead,* 30 Mich., 431; *Mott v. State,* 29 Ark., 147; *Conner v. Commonwealth,* 76 Ky., 714; *State v. Mace,* 76 Me., 64; *Norris v. State,* 33 Miss., 373; *State v. O'Flaherty,* 7 Nev., 153.

In *Wabash, St. L. & P. R. Co. v. People,* 12 Ill. App., 448, it is said, with respect to the requirement that the essential facts necessary to constitute the offense charged must be stated directly and positively: "Every fact and circumstance stated in an indictment must be laid positively. They can not be stated by way of recital, nor by way of argument or inference; the allegations must be in words clear, direct and not argumentative or inferential."

Another court has said: "The want of a direct and positive allegation, in the description of the substance, nature, or manner of the offense, can not be supplied by any intendment, argument, or implication." *State v. Paul,* 69 Me., 215.

To the same effect and in support of the same rule this

court has said: "An indictment must charge explicitly all that is essential to constitute the offense. It can not be aided by intendments, but must positively and explicitly state what the prisoner is called upon to answer." *Smith v. State,* 21 Nebr., 552, 556; *State v. Hughes,* 38 Nebr., 366, 369; *O'Connor v. State,* 46 Nebr., 157.

Numerous other authorities may be cited, as, for instance: *People v. Logan,* 1 Nev., 110; *State v. La Bore,* 26 Vt., 765; *Kearney v. State,* 48 Md., 16; *Allen v. State,* 13 Tex. App., 28; *State v. Collins,* 62 Vt., 195.

Does the information in the case at bar measure up to the requirements of the rule we have just adverted to? Can it be said without indulging in unwarranted inferences that Krapf, by means of the false pretenses alleged as the inducing cause thereof, was persuaded to place his signature on the warranty deed referred to? that the instrument was of the value of $35 or more, and that it was obtained from the complainant by the accused? These are all essential facts and circumstances to be alleged before it can be said the crime sought to be charged against the defendant is in fact stated with that fullness and certainty required to constitute the offense. Manifestly, what is alleged after charging the false and fraudulent pretenses is that Krapf was induced thereby to give up his property to the accused and then and there conveyed and delivered to him the quarter section of land described, which was of the value of $2,500. The qualifying phrase "by warranty deed" we regard as in the nature of a recital as to the means or instrumentality by which the delivery of the real property charged to have been falsely and fraudulently obtained was delivered to the accused. Certainly it takes something of a stretch of the imagination and indulgence in intendments, in our judgment not at all warrantable, to say that the false and fraudulent representations alleged induced the complainant to sign the warranty deed mentioned. For all that appears, the deed may have been executed, conceding the legal title to have been in the complainant, Krapf, before the alleged false representa-

tions were made. The worthless deed to the land which it is alleged was conveyed to Krapf for his real estate was manifestly executed before any of the alleged false representations were made. Why may it not be also inferred that Krapf, although owning the land, had executed a deed in anticipation of a sale of it, which it seems he was desirous of making, and that the false representations consisted in inducing him to deliver the deed to the accused, with the possession of the real estate conveyed thereby? Such circumstances would not, in our opinion, constitute the offense sought to be charged, *i. e.,* obtaining his signature to an instrument of value, and yet everything alleged may be true, and the transaction have taken place as we have just delineated.

Again, suppose the accused and Krapf enter into bona-fide negotiations for the purchase of Krapf's land and the deed is executed in pursuance of such negotiations, but before the trade is finally consummated the accused offers to and by means of the false pretenses alleged obtains the deed thus executed for the worthless conveyance given in exchange as alleged in the information; can it then be said that the statute has been violated and the crime of obtaining a signature to a written instrument of value committed as therein denounced? It seems to us the answer must be in the negative. These illustrations, and the mind can conceive of many, but serve to emphasize the fact that the information does not charge explicitly and directly the essential ingredients necessary to constitute the offense of which the accused was convicted. It is manifest that the information would not put him on his guard as to the necessity of defending to the charge of having obtained the signature of Krapf to an instrument by false and fraudulent pretenses. Any lawyer, much more so a layman, upon reading the information, would at once infer therefrom that it was sought to charge the defendant with obtaining the real estate described therein by false and fraudulent representations and pretenses, and that the execution of a deed therefor, and the manner in which the

same was done or caused to be done, was of no vital importance. Had such charge been directly made he might have been able, as suggested by the preceding illustrations, to have successfully defended against it. Presumably, he was innocent of the crime charged or sought to be charged, and should have been fairly and explicitly advised by the information of the exact nature and cause of the accusation preferred against him.

It may be doubtful whether it is charged in the information that the instrument to which his signature is claimed to have been obtained (the warranty deed) is of any value. Manifestly, the value of it is not directly alleged, because the only statement as to value without doubt refers to the real estate and not to the instrument by which it was conveyed. It may be, and is, argued that the allegation of value as to the real estate is an allegation of value of the instrument by which it was conveyed. The question, however, is not here determined, as we regard other defects in the information more vital. The information we regard as unquestionably fatally defective in not charging in direct terms that the deed mentioned was obtained by the accused from the complainant. It seems that the proposition is hardly open to argument that in order to constitute the crime sought to be charged it must be explicitly alleged in the information, conceding that it sufficiently alleges that the signature of the complainant to the instrument was obtained by false pretenses, that such instrument was obtained by the accused from the complainant; or, to state it in another form, a crime is not charged until it is alleged, not only that the signature was obtained to the instrument fraudulently, but also that there was a delivery of such instrument. There is nothing in the information that charges the essential fact that the deed was delivered to and obtained by the accused. What is charged, is that the land was conveyed and delivered by means of a warranty deed. The allegation of itself is largely in the nature of a conclusion rather than a statement of fact. Delivery and possession of the land may have in contemplation of the

parties taken place without any delivery of the deed. Its simple execution may have been deemed sufficient for the completion of the trade and delivery of the land. At most, the phrase "by warranty deed" is in the nature of a recital describing how or by what means the land was delivered which is the property that is directly charged to have been obtained by false pretenses. In principle, the defect in the information just mentioned comes quite within the rule announced in the case of *State v. McGinnis*, 33 N. W. Rep. [Ia.], 338, in which it is held, under a statute quite similar to ours, that an indictment charging a defendant with having obtained the signature of a person to a chattel mortgage by means of false pretenses, but that does not charge the delivery of the mortgage, charges no crime.

Without examining the other errors complained of, we are constrained to the view that the information does not contain essential and necessary allegations to charge the accused with the crime of which he was convicted and sentenced to imprisonment, and for this reason alone the judgment of the district court must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

NOTE.—Section 125 of the Criminal Code constitutes section 2203 of Cobbey's Annotated Statutes; see page 763, volume I., where the Nebraska decisions will be found in a note.—W. F. B.

STATE OF NEBRASKA, EX REL. J. Y. NILES, RELATOR, V. CHARLES WESTON, AUDITOR, RESPONDENT.

FILED JANUARY 21, 1903. No. 13,042.

1. **Writ of Mandamus Against State Auditor.** A petition for a peremptory writ of mandamus directed to the state auditor, requiring him to register refunding bonds issued by a county, and certify thereon that such bonds have been regularly and legally issued and registered in accordance with law, will be held defective in substance, on a ruling on a demurrer thereto, where it is not made to appear from the allegations therein

Syllabus by court; catch-words by editor.

contained that there has been filed in the office of the auditor the necessary information and data relative to the issuance of such bonds, from which it may be inferred that they were issued by authority and in pursuance of a valid statute, and that the statutory requirements to entitle them to registration have been complied with.

2. **Mandamus:** RIGHT OF RELATOR: INTENDMENT. Before the court is warranted in granting a peremptory writ of mandamus, it must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce. Nothing essential to that right will be taken by intendment.

ORIGINAL application for a writ of mandamus directed to the auditor of the state commanding him, on a day named in said writ, to register in his office, a certain refunding bond of $1,000 issued by Douglas county, and also commanding him, under his seal of office to certify on such bond the fact that it had been registered in his office and was legally issued. *Writ denied.*

Alfred Hazlett and *Fulton Jack,* for relator.

Frank N. Prout, Attorney General, and *Norris Brown, contra.*

HOLCOMB, J.

The relator in his petition prays that a peremptory writ of mandamus be issued directed to the respondent, as auditor of the state, requiring him to register a certain bond alleged to be held and owned by him, which was issued by Douglas county as one of a series of refunding bonds, to take up other bonds of the county then outstanding. A demurrer is interposed by the attorney general on the ground that the petition does not state facts sufficient to warrant the granting of the relief prayed for, and also because it is shown on the face of the petition that the bond which it is sought to require the auditor to register was issued under an act of the legislature which is void, as declared by the previous decisions of this court.

The question, therefore, we are called upon to determine, is whether upon the face of the petition, the allegations of which are admitted to be true, the relator is entitled to the writ prayed for. The material averments of the petition, so far as are necessary to a proper consideration of the demurrer, are in substance as follows: That Douglas county, prior to the first of July, 1887, had outstanding a bonded indebtedness of $268,000, bearing interest at 8 per cent. per annum, which was incurred to aid in the construction of certain lines of railroad by certain railroad companies (naming them), due and payable July 2, 1897; that on July 2, 1887, the said indebtedness was compromised and refunded at an interest rate of 5 per cent. per annum, said refunding bonds being issued to take up, be substituted and exchanged for the bonds and annexed coupons, theretofore issued and outstanding, and which indebtedness had been compromised as aforesaid; that said refunding bonds were issued by authority and in pursuance of an act of the legislature of the state of Nebraska approved March 5, 1885, being of the denomination of $1,000 each, with coupons for interest from the first day of July, 1887, at the rate of 5 per cent. per annum; that the bonds so issued did not at the time exceed the actual amount of outstanding indebtedness of said county, inclusive of the attached coupons so refunded by said new bonds; that the said refunding bonds are legally and regularly issued in conformity with the act of the legislature of the state of Nebraska approved March 5, 1885. It is then alleged "that the proper officers of Douglas county, at the time of issuing said refunding bonds, made out and transmitted to the respondent, as auditor of the state of Nebraska, a certified statement of all proceedings had by the county and board of county commissioners of the county, as shown of record, and stating that said bonds had been issued for value in all respects in conformity with said act of the legislature of the state of Nebraska, approved March 5, 1885, as required by the proper officers of the county, which said statement was attested by the county

clerk under his official seal." It is further alleged that the relator, before these proceedings were begun, became the owner and holder of bond No. 10, for $1,000, being one of the bonds aforesaid issued by the said county on the first day of July, 1887.

From what is hereinafter said, we must not be understood as in any way intimating that the bond which it is sought to have the state auditor register or any of the series of the issue of which it is one, are invalid or were issued without authority of law. The case is discussed solely in its aspect in relation to the legal duty or the lack thereof, of the state auditor to register the bond in his office and certify thereon that it had been issued in compliance with, and in conformity to law. By section 12 of chapter 9, Compiled Statutes, 1901,* it is provided that whenever the holder of county bonds shall present the same to the auditor of the state for registration, the auditor, upon being satisfied that such bonds have been issued according to law, shall register the same in his office and certify upon such bonds the fact that they have been regularly and legally issued and have been registered in his office in accordance with the provisions of the act; the data filed in his office being the basis of such certificate. While the bond in question purports to have been issued under the authority given by the act of 1885, approved March 5 (Session Laws 1885, chapter 59, page 270), it is conceded that this act, which was amendatory legislation, attempted to amend certain sections of the act of 1877, which latter act had been repealed by implication by the act of 1883 (Session Laws 1883, chapter 29), and that because said original act of 1877 had been thus repealed the amendatory legislation of 1885 sought to amend a void act, and therefore neither the original act nor the amendatory legislation ever had any legal existence subsequent to the time of the passage and taking effect of the act of 1883. The act of 1885, under the authority of which the bond held by relator purports to have been issued, has

*Cobbey's Annotated Statutes, sec. 10757.

been by this court heretofore declared void and of no effect, in the case of *State v. Benton,* 33 Nebr., 823, and in *State v. Benton,* 33 Nebr., 834. These decisions are regarded as final on the question of the invalidity of the act approved March 5, 1885, above mentioned, and we are not asked to re-examine the question.

It is contended, however, by counsel for relator, and we are disposed to agree therewith, that the act of 1883, heretofore referred to, which related to the authority of counties to refund outstanding bonds at a low rate of interest, was sufficient authority for the action taken by the officers of Douglas county in refunding the bonds described in the petition, and that even though the county commissioners ostensibly acted in pursuance of the authority attempted to be given by the act of 1885, yet such action was valid, if in fact there existed at the time a law authorizing that which was actually done. Without, however, determining that question, which is not properly before us, we undertake only a consideration of the duty of the auditor under the facts alleged in the petition, and for that purpose assume that the general legislation on the subject of refunding bonds contained in the act of 1883 authorized the refunding of the outstanding bonded indebtedness mentioned. It should here be said that it is evidently the intention of section 12, chapter 9, *supra,* that the auditor shall be furnished with data sufficient to advise him that county bonds have been issued or refunded in accordance with the provisions of law before he can rightfully be asked to certify, as therein contemplated, to the legality of the issue. This information is usually contained in a document properly certified by the county authorities which is frequently called a history of the bonds issued, containing all the necessary information showing compliance with and conformity to the essential requirements of the statute in relation to the issuance of such bond or bonds. Without such information has been produced and filed with the auditor, he can not, in justice, be asked to register bonds issued by a county, and certify thereon the regularity and legality

of their issue in the manner contemplated by section 12 aforesaid. In this connection we should perhaps say that in our opinion, the mere fact that the county authorities recite in the bond, or the history thereof, that action was taken in pursuance of and under a void statute, when in fact there was legal authority at the time existing for the action taken, would not be a sufficient excuse to justify the auditor in declining to register a bond or series of bonds otherwise entitled to registration. If the bond in question, although ostensibly issued under the authority of the void act of March 5, 1885, was in fact authorized by the act of 1883, or any other valid law then existing, it would, we think, be the duty of the auditor to register and certify as contemplated by statute when he was furnished, as required by law, the necessary information and data from which the validity of the issue and the regularity of the proceedings could be inferred. The law is intended, we apprehend, to safeguard the issuance and floating of municipal securities and to prevent spurious and irregularly issued bonds from being imposed on the investing public, and thus better maintain the credit of the state and its various political subdivisions. The registry and certification by the state auditor of municipal bonds gives to them credentials of authenticity, regularity and legality of issue, which they would not otherwise possess, and is calculated to inspire greater confidence in prospective investors as to their validity. All that is alleged in the petition as to the information furnished to the auditor relative to the history of the transaction from which he is to determine his duty regarding the registration of the bond and making the proper certification thereon, is that a statement of all proceedings had by the county and board of county commissioners, as shown of record, had been transmitted to the respondent, properly certified, in which it was said that the bonds had been issued for value and in conformity with the act approved March 5, 1885. The certified statement alluded to obviously refers to the proceedings had of record in connection with the issuance of the refunding bonds.

Admitting this statement to be true, which the demurrer does, and accepting as true the other allegations as to the issuance of a series of refunding bonds, does the legal inference necessarily arise that it is the duty of the auditor to register and make certification on the bond presented by the relator as prayed for in the petition? We think not. The fair test as to the proper answer to the question is whether we can say from what is alleged in the petition that it is the duty of the state auditor upon information and data certified and furnished him as alleged, to register and certify to the bond in controversy, because it is made to appear from the information and data thus furnished him that the bond was regularly and legally issued in accordance with law. The auditor presumably did his duty and refused to register the bond presented for reasons that are sufficient in law. The validity of the refunding bonds in the first instance depends for support upon the regularity and legality of the issue of the bonds for which they were substituted as refunding bonds. There must exist a basis for the issuance of the refunding bonds, or in other words, there must be valid bonds to refund before the county board is authorized to proceed to refund the indebtedness under the law providing therefor. It is necessary, then, that the auditor be advised of the history of the original transaction, and have information as to the proceedings in respect of the bonds originally issued, as well as of the bonds issued to refund them. By the act of 1883, it was provided that in the issuance of refunding bonds as therein authorized, the county clerk of the county issuing such bonds should certify to the auditor the number, amount and description of each bond canceled or to be canceled and refunded and the amount due thereon for principal and unpaid interest, and thereupon the auditor is authorized to register a similar amount of refunding bonds, but in no case shall the auditor register any refunding bonds in excess of the amount so certified to him by the county clerk, and that the bonds shall be entitled to registration in the order presented to the auditor. Nothing is stated in the

petition from which it appears that this information has been furnished the auditor, and the provisions of the section complied with, which is a condition precedent to his registration and certification of the refunding bonds. From all that appears in the petition, registration may have been made of all bonds he was entitled to register under the provisions of the act of 1883. But if it be contended that the bond should be registered under the law as at present existing, then, by reference to section 40, chapter 9, Compiled Statutes, 1901,* it will be seen that refunding bonds are to be registered as provided by law for the registration of municipal bonds generally. By section 10 of said chapter it is made the duty of proper county officers, when bonds are issued, to make registration in a book kept for that purpose of all of the several transactions connected with the issuance of such bonds as therein enumerated, and transmit to the auditor of state a certified statement of such registry for his information; and by section 11 further duties devolve upon the county clerk with respect to the bonded indebtedness of such county, and giving the information thereof to the auditor for his information and guidance in the registration of bonds in his office and the certification thereof, as provided by law. From the petition, we can not say that the auditor has been furnished with and put in the possession of the necessary information which he is lawfully entitled to before he can be compelled to register the bond in question, and for that reason the writ ought not to issue. Before the relator may demand this writ to issue, it must not only be made to appear that the bond in question has been legally and regularly issued in accordance with law, but also that the necessary information and data have been filed in the office of the auditor of state, from which it may be determined by him that the law in respect thereof has been complied with. This, we are of the opinion, the relator does not show in his petition for the writ, and it ought not, therefore, to issue. The rule is that before the court is warranted in granting a mandamus it

*Cobbey's Annotated Statutes, sec. 10782.

must be made to appear that the relator has a clear legal right to the performance by the respondent of the duty which it is sought to enforce, and that nothing essential to that right will be taken by intendment. *State v. Bowman,* 45 Nebr., 752; *State v. Nelson,* 21 Nebr., 572; *State v. City of Omaha,* 14 Nebr., 265; *State v. Whipple,* 60 Nebr., 650; *State v. Bartley,* 50 Nebr., 874.

The demurrer is sustained.

JUDGMENT ACCORDINGLY.

MARY E. CURTIS ET AL. V. GEORGE C. ZUTAVERN ET AL.

FILED JANUARY 21, 1903. No. 12,443.

Commissioner's opinion, Department No. 1.

1. **Decree of Partition:** JURISDICTION OF PARTIES: COLLATERAL PROCEEDING. A decree of partition, where the court has jurisdiction of all parties, and assigns with proper findings their several shares, is final and conclusive in any collateral proceeding as to the title then held by each of the parties.

2. **Dower:** BOND: DISTRIBUTION. Where one-third of the net proceeds of a partition sale has been delivered to the assignee of the widow's dower for his use during her life, only, and on his bond conditioned for its repayment into court at her death, it will come back into court for distribution in the same proportions as originally decreed for the remainder of the estate unless transfers have intervened.

3. **Assignment of Interest.** Assignment of an interest in such reversion fund may be oral and may be proved by oral testimony.

4. **Quitclaim Deed as Evidence of Assignment.** A quitclaim deed of the land, made after the confirmation of the partition sale to the purchaser at such sale, may or may not be evidence of such an assignment, but would not itself constitute one.

5. **Conveyance Before Partition:** INTENT. A conveyance, before the partition proceedings, by one of the owners of the land to a brother, though purporting to convey all his interest, where by its other terms and the circumstances it is clear that only a transfer of an interest obtained by purchase was intended, and where the decree of partition so finds, will be held to convey the purchased interest only, and not the one inherited.

Syllabus by court; catch-words by editor.

6. Quitclaim Deed: REVERSIONARY INTEREST. The quitclaim deed of an owner, purporting to convey all his interest in land, carries not only his interest in possession, but also any reversionary rights in the same land which he holds subject to a then existing dower estate.

7. Decree in Partition: REVERSION. Owners of lands who have given such quitclaim deeds and have suffered a decree in partition against them that their grantee holds title to the land so conveyed and have allowed in such action of partition one-third of the net proceeds of the sale to be paid to the purchaser of the dower estate, to be held by him during the life of the doweress, are estopped to assert any claim accruing before the partition proceedings to the reversion of the dower.

8. Owners of Land: REPRESENTATIVES: SUIT ON BOND: DOWER FUND. The owners of the land as ascertained in such partition suit, and their representatives, so far as they are deceased, may join as plaintiffs in a suit on the bond given in those proceedings for the repayment of the dower fund.

ERROR from the district court for Johnson county. Action on bond. Tried below before STULL, J. *Reversed.*

M. B. C. True, for plaintiffs in error.

Samuel P. Davidson, contra.

HASTINGS, C.

An examination of the record in this case, discloses no important dispute as to facts. The defendants' brief makes no objection to any statements of fact in that of plaintiffs. The reply brief only objects to the defendants' propositions of law. The legal questions arising seem to relate wholly to the intention and effect of certain admitted conveyances and the effect of a partition decree and of a bond given for the payment into court on the death of the widow of a certain sum, whose income was set apart as her dower. The action was begun, evidently, upon the theory that this sum of money, whose interest the widow's grantee had enjoyed during her lifetime, was intended at her death to be distributed among the heirs of her husband, and that they were entitled to it all by right of descent. That theory the

district court refused to entertain and rendered judgment only in favor of certain heirs whose conveyances were not of record and whose interests were not claimed by defendants.

The real question between the plaintiffs and defendants is whether or not, under the circumstances, and in view of the partition proceedings, and the giving of this bond, the heirs of Bluford Cannon, as such, are entitled to receive the amount of it. On September 26, 1871, Bluford Cannon died in Johnson county, leaving eight surviving children and two grandchildren, Jane and Patience Cannon, the latter of whom died leaving two great-grandchildren of the intestate, John and Swift Berry; and Jane Cannon became the Jane Patrick of the petition. Four of these children were minors and at the time of his death had received nothing from his estate. The other five had received advancements to the extent of $1,000 each. The widow and the younger children continued to reside upon the homestead farm of 400 acres in Johnson county. After the father's death the children seem to have regarded the farm as of value sufficient to place the four younger children on an equality with the older ones and leave intact the mother's dower. The mother remarried and became Mrs. Platt. The family seems to have remained in occupation of the farm. In 1878 Benjamin became of age, and deeded his interest in the land to his mother, by what purported to be a warranty deed, and conveyed "all of my undivided one-fourth interest, the same being his entire interest" in the 400 acres of land. In 1881, Katie, having married, herself and husband deeded her interest to her two brothers, Charles Henry and Benjamin; this was also by a deed in the form of a general warranty, and purported to convey "all of an undivided one-fourth interest, the same being their entire interest in and to" the lands. In 1881 Cora and her husband conveyed to the defendant Zutavern, by deed of quitclaim, "all the undivided right, title and interest in and to" these lands. In 1882 the mother conveyed to the defendant Zutavern, by quitclaim deed, "all the undi-

vided one-fourth interest, the same being my entire interest by purchase in and to" this same land. The same year, and four months later, Charles Henry and wife deeded to Benjamin one-half of the undivided one-fourth of the premises described, "the same being the entire interest of said grantors in and to all said premises." Charles Henry, it must be recollected, was one of the five older children. He was evidently asserting an interest only to the extent of an undivided one-half of that which had been conveyed to him jointly with Benjamin by Katie and her husband. A month later Benjamin and his wife deeded to the defendant Zutavern "all of an undivided one-fourth interest, the same being their entire interest in and to the premises described." By this conveyance Benjamin evidently intended to convey the interest he had acquired from Katie and her husband through their joint deed to himself and Charles Henry and then by Charles Henry's deed to him. It will be remembered that he had previously, in 1878, conveyed to his mother the one-fourth interest which he claimed by descent. Charles Henry and Benjamin, while they held Katie's share, apparently mortgaged it, and this conveyance to Zutavern by Benjamin was made subject to taxes and mortgages. On August 8, 1882, the defendant Zutavern brought an action in the district court of Johnson county to partition the land. The family were all made parties. Zutavern alleged his purchase of the shares of Benjamin, Cora and Katie and a purchase of the widow's dower. He alleged that he owned three-ninths of the land, and the grandchildren one-ninth, and the five surviving children of Bluford Cannon each a ninth interest, subject to the dower right. He asked that the shares be decreed as alleged. The court found his interest as well as the others to be as alleged in the petition. The land was sold. Under the decree it was provided that the advancements to the several older children should be considered in the distribution of the proceeds and that the portion of the proceeds due Charles Henry and Benjamin should be applied to the payment of the mortgages so far as needed to satisfy such

mortgages. The land was sold and in the decree of confirmation it was provided that one-third of the net proceeds of the sale, the sum of $2,214.14, should be put out at interest for the benefit of George C. Zutavern during the life of the mother, the interest only to be paid to him as his own property, and that if he should enter into a bond for the repayment of the principal on the death of the mother, the money should be "delivered to him for his own use until that death." Zutavern executed the bond in the following terms:

"Know all men by these presents, that George C. Zutavern, as principal, and Charles McCrosky, Chas. A. Holmes, Alf. Canfield, D. R. Bush, J. S. Harmon, G. M. Buffum, C. H. Halstead, Martin Gabriel, as sureties, are held and firmly bound unto the judge of the district court in and for Johnson county, state of Nebraska, in the penal sum of four thousand dollars for the payment of which we hereby bind ourselves, our heirs, administrators and assigns. The condition of the above obligation is such that, whereas the said George C. Zutavern has been appointed by the district court in and for Johnson county, state of Nebraska, the custodian of the dower interest of Sarah E. Platt, widow of Bluford Cannon, deceased. Now therefore, if the said George C. Zutavern shall, upon death of the said Sarah E. Platt, pay into the district court the sum of two thousand, two hundred and fourteen 14-100 dollars, the same being the full amount of said dower interest of said Sarah E. Platt, then this obligation to be void, else to remain in full force and virtue in law. Witness our hands this 15th day of March, A. D. 1883."

One of the sureties, Charles McCrosky, died before the doweress. Her death took place June 10, 1900. No money was paid into court, and this action was brought, making all of the surviving heirs of Bluford Cannon parties plaintiff, and Zutavern and his sureties and the heirs of the deceased McCrosky defendants. There were two answers filed,—one of Zutavern and the other by the sureties, including the McCrosky heirs. The answers are substantially

the same except, of course, that one admits executing the bond as principal, the others as sureties. The defenses are: (1) Insufficiency of the petition to state a cause of action; (2) invalidity of the bond as not based on any statute or agreement, and that it is made payable to the judge of the district court and not to the plaintiffs; (3) denial of all allegations except as admitted. The answers then admit the death of Bluford Cannon; his ownership of the land; the relationship of the parties; set up the conveyances which have been described; allege that on March 3, 1882, the mother sold and conveyed to Zutavern, as guardian of Smith J. Cannon, his entire interest in the land, and received from Zutavern the full agreed price of it, and reported the same to the county court, and afterwards, on coming of age, he received the entire proceeds of the sale and has ever since, and for more than ten years, retained them; and allege that in 1884, after the partition proceedings, Patience Curtis and her husband sold their entire interest in the lands and all interest that should thereafter accrue to them, meaning and intending to convey all the interest they had in the reversion of the mother's dower. The answers claim that by means of these conveyances and of those which had preceded the partition, Zutavern became the absolute owner of the entire amount of the reversion except the one-ninth interest of Mary E. Curtis and the one-ninth interest of the three grandchildren and great-grandchildren, Jane Patrick and John and Swift Berry. The answers also allege a tender of $1,023.35 on January 4, 1901, and allege that it had been kept good, but say that no more than $492 were due. The reply admits that the bond was based upon the order in the partition suit and admits the tender and denies generally. The district court found due Mary E. Curtis $246.01, being one-ninth of the dower money, and that she was entitled to interest from January 4, 1901. The court found that Jane Patrick and John and Swift Berry were jointly entitled to one-ninth, and that prior to the commencement of the suit Zutavern had paid to each of the other plaintiffs their entire interest.

Judgment was rendered in favor of these parties and against the remaining plaintiffs, and the action dismissed as to all the others. Plaintiffs except, and all join in the motion for new trial. It may be remarked that before replying the plaintiffs demurred to each of the answers. Motion for new trial was filed, urging objections to all of the proof of the conveyances; alleging error in overruling the demurrer to the answers; error in finding that Zutavern had purchased the interests of each of the several plaintiffs Charles Henry, Benjamin and Smith Cannon, and of Cora Jones and Katie Jones and of Patience Curtis; that such finding, and as to each of said parties, was not sustained by the evidence; and that the court erred in admitting evidence of Zutavern as to conversations with Mrs. Platt, and erred in finding less than the amount of the tender pleaded. The motion for new trial was overruled and plaintiffs bring error to this court under thirty-three assignments.

Plaintiffs' brief urges that the demurrers to each of the answers should have been sustained; that they set out no defense to the bond. Complaint as to the admission of evidence to show Zutavern's purchase of Smith Cannon's interest from the mother is made. It is alleged that there was error in taking oral testimony as to the estate intended to be conveyed by the deeds to Zutavern. It is claimed that there is no proof of authority for the sale of Smith Cannon's interest or that he received the proceeds of it; that the deed from Patience Curtis was subsequent to the partition proceedings, and does not purport to convey any interest in this money, and was erroneously received in evidence; that it purports to be only a quitclaim deed of certain land and can have no relation to a sum of money already derived from the sale of the land; that there is no evidence to uphold any finding of the sale of the share of Charles Henry to Zutavern. It is alleged that the trial court was wrong in the effect which it gave to these deeds and that the deeds only purport to convey a present interest in the land and could have had no reference to any

reversion of a fund. It is also urged that the defendants are bound by their tender, and the plea of it in the answer, and the court should have at least decreed the plaintiffs that amount. It is alleged that Charles Henry died intestate subsequent to the partition proceedings and that by reason of his death plaintiffs each have an interest in the dower fund to the extent of their proportion of his share. While the general relations of the parties are admitted, we do not find any express admission on this point, and there is no proof. The district court in its finding that defendant Zutavern was the owner of the reversion of the dower to the extent of seven-ninths seems to have acted upon certain testimony of Zutavern's own, all of which was taken over plaintiffs' objection. He swore that at the time these conveyances were made, he supposed that he was buying the entire reversion of the dower interest; that such was the agreement with the mother as to Smith J.'s share, and he supposed he got the others, all except those of John W. Cannon and Mary E. Curtis. When he purchased any of them, aside from the procuring of the deeds before mentioned, he does not say. He testified, over plaintiffs' objection, that the deed of Mrs. Patience Curtis, the only one which is subsequent to the partition proceedings, was intended to convey her interest in the reversion of the dower. The deed, on its face, is simply a quitclaim deed of all interest in the land. Mrs. Curtis says there was no intention on her part and no understanding that it was a sale of her right in the reversion of the dower. Mrs. Platt, the mother, as stated, is dead. Benjamin C. and Mrs. Katie Jones swear that their intention when the deeds were executed, was to convey merely their then present interest in the land, subject to the dower right, and that their understanding at the time was that this was all which was conveyed. Mrs. Cora Jones apparently does not testify. Mrs. Platt's deed purports to convey only a one-fourth interest in the land, "acquired by purchase." She made apparently a separate assignment of her dower, though we are unable to find it in the record. As a matter of fact, Zutavern

seems to have had no dealings, by way of procuring conveyances or assignments from any of the older children, as to this dower reversion, except the taking of a deed of Mrs. Patience Curtis.

It is clear that when the partition sale was made the amount of money named in this bond was taken out of the price of the land. It is clear that it was taken out in a gross sum. It is clear that whoever was entitled at that time to the value of the reversion of this dower did not receive it. It is clear that Zutavern obtained the possession of this money by the giving of this bond and that it was signed by the sureties with the understanding that it was to be repaid. He and they are alike each estopped from denying the recitals in the bond. Zutavern at that time claimed no interest except the three-ninths and the dower right. This three-ninths interest is that represented by Mrs. Platt's conveyance to him of the interest she had acquired from Benjamin, by Benjamin's conveyance to him of the one-ninth interest he had derived through Charles H. Cannon from Mrs. Katie Jones, and the one-ninth conveyed to Mr. Zutavern by Cora Jones and husband. At that time he only claimed to own the three shares thus obtained from Benjamin Cannon and from Mrs. Cora Jones and from Mrs. Katie Jones through her brothers Benjamin and Charles H. The partition decree must be esteemed conclusive upon Zutavern as to his holding any other right or claim in this land at that time. It was an adjudication, at his own instance, in which all the plaintiffs here and Charles H. Cannon were defendants. The only right that he claims to have acquired since is by the quitclaim deed of 1884 from Mrs. Patience Curtis. If he has any right in the other five-ninths of the reversion, it must come by reason of the understanding that he testifies to have accompanied the deeds that he was getting the entire interest. Zutavern appears to have been at one time for some years a member of the Cannon family in the capacity of a boarder. His claim to the share of Smith J. Cannon rests wholly on his assertion, and that of the justice who took the acknowl-

edgment of Mrs. Platt's deed, that it was made with the understanding that Mrs. Platt was conveying away the interest of her 11-year-old son, Smith J. The conveyance not only makes no mention of any such intention, but it distinctly states that Mrs. Platt is conveying "one-fourth interest, being her interest by purchase" in the lands, and that she is relinquishing her right to dower in them. At that time Smith J. Cannon owned a one-ninth interest in the land. Zutavern's partition proceedings, taken a few months later in the same year, allege that Smith still held such one-ninth interest, and from the proceeds of the sale he seems to have received some money. The money clearly must have been outside of and in addition to any interest in the reversion of the dower, because the dower, as above stated, was taken out in a gross sum of the one-third of the net proceeds of the partition sale. It is impossible to see how oral testimony of Zutavern's, that he had this previous oral understanding with the mother that he was getting Smith's interest in the land, can be permitted to prevail both against the statute of frauds and against the estoppel in the decree of partition and in the acceptance and ratification of it by the giving of the bond here in question. It seems impossible to hold, in the face of this estoppel, that Charles H. Cannon's interest in the reversion of the dower ever passed to Zutavern. The latter did not claim it in his partition suit. The circumstances of the deeds indicate conclusively that all parties understood that Charles H. Cannon, by his deed to Benjamin, merely intended to release to the latter a one-half interest in Katie's share, which had been conveyed to Benjamin and Charles Henry jointly. Zutavern, being plaintiff in the partition proceedings, and Charles Henry a defendant, both must be held bound by the decree that Charles Henry had still at that time a one-ninth interest in this land. If Charles Henry is now dead, without issue, his brothers and sisters and their descendants have inherited his share, and all the plaintiffs, therefore, have an interest in the reversion of this dower, at least to that extent.

It remains to consider whether or not Zutavern and his sureties should be held to be estopped from claiming that he is entitled to any part of the reversion of this dower by the terms of the decree of partition and the recitals of the bond. We are constrained to think not. It is true that this money was turned over to him for use only during the life of Mrs. Platt under his express agreement to repay it into court when that life was over. But it seems clear that it must have been the intention of the court, and of all parties at the time, that when Mrs. Platt was finally dead this money should be paid back, to be divided in accordance with the partition decree. It is impossible to give to the uncertain declarations of witnesses as to circumstances accompanying the making of the prior deeds and as to the intention with which they were made, the effect to do away with their plain purport. Neither can such evidence be allowed to do away with the palpable meaning and effect of so public an act as a decree in partition, procured on Zutavern's behalf, by one of the distinguished lawyers of the state, and entered by a distinguished district judge.

It remains still to consider whether or not the quitclaim deed of Mrs. Patience Curtis should be permitted to be shown by Zutavern as an assignment of her reversion in this fund, which Zutavern himself asserts was at the time wholly disconnected by means of the partition proceedings from the land. The conclusion reached is that the question of this subsequent assignment of the reversionary interest is one which may be determined by parol evidence. The quitclaim deed to the land, under the circumstances under which it was given, would not operate by its terms to effect such assignment. It seems, however, to have been properly admitted in evidence as one of the circumstances in connection with the negotiations between the parties, which should be considered in determining whether or not Mrs. Patience Curtis, as a matter of fact, did, after the partition, assign her interest in the reversion to this fund.

Defendant raises the question of pleading in his answer that there was no joint right of recovery in this case on

this bond. In our opinion, the beneficiaries of the fund, the heirs of Bluford Cannon, have a joint interest in getting the fund replaced. Each of them is interested to the extent, at least, of his proportion of the share of Charles H. Cannon in the subject-matter of the action and in the recovery of the judgment. The bond itself is an entirety. It was taken for their benefit, in a proceeding in which they all were parties. There are no allegations in the answer which indicate any reason for requiring any appointment of an administrator for Bluford Cannon's estate, and if there are none, it would seem that the heirs are entitled to proceed jointly to recover the amount due them. It would also seem that the obligors on the bond are entitled to show that the principal signer is entitled to the three-ninths of this reversion under the decree of partition, and, if they can establish its assignment, also to the one-ninth originally belonging to Mrs. Patience Curtis.

With regard to the claim that the interest in the reversion of the dower did not pass to Zutavern under his deeds of quitclaim and of bargain and sale, by which he held the three-ninths interest claimed by him in the partition proceedings, and that, therefore, he is not now entitled to any portion of this fund, it seems impossible that it should be sustained. Section 50, chapter 73, Compiled Statutes,* provides: "Every conveyance of real estate shall pass all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used." The right to this reversion was a vested remainder. "A remainder is 'vested' when there is a person in being who would have an immediate right to the possession upon the ceasing of the intermediate particular estate. It is an estate grantable by any of the conveyances operating by force of the statute of uses." Anderson's Law Dictionary, *sub voce,* citing *Croxall v. Shererd,* 5 Wall. [U. S.], 268, and cases there cited. *Doe v. Considine,* 6 Wall. [U. S.], 458. The citations amply sustain the doctrine. No other intention than that to pass this estate can be gathered from the deeds,

*Cobbey's Annotated Statutes, sec. 10253.

for they expressly provide for the conveyance of "all the grantors' interest"; but it does not seem necessary to consider this question at all.

It having been concluded that Zutavern is estopped by the decree and the bond given under it from claiming more than three-ninths of this land, it follows that the other parties to that action, who were makers of these deeds, are also estopped. It must be held, as to them, conclusive that at the time of the partition proceedings Zutavern held absolutely the dower interest and the three-ninths of the fee title. He therefore must be allowed to have that three-ninths of the reversion of this fund which is derived from the sale of his three-ninths of the land. It is believed, therefore, that the heirs of Bluford Cannon are entitled to recover six-ninths of this fund by their joint action, unless Patience Curtis is found to have assigned to Zutavern her original one-ninth of it; that the one-ninth of it belonging to Charles Henry Cannon in his lifetime, if he is dead without leaving a will, should go to the plaintiffs jointly; and that Benjamin Cannon, Katie Jones and Cora Jones should receive their portion of this one-ninth. As to Patience Curtis, the question of whether or not she has assigned her reversionary interest to Zutavern since the partition proceedings should be determined.

It is recommended that the judgment of the district court be reversed and the cause remanded for further proceedings according to law.

LOBINGIER 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 according to law.

REVERSED AND REMANDED.

BAESCHLIN & SHUMAN V. CHAMBERLAIN BANKING HOUSE.

FILED JANUARY 21, 1903. No. 12,552.

Commissioner's opinion, Department No. 1.

1. **Agent:** DRAFT: PAYMENT: ABSOLUTE AGREEMENT: PLAINTIFF: AGREEMENT: CONFLICTING EVIDENCE. Where plaintiff alleges an absolute agreement to pay drafts of an agent if cashed by plaintiff, and defendants set up a conditional agreement, and the evidence is conflicting, defendants should be allowed to prove facts showing that under the agreement, as claimed by them, there was nothing due the drawer and no authority to make the draft.

2. **Bank:** AGENT: DRAFT: PLEA: DRAWEE: BAD FAITH: ADMISSION OF CERTAIN EVIDENCE. In case of a draft made through a bank by an agent on a plea by the drawee of bad faith upon the bank's part, and when there is evidence showing knowledge by it of the relations of the drawer and drawee, evidence tending to show a misappropriation of the proceeds of the draft by the agent for the bank's benefit, and with its knowledge, should be admitted.

3. **Former Agent:** ACTUAL AUTHORITY: PRINCIPAL: BANK: RETENTION OF PROCEEDS. Where a former agent, without actual authority, and with nothing due him, has drawn on his former principal through a bank instructed by the principal to pay such drafts, it is the bank's duty, as soon as it learns of the agent's lack of authority, to retain any proceeds of the draft which have not been paid out.

4. **Suit by Bank:** AMOUNT PAID: NOTICE OF AGENT'S WANT OF AUTHORITY: RECOVERY. In a suit by the bank to recover for the amount paid on such a draft, it can recover only the amount paid before receiving notice of the agent's want of authority. That the remainder had been previously placed to the agent's credit in the bank, is not sufficient.

ERROR from the district court for Johnson county. Action by Chamberlain Banking House against Baeschlin & Shuman, upon inland bill of exchange. Tried below before LETTON, J. Judgment for plaintiff. *Reversed.*

Samuel P. Davidson, for plaintiffs in error.

M. B. C. True, contra.

Syllabus by court; catch-words by editor.

HASTINGS, C.

This is an action on a draft drawn by one House upon the defendants, Baeschlin & Shuman, and alleged by plaintiff to have been cashed for the defendants at their request and under an agreement that they would honor and pay such drafts by House, who was their agent at Tecumseh, Nebraska, in the purchase of poultry. The draft was drawn April 13, 1899, and plaintiff says it paid it on that day. The defendants admit plaintiff's incorporation and their partnership and deny the other allegations of the petition, and especially deny making any agreement to pay all drafts by House and deny his agency for them; deny his drawing the draft; deny any agreement to pay drafts except for money to pay for poultry purchased by House and shipped to defendants, which drafts were to be accompanied by a statement of poultry purchased with the money. They allege that their contract with House, made with plaintiff's knowledge, was that House was to buy poultry and consign it to defendants and defendants were to honor a draft for the money to pay for it, but not unless the draft was accompanied by a statement, and that they would honor no draft for any other purpose. They allege that the draft in question was drawn and the proceeds used to pay House's indebtedness to plaintiff, which he owed prior to becoming defendants' agent. They also say that when this draft was drawn House had received more than enough money to pay for all the poultry purchased for consignment to defendants and that plaintiff knew this. Plaintiff replied by general denial. The jury returned a verdict for $117 and the defendants bring error, under twenty-three assignments, in this court. Their brief, however, complains only of error in refusing evidence that on the day prior to the drawing of this draft they had a complete settlement with House and paid him in full; error, also, in refusing evidence of the condition of House's account with plaintiff upon December 27 and 29, be-

fore, and April 14 and 17, after, the drawing of the draft; also error in refusing evidence that no more poultry was bought for defendants by House after the settlement of April 12. Complaint is also made of instruction 6, which told the jury that, if they found for plaintiff, to find for the amount of the draft. It is claimed that only $50 was paid out on this draft,—the other $50 being put to House's credit in plaintiff's bank,—and that there is no evidence to show that it was ever paid to him. Complaint is also made because the instructions merely told the jury that the defendants deny liability on the draft and their defense would be found more specifically set out in the answer which the jury would have. Complaint is also made of the refusal to instruct the jury to find for the defendants if plaintiff knew that the money was drawn for other purposes than payment for poultry. Complaint is also made of a refusal to instruct the jury as to the effect of a telegram sent to plaintiff by defendants in response to one of plaintiff's to them, refusing to honor any more drafts. Complaint is also made of the refusal of instruction 4 asked by defendants, to the effect that the jury were to find for defendants if the money was drawn for any other purpose than buying poultry. The refusal of instruction 5, which told the jury to find for defendants if they found that a settlement had been had before the drawing of this draft, between House and the defendants, and also found that plaintiff knew of the contract between House and defendants, is complained of.

The fundamental question in the case seems to be, what was the agreement between plaintiff and defendants with regard to honoring House's drafts, and to what extent was there a duty on plaintiff's part to ascertain the purpose for which the money was drawn? Plaintiff claims an absolute agreement to honor all of House's drafts for less than $100. Defendants deny any agreement except to honor drafts for poultry which were accompanied by a statement of the consignment. Knowledge of the relationship between House and the defendants on plaintiff's part appears.

Under such circumstances, actual knowledge on its part that this money had been or would be misappropriated, would prevent any recovery. The trial court, in substance, told the jury to find for the plaintiff if they found that the defendants had agreed to honor all drafts, to a reasonable amount, drawn on them by House, and to find for the defendants if the drafts were to be honored and paid only when a statement of poultry bought and shipped accompanied the draft, and that they should either find for the defendants or for plaintiff to the full amount of the draft. The court also, at defendants' request, instructed as follows: "The court instructs the jury that if you believe from the evidence that it was specially and definitely agreed by and between defendants and Al. House, mention[ed] in the pleadings, with the knowledge of the plaintiff, that said Al. House should buy poultry consisting of chickens, ducks and geese and consign the same to defendants, and that defendants would honor such drafts drawn upon them by said House for the sole and only purpose of paying for such poultry so consigned, provided a statement of the amounts and character of the poultry so purchased by the money so drawn for should in every instance accompany such draft; and if you further believe from the evidence that no such statement accompanied the draft in controversy and that the money for which the draft was drawn was not used in paying for such poultry consigned to defendants, then and in that case you will find for the defendants." By the last portion of this instruction the jury were told that the fact that the money was not used for buying poultry consigned to defendants, if they found it to be a fact, was vital. It seems clear that the testimony tendered as to the settlement and the paying out for all poultry on and prior to April 12, which was rejected by the court, bore directly upon this claim and should have been admitted in order to show that the proceeds of this draft were not and could not have been used for any such purpose. It would seem that the rejection of this evidence was error. Plaintiff says it was rejected because knowl-

edge of this settlement was not brought home to plaintiff. Of course, if plaintiff knew of such fact, there could be no recovery. But the verdict may have been, for aught the record shows, based on defendants' theory of the contract and rendered for lack of proof that the draft was not for poultry payments.

It would also seem that the trial court, in telling the jury to find for plaintiff if they found, under the agreement, that plaintiff was to honor all drafts up to a reasonable amount, and to find for defendants if they found no statement accompanied this draft, and that the agreement required such statement, unduly narrowed the issues. Whatever the agreement between the plaintiff and defendants may have been, it is alleged,—and there is evidence strongly tending to support such allegation,—that the relationship between House and the defendants was well known to plaintiff. Under such circumstances, it would seem clear that knowledge on the plaintiff's part that this money was being misappropriated would be a defense, and it certainly would be a defense that at the time of the refusal to pay the draft the money had not been paid out to House. Counsel do not claim that the evidence shows that it had. The utmost they claim is that $50 had been paid out, and the other $50 had been placed by the plaintiff to House's credit and that the evidence does not show that it had not been paid out before notice of dishonor of the draft was received.

No authorities are cited to the proposition that such a placing to House's credit would put the money beyond plaintiff's control or authorize a recovery for it if it was not really due to House. It would seem that the bank, in giving Mr. House credit for this amount, and failing to charge it back to him on learning of the draft's dishonor, must have taken the risk of defendants' being indebted to House to that amount and must be held not entitled to recovery as to this $50 unless the money for the draft was actually due to House from the defendants. The instructions given, and rulings as to evidence, indicate clearly

that in the mind of the trial court the sole question in the case was the agreement about paying drafts. The court's action was evidently based on the conclusion that if defendants had absolutely agreed to honor House's drafts through plaintiff for amounts of $100 and less, it did not matter whether or not anything was due House from defendants, or whether or not the money was applied to his indebtedness to plaintiff. The evidence, as above suggested, is conclusive that plaintiff knew the relationship between House and the defendants and the purpose for which the drafts which were paid were drawn. Plaintiff was bound to take notice, as we think, that this money was advanced to a purchasing agent of defendants, even though the terms of its agreement were as it claimed. The rejected evidence of the condition of House's account with plaintiff tended to show a misappropriation not only with plaintiff's knowledge, but for its benefit. If defendants could show this, it should defeat a recovery. So, too, the fact, if it is a fact, that only $50 had been paid out on the draft before its dishonor, should go to reduce damages.

It is recommended that the judgment of the district court be reversed, and the cause remanded for further proceedings.

KIRKPATRICK and LOBINGIER, 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.

WILLIAM BETTS, DIRECTOR OF SCHOOL DISTRICT NO. 94, v. STATE OF NEBRASKA, EX REL. PETER JORGENSEN.

FILED JANUARY 21, 1903. No. 12,514.

Commissioner's opinion, Department No. 1.

Mandamus: REVIEW: RIGHT OF RESPONDENT: STATEMENT OF CASE. A respondent in mandamus proceedings, against whom a writ has been issued, and who has performed its commands, after the allowance of a supersedeas and before his motion for a new trial has been disposed of, is not entitled to a review in this court of the question whether the writ should have originally been granted, especially where the judgment complained of provides for his reimbursement for costs and where his official term has meanwhile expired.

ERROR from the district court for Cass county. Application for a writ of mandamus to compel the director of a school district to examine and approve the bond of a school-district treasurer. Tried below before JESSEN, J. Peremptory writ allowed. *Error proceeding dismissed.*

Harvey D. Travis, for plaintiff in error.

Samuel M. Chapman and *A. M. Russell, contra.*

LOBINGIER, C.

This was an application for a peremptory writ of mandamus to compel the respondent, as director of school district No. 94, Cass county, to examine and approve the bond of the relator as treasurer of said district. The alternative writ recited that the relator, "within the time required by law duly executed and presented to the school board of said school district * * * a good and sufficient undertaking as required by law in compliance and in conformity with the laws of the state," and that respondent "refused to examine and approve said undertaking." The return to the writ, which was in the form of an ordinary answer, was in effect a general denial, coupled with certain admissions. Upon a hearing the court found generally in the relator's favor

Syllabus by court; catch-words by editor.

and specifically "that on October 27, 1900, relator tendered to the respondent a valid bond, which the respondent then and there refused to approve." A peremptory writ was thereupon awarded and the judgment contained the following clause: "It is further considered by the court that the respondent is adjudged to pay all the costs of this action; when paid into court by respondent, shall be repaid to the respondent by the said school district No. 94, and said district is directed to so proceed as soon as said costs are paid into court by respondent and supersedeas fixed at $100." After a motion for a new trial had been overruled, but without executing a supersedeas bond, the respondent brought the case here on error. His principal contentions are that the bond was never delivered to him for filing, nor its approval demanded, and that the sureties thereon are not shown to have been freeholders as required by section 9 of chapter 10 of the Compiled Statutes*; and he relies upon *Woodward v. State*, 58 Nebr., 598. The trial court evidently took the view that the demand for approval was rendered unnecessary by the conduct of respondent; that the case was governed by *State v. Baushausen*, 49 Nebr., 558, 561; and that the recitals of the alternative writ were sufficient, in the absence of a motion for a more specific statement, to show the presentation of a bond with all the requisites, including the signatures of qualified sureties.

We do not deem it necessary or advisable to enter upon a discussion of these questions or to determine which of these diverse views is correct, for, in our opinion, the case must be disposed of on other grounds. A few days after the entry of the judgment, and long before the motion for a new trial had been disposed of, the respondent filed with the clerk of the district court the following paper:

"Comes now the respondent and because an execution has been issued against him in said cause here, now, to save further costs pays into court under protest the amount of the judgment for said costs taxed at $65.98 and shows to the court that he has approved the bond as ordered by the

*Cobbey's Annotated Statutes, sec. 9008.

court in above cause all under protest, and at all times excepting to the order of said court in the premises.

"January 14, 1901. WILLIAM BETTS,
"By H. D. TRAVIS, *his atty.*"

It is also stated in the brief of relator, and not denied in that of respondent, that the school district "has repaid respondent the costs adjudged against him, and respondent received and accepted the same." It is true that this fact does not appear in the record, but it does appear, as we have seen, that this action was required of the district as one of the conditions of the judgment sought to be reversed, and no one is here on behalf of the district complaining of this order. Such being the facts, the case falls within the rule announced as follows in *City of San Diego v. Board of Supervisors*, 97 Cal., 438, where the respondents, after resisting an application for mandamus to compel them to levy a tax, complied with the commands of the writ and then took an appeal: "The defendant voluntarily complied with the mandate of the court, and the judgment was thereupon satisfied and its force exhausted. After it had thus been satisfied, there was nothing in the judgment which the court had rendered of which the defendant could complain, or about which it could say that it was aggrieved. A reversal of the judgment would not of itself set aside the levy of the tax which had been made, nor did the appellant, by its compliance with the judgment, lose any property or rights of which restitution could be made in case of a reversal. Code of Civil Procedure, sec. 957. The proceeding was for the purpose of compelling the defendant to perform an official duty, and not one in which it had any personal rights to be effected." See, to the same effect, *Leet v. Board of Supervisors,* 47 Pac. Rep. [Cal.], 595. Under similar facts it was observed in *State v. Napton,* 10 Mont., 369, 370: "A judgment of any kind from this court would present a peculiar result. An affirmance would be to direct the district court to issue a writ, which that court has already issued, and which has been obeyed. A reversal would be to say to the lower court, you may not order the clerk

to do that which he has already fully performed. It is apparent that there is no controversy before us. The case is fictitious." It is true that the respondent declares that he approved the bond under protest, but he failed to make his protest effective, as he might have done by taking advantage of the supersedeas which the court had a right to grant (*Cooperrider v. State,* 46 Nebr., 84; *Home Fire Ins. Co. v. Dutcher,* 48 Nebr., 755, 762), and which he might have perfected by depositing or giving a bond for a sum about one-half more than that which he claims to have paid into court. Moreover, his payment of costs, even if he has not been reimbursed, will not alone afford such a subject of controversy as an appellate court will consider. *State v. Meacham,* 17 Wash., 429; *Moores v. Moores,* 36 Ore., 261; *State v. Sloan,* 69 N. Car., 128; *State v. Richmond D. R. Co.,* 74 N. Car., 287. Besides, his motion for a new trial was still pending and if he had confidence in his grounds he should, at least, have exhausted that remedy. The respondent's course in performing the commands of the writ leaves no controversy involving any substantial right. As was said in *Matter of Manning,* 139 N. Y., 446, 448, which was an application for a writ to compel the respondent to publish lists of election officers under a charter since expired: "The appeal does not now present an actual litigation but an abstract question. The practice of this court has been to refuse to entertain appeals when it is plain that nothing can be accomplished by the decision. * * * The demands of actual practical litigation are too pressing to permit the examination or discussion of academic questions, such as this case in its present situation presents." This language is peculiarly applicable to this court with its overcrowded docket. If the question were at all in doubt we would be disposed to adopt a rule which would discourage the prosecution to this court of proceedings where the sole object is personal vindication or the settlement of merely hypothetical questions. The doctrine above stated is, however, well supported by the authorities. See, in addition to the foregoing, *Jacksonville*

School District v. Crowell, 33 Ore., 11; *People v. Common Council of Troy,* 82 N. Y., 575; *People v. Phillips,* 67 N. Y., 582; *Bryant v. Thompson,** 128 N. Y., 426; *People v. Walter,* 68 N. Y., 403; *Ellis v. Whitaker,* 62 Kan., 582; *Hice v. Orr,* 16 Wash., 163; *Cutcomp v. Utt,* 60 Ia., 156; *People v. Leavitt,* 41 Mich., 470. Indeed, we have found but one case (*Commissioners of Polk County v. Johnson,* 21 Fla., 577), holding that an appeal may be prosecuted from the allowance of a peremptory writ of mandamus after its commands have been performed. The opinion there contains no discussion of the point on principle and no reference to any of the authorities above reviewed, while anything in its favor in *O'Hara v. MacConnell,* 93 U. S. [3 Otto], 150, on which it relies, is rendered clearly inapplicable by later decisions of the federal supreme court. *Mills v. Green,* 159 U. S., 651, and cases there cited.

There is still another ground upon which it would seem that the case might be disposed of. The term which respondent was serving when the writ was issued has expired. At the hearing in January, 1901, he testified that he had held the office of director "two years last annual meeting." His term must have ended, therefore, at the annual meeting in June, 1901. Compiled Statutes, ch. 79, subdiv. 3, sec. 1.† We can not presume that he was re-elected, and there is no showing or intimation that he was. The case, therefore, would seem to fall within the rule of *Edgerton v. State,* 50 Nebr., 72, where, because respondent's term of office had expired, it was declared that "there is presented upon the record no existing substantive matter of right of plaintiff in error for our consideration." See, also, *State v. Grand Jury,* 37 Ore., 542; *People v. Common Council,* 82 N. Y., 575. The rule is especially applicable where the aid of the appellate court is not invoked until after the expiration of the term. *Schrader v. State,* 157 Ind., 341. The petition in error before us was filed January 8, 1902.

* 13 L. R. A., 745.

† Cobbey's Annotated Statutes, sec. 11045.

Relator asks an affirmance and not a dismissal; but in our view, the case is one which requires the latter disposition. In some of the New York and California cases above cited, as well as in *Edgerton v. State,* 50 Nebr., 72, the court appears to have entered such an order on its own motion and without an application on the part of the relator. And in *Mills v. Green,* 159 U. S., 651, the rule is announced that: "When, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for the appellate court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief, the court will not proceed to a formal judgment, but will dismiss the appeal." On the same principle we recommend that this error proceeding be dismissed.

HASTINGS AND KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the error proceeding is

DISMISSED.

BROUGHAM STEVENSON ET AL. V. FRANCIS C. MORGAN ET AL

FILED JANUARY 21, 1903. No. 12,576.

Commissioner's opinion, Department No. 1.

1. **Bond**: STATUTE UNDER WHICH IT IS DRAWN DECLARED UNCONSTITUTIONAL: EFFECT. A bond executed in pursuance of a statute, is not necessarily rendered void because the statute is afterward pronounced unconstitutional.

2. ———: ———: ———: CONSIDERATION: ESSENTIALS OF COMMON-LAW CONTRACT: TEST OF ENFORCEABILITY. The test of the enforceability of such a bond, is whether a consideration exists independent of the statute; if so, and the bond has the other essentials of a common-law contract, it may be enforced.

3. ———: ———: ———: ———: ———: ———: FORCIBLE ENTRY AND DETAINER: RETAINING POSSESSION OF PREMISES. Recovery is permissible on a bond given in an appeal from a justice of the peace in a forcible entry and detention proceeding, though

Syllabus by court; catch-words by editor.

the statute authorizing such bond is afterward declared unconstitutional, provided the obligor has been thereby enabled to retain possession of the premises.

ERROR from the district court for Douglas county. Action upon statutory bond given in an appeal from a judgment in forcible entry and detainer. The law was declared unconstitutional in *Armstrong v. Mayer,* 60 Nebr., 423. The question here involved was, could a recovery be had upon a statutory bond where the statute was unconstitutional? Tried below before KEYSOR, J. Judgment for plaintiffs. *Affirmed.*

Weaver & Giller and *Kennedy & Learned,* for plaintiffs in error.

George W. Doane, contra.

LOBINGIER, C.

This is an action on a bond given by plaintiffs in error in order to perfect an appeal to the district court in a forcible entry and detention proceeding. More than two years after the execution of the bond this court, in *Armstrong v. Mayer,* 60 Nebr., 423, declared unconstitutional the statute which provided for such appeals and for bonds in pursuance thereof. But the appellant in that proceeding had retained possession up to the time when this action was brought, and judgment having been rendered against him and his surety thereon, the cause is brought here by petition in error; the sole contention being that by reason of this annulment of the statute the bond affords no cause of action.

The diligence of counsel has materially lightened the labors of the court in determining this question, and the ably prepared briefs contain most of the authorities which relate to it. We were at first of the opinion that there was some conflict among these, but a comparison of the cases convinces us that they may be harmonized and that the question before us does not involve serious difficulty.

We are cited to *Brookman v. Hamill,* 43 N. Y., 554, and *Poole v. Kermit,* 59 N. Y., 554, in support of the contention that a bond given in pursuance of a statute afterward pronounced unconstitutional, is invalid. In these cases each bond was given to procure the release of a vessel from an attachment for wharfage claims. It will be seen that there could have been no consideration for the making of such an instrument unless the statute providing for it was valid, since the benefit obtained, viz., the release of the vessel, was one which the obligor was entitled to in any event, except as the statute authorized detention. In neither of these cases does the court overrule or question its earlier decision in *Van Hook v. Whitlock,** 26 Wend. [N. Y.], 43, where it held that though a statute providing for a corporate assignment for the benefit of creditors was unconstitutional and void as to creditors generally, still those who had accepted benefits in the form of dividends under the statute were estopped from taking advantage of its invalidity. Nor in the cases first cited is it intimated that the bonds in question might not have been sustained as common-law contracts had there been a sufficient consideration; for this principle is as well established in New York as elsewhere. *Toles v. Adee,* 84 N. Y., 222; *Ryan v. Webb,* 39 Hun [N. Y.], 435; *Goodwin v. Bunzl,* 6 Civ. Pr. Rep. [N. Y.], 226. We can not, therefore, interpret the cases relied on as holding that any statutory bond becomes invalidated when the statute is annulled. These must be understood as applicable only to such bonds as were there in controversy, which were dependent for a consideration entirely upon the validity of the statute.

Plaintiffs in error also rely on *Byers v. State,* 20 Ind., 47, where recovery was denied on a bond given in the course of bastardy proceedings in order to prevent defendant's incarceration. The court held that the sections of the statute which required such a bond were unconstitutional, and said (p. 49): "Such a bond is without a valid consideration, and that fact is a bar to an action upon

* 37 Am. Dec., 246.

it." It will be seen that here also the annulment of the statute left the instrument sued on without any legal basis of recovery. The fact that by executing it the defendant was enabled to retain his liberty afforded him no privileges which he was not all the time entitled to, since, as it developed, there was never any authority for his imprisonment. But in the earlier case of *Spader v. Frost*, 4 Blackf. [Ind.], 190, a bond which procured the release of one lawfully imprisoned was held good as a common-law obligation, though the court recognized that it might have been insufficient under the statute. A similar doctrine is announced in other Indiana cases and is not disapproved, but on the contrary is expressly recognized in the case cited by defendant in error. *State v. Lynch*, 6 Blackf. [Ind.], 395; *Marshall v. State*, 8 Blackf. [Ind.], 162; *Thompson v. Wilson*, 1 Blackf. [Ind.], 358. Moreover, a distinction is drawn between "bonds which may be enforced as common-law obligations between individuals" and "bonds executed to the state for the appearance of persons charged with criminal offenses." *State v. Fraser*, 165 Mo., 242, 261; *Dickenson v. State*, 20 Nebr., 72. In the latter case, COBB, J., makes a distinction between bonds like that involved in *Byers v. State*, 20 Ind., 47, and "appeal and forthcoming bonds," which include the one in controversy.

The cases from New York and Indiana are the only ones to which we are cited where bonds were held void after statutes authorizing them had been declared unconstitutional. We may now refer to some instances where recovery has been allowed on such bonds. In *Daniels v. Tearney*,* 102 U. S., 415, the action was on a bond authorized under the Virginia secession ordinance, which provided that by giving a bond a debtor might prevent the enforcement of execution against him. The court in the case cited pronounced the statute void, but held that inasmuch as the obligor had enjoyed its benefits by obtaining a stay of execution he was estopped to question its validity. The

*26 L. Ed., 187.

language used is peculiarly applicable here: "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he can not, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect." P. 421. In *Ferguson v. Landram,** 1 Bush [Ky.], 548, 5 Bush [Ky.], 230, it was held that a statute authorizing the issuance of certain bonds was unconstitutional but that those who had participated in procuring its passage and accepted benefits therefrom were estopped to deny its validity. See, to the same effect, *Van Hook v. Whitlock,*† 26 Wend. [N. Y.], 43, already cited.

These cases are sufficient, we think, to illustrate the distinction between a bond which depends for its consideration solely upon the requirements of the statute, as in the cases cited by plaintiffs in error, and one which rests upon a consideration of its own. In the latter, the benefits already enjoyed by the obligor are not taken away by the annulment of the statute, and, in the language of POUND, C., in *State v. Paxton,* 65 Nebr., 110, 123, it "may nevertheless be upheld as a common-law contract, if otherwise unobjectionable." See, also, 5 Cyclopædia of Law and Procedure, 748, note 13; 8 Century Digest, sec. 40. This distinction is recognized in *Brounty v. Daniels,* 23 Nebr., 162, which was an action on a bond given in a supposed appeal from the county court in a case where no judgment had actually been rendered. It was held, in effect, that there was no consideration for the bond because no execution could have been issued. But the court also recognizes and reaffirms the earlier cases of *Gudtner v. Kilpatrick,* 14 Nebr., 347, and *Adams v. Thompson,* 18 Nebr., 541, which hold, in substance, that after the benefits of such a bond

* 96 Am. Dec., 350.
† 37 Am. Dec., 246.

have been accepted and enjoyed, the obligor is estopped to question its recitals that an appeal has been perfected. To these have since been added *Dunterman v. Storey,* 40 Nebr., 447; *Flannagan v. Cleveland,* 44 Nebr., 58. See, also, *Thompson v. Rush,* 66 Nebr., 758. The basis of distinction between these two lines of cases is the consideration. If it exists, the instrument may be enforced like any other contract and the annulment of, or departure from, a statute providing for it is not fatal. If, on the other hand, the consideration is absent, the instrument, like any other *nudum pactum,* affords no basis for recovery.

In the case at bar the principal obligor on the bond was enabled by means of it to retain possession of the premises. At the time of the trial below, in February, 1901, he had occupied them for nearly three years following the execution of the bond. As one condition of the bond sought to be enforced was payment of rent, it will be seen that the obligor's promise was supported by a sufficient consideration, and this, without taking into account the fact that he also obtained *pro forma,* at least, a review of the justice's judgment in the district court. Indeed, it can not be doubted that if the instrument in controversy be denied the character of a bond at all and be treated simply as an agreement to pay rent in consideration of the occupancy of the premises, recovery must be allowed. We can reach no other conclusion than that the case at bar belongs to the class, above reviewed, where the bond rests upon a consideration of its own and where the unconstitutionality of the statute can not affect the right of recovery.

We are cited to *Steele v. Crider,* 61 Fed. Rep., 484, but so far as this holds that a bond given to perfect an appeal where none can be taken is invalid, it conflicts with *Gudtner v. Kilpatrick,* 14 Nebr., 347, and *Love v. Rockwell,* 1 Wis., 331. The same may be said of *Jabine v. Oates,* 115 Fed. Rep., 861. We are also cited to *Caffrey v. Dudgeon,* 38 Ind., 512, and *State v. Winninger,* 81 Ind., 51, holding that bonds taken by a justice of the peace in cases beyond

his jurisdiction are void. The distinction between these cases and the one at bar is obvious. There the taking of the bond was, in effect, prohibited; for the justice was forbidden to act in matters beyond his jurisdiction. In this case the annulment of the statute merely leaves the bond without a statutory authority and does not make its execution illegal or leave it in any worse plight than if the statute had never been enacted. 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.

RED WILLOW COUNTY v. ISAAC M. SMITH.

FILED JANUARY 21, 1903. No. 12,404.

Commissioner's opinion, Department No. 1.

1. Officer: FEES: SERVICE RENDERED WITHOUT FEE. An officer can not charge fees not authorized by statute for services performed, and any service rendered for which no statute authorizes a fee must be performed gratuitously.
2. Sheriff: DISTRESS WARRANT. Under the revenue laws of this state, a sheriff in whose hands the county treasurer has placed a distress warrant can not charge the county a fee of fifty cents for a return upon such warrant, "No property found."

ERROR from the district court for Red Willow county. Claim against a county for fees as sheriff, on distress warrants, where no collection has been made. Tried below before NORRIS, J. Judgment on demurrer for plaintiff. *Reversed.*

W. R. Starr, for plaintiff in error.

Webster S. Morlan, contra.

Syllabus by court; catch-words by editor.

KIRKPATRICK, C.

This is an action brought by defendant in error against plaintiff in error, Red Willow county. The facts sufficiently appear from the petition filed in the district court, the material portions of which are as follows: "On [and] between the 2nd day of February, 1899, and the 4th day of January, 1900, the plaintiff was the duly appointed, qualified and acting deputy sheriff of Red Willow county, Nebraska; that on and between said 2nd day of February, 1899, and the 4th day of January, 1900, there were issued by the county treasurer of said Red Willow county two hundred distress warrants for delinquent taxes; that said distress warrants were, by said county treasurer, duly delivered to the plaintiff as such deputy sheriff for collection; that upon receiving said distress warrants the plaintiff made diligent search for property whereon to levy the same, but was unable to find any property in said county subject to levy under said distress warrants. Thereupon plaintiff indorsed upon each of said distress warrants his return that he was unable to collect the same for want of property upon which to levy, and returned the same to the county treasurer of said county; that at the time of making the return of said warrants as aforesaid, the plaintiff also indorsed upon each of them his fees for making said searches and returns amounting to the sum of fifty cents on each warrant." In addition to the foregoing, the petitioner recited the filing of the claim before the board of county commissioners of the county, and their rejection and disallowance of the claim; a copy of the claim being attached to and made a part of the petition. To this petition plaintiff in error filed a general demurrer, which was by the trial court overruled. Plaintiff in error declining further to plead, and electing to stand upon its demurrer, judgment was entered against the county in favor of defendant in error in the sum of $100 and costs, being the amount prayed for in the petition. The one question presented in this court is the correctness of the action of the trial court

in overruling the demurrer. To determine this question the county prosecutes error to this court.

It is well settled in this state that an officer can charge only such fees for the performance of services as are allowed by law, and that services performed by an officer for which the statute does not expressly authorize a charge must be performed gratuitously. *Stoner v. Keith County*, 48 Nebr., 279; *State v. Meserve*, 58 Nebr., 451. We have made a careful examination of the statute and are unable to find any authority under which the fees recovered by defendant in error in the trial court can be legally collected, either by the county treasurer or the sheriff acting under his direction. The principle involved in this case was before this court in *Kane v. Union P. R. Co.*, 5 Nebr., 105, where it was said: "Under the revenue laws, a collector of taxes has not the right to demand and receive from the taxpayer the commissions and five per cent. penalties, unless he has made a 'distress and sale' of the taxpayer's property in payment of his taxes. A mere levy and payment without sale do not entitle the officer to these penalties." In that case a levy had been duly made upon personal property of the delinquent tax debtor. Payment was afterwards made by him and the levy discharged. It was held that the sheriff was not entitled to the commissions and the penalties unless in addition to making a levy he had also made a sale. Whether a deputy sheriff, such as defendant in error alleges himself to be, could recover fees from the county in any case without averments in his petition in addition to those set out, may well be doubted; but it is clear that under the statute and the state of facts as disclosed by the petition, even the sheriff, to whom the distress warrants might properly have been delivered, would not be entitled to compensation from the county for a return made upon such warrants that no property had been found. Experience has demonstrated that a large amount of personal-property taxes is never collected. This was in contemplation of the legislature when it made provision for relieving the county treasurer

and his bondsmen under certain circumstances from liability for failure to collect such taxes. It is very apparent that if a county treasurer were permitted to issue distress warrants against persons who were unable to pay their personal-property tax, many of whom might not even be residents of the state, much less residents of the county at the time the distress warrant was issued, and charge up to the county a fee of fifty cents for making a return upon such warrant that no property was found, it would lead to consequences not contemplated by the legislature. An arrangement like this would be to offer a premium to the county treasurer to increase his own fees at the expense of the public without increasing the public revenues; and if the county treasurer could not himself charge such fees, it is apparent that a sheriff, to whom such distress warrants had been delivered, could not. It is clear that the petition wholly fails to state a cause of action. The demurrer should have been sustained. The judgment of the trial court in overruling the same is wrong. It is therefore recommended that the judgment be reversed and the cause remanded.

HASTINGS and LOBINGIER, 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.

NOTE.—*Fees of Sheriff—Justice of the Peace.*—A public officer who is paid solely by fees takes and holds his office *cum onere;* that is, he accepts his office with its benefits and burdens. He can claim no compensation for any service not specifically provided by statute. The law recognizes no compensation as reasonable, where the statute provides none. In some cases the rule may operate harshly, but the remedy, if any is needed, rests with the legislature alone. The court has no power either to make or amend fee-bills. Murfree, Sheriffs, sec. 1082*a*. Fees of a sheriff are purely statutory; that officer received no fees at common law; hence an action will not lie, at the instance of a sheriff, for a recovery *quantum meruit*, for fees; and an agreement between a constable and judgment creditor, for the

payment of a sum in excess of the statutory fees allowed for serving an execution, is void as against public policy. *Wilcoxson v. Andrews*, 66 Mich., 553. See, also, *State v. Kinne*, 41 N. H., 238.

In Michigan a justice of the peace agreed with an attorney that he would charge no fees in certain cases, unless the judgment was collected. The justice afterward sued the client for fees in sundry suits. Verdict and judgment for defendant. On review the court said: "We entirely agree with the claim that such a contract is in direct violation of public policy. It was an agreement which made plaintiff's right to fees depend on whether or not he gave judgment for the party suing before him. It would be difficult to conceive any more palpable violation of judicial duty. But it is a remarkable claim that, where work is done under such a contract, the contract may be treated as null, and the services regarded as rendered properly. No one can use a void contract as a means of getting better terms than he could have claimed under it. The whole transaction is covered by the same taint, and must be treated as beyond the protection of courts of justice." *Willemin v. Bateson*, 63 Mich., 309, 311. This case was cited with approval in *Wilcoxson v. Andrews, supra.* It is plain to any lawyer that the gist of the holding in *Willemin v. Bateson* is that a justice of the peace, who agrees with a party plaintiff to claim no fees unless the judgment is collected, can collect no fees at all. As such agreements are not unusual, this case should be observed with care.

A sheriff or regular constable who holds a warrant for the arrest of an offender, can not recover a reward offered for his apprehension. This is on the principle that it is against public policy to allow any man to recover a reward for doing his duty as a public officer. Murfree, Sheriffs, sec. 1090, and authorities cited in note.

A constable of Le Sueur county, Minnesota, received a warrant delivered to him by a justice of the peace and, as such constable, traveled 800 miles in pursuit of a criminal, for the purpose of arresting him, but failed to apprehend the criminal. Thereafter plaintiff duly presented a verified bill for $80, for such services, which was disallowed by the board of county commissioners. The case was before the supreme court. Gilfillan, C. J., delivered the opinion, and said, *inter alia:* "As he [the constable] is required to make diligent endeavor to serve any warrant placed in his hands, his duty is not to be measured by his success. Traveling in making such endeavors when he is unable to make service is a similar service to traveling when he succeeds, and it is just as much his duty to perform it, and when performed in good faith he is in justice as much entitled to compensation for it." *Davis v. County of Le Sueur*, 37 Minn., 491, 492, 35 N. W. Rep., 364. Under the Minnesota statute, a constable was entitled to ten cents a mile for "traveling in making any service upon any writ or summons." See General Statutes of Minnesota (1878), chapter 70, section 11. The penal Code of Minnesota, sections 104, 105, makes willful neglect or refusal in any such officer to perform his statutory duty a misdemeanor. The statute

regulating the fees of a Minnesota constable, did not expressly allow mileage, whether the warrant be served or not. Compare the Minnesota with the Nebraska statute.

A sheriff is not entitled to mileage on a personal-tax warrant returned *no property found*. Service of the writ is the actual performance of the duty commanded by it; and when there is no performance of the duty, from whatever cause, there is no service. *Labette County v. Franklin*, 16 Kan., 450; Brewer, J. The Kansas statute provided fees for *service and return*, and that no officer shall receive any fees for constructive services or mileage in any case. A subsequent opinion* by the same judge allowed twenty-five cents for *a return of personal-tax warrant no property found*, but disallowed mileage, citing his former opinion in *Labette County v. Franklin*, *supra*. *Thralls v. Sumner County*, 24 Kan., 594, opinion by Valentine, J., reaffirms the former decisions.

Section 9 of the Statutes of 1869-70, page 148, which provides that the sheriff may charge "for mileage in any criminal case or proceeding," does not authorize him to charge mileage for other traveling than that which is expressly mentioned in the statute, but simply fixes the rate which may be charged when mileage is allowed by any other law or statute; the statute does not allow mileage for traveling in different directions in looking for one charged with a crime, who is not arrested. *Broughton v. Santa Barbara County*, 65 Cal., 257.

A constable is not entitled to fees for traveling to serve a criminal warrant, unless the service is actually made, though the party sought to be arrested can not be found. The rule is probably without exception that no fees are allowed to any officer for traveling to serve process unless the service is actually made. The principle is entirely settled, and it is one of sound policy. It excites to vigilance and fidelity, whereas the opposite rule would afford a strong temptation to remissness and fraud. *Ex parte Wyles*, 1 Denio [N. Y.], 658.

Under a statute fixing the sheriff's fee "for traveling to serve criminal process; at ten cents per mile for every mile actually traveled," the sheriff can not charge, in addition to such statutory fee, for personal expenses, hotel bills, railroad fare, team hire, etc., while traveling to serve criminal process. *Crocker v. Brown County*, 35 Wis., 284.—W. F. B.

**Titus v. Howard County*, 17 Kan., 363.

JOHN GRANT V. COMMERCIAL NATIONAL BANK OF OMAHA.

FILED JANUARY 21, 1903. No. 12,408.

Commissioner's opinion, Department No. 1.

1. **Default:** DEMURRER: PRESUMPTION. Where it appears that a default was entered by the district court in an action upon the same day on which defendant filed a general demurrer to the petition, and it does not appear that the demurrer was on file at the time the default was entered, and further that defendant did not call the attention of the district court to the fact, if it was such, that a demurrer was on file, it will be presumed on error that the trial court acted regularly, and that the default was entered before the filing of the demurrer.

2. **Demurrer:** MOTION TO MAKE MORE DEFINITE AND CERTAIN. Objections going to the formal defects of a pleading can not be raised by demurrer, but must be raised by motion asking a more definite and specific statement.

3. **Demand Note:** ACTION. In an action on a demand note, the failure to allege a demand before suit brought, will not be held fatal after judgment.

ERROR from the district court for Douglas county. Action to foreclose a lien. Tried below before ESTELLE, J. Judgment for plaintiff. *Affirmed.*

Hall & McCulloch, for plaintiff in error.

Westel W. Morsman, contra.

KIRKPATRICK, C.

This is a suit brought in the district court for Douglas county to foreclose a lien upon eighty-two and a half shares of the capital stock of the Grant Paving Company, which certificates had been pledged as security for the payment of three promissory notes aggregating the sum of $5,000. The suit was brought on the 16th day of August, 1901, and plaintiff in error, defendant below, was required to answer on or before September 17, 1901. On October 23, 1901, a decree was entered by the trial court, foreclosing the lien

Syllabus by court; catch-words by editor.

and ordering that the stock be sold by the sheriff for satisfaction of the amount due, which was duly found and adjudged against plaintiff in error. Error is prosecuted to this court from such judgment. It is alleged that there is error in the judgment of the trial court in this: First, that the trial court improperly entered judgment by default against plaintiff in error on October 23, 1901, at which time, it is alleged, plaintiff in error had on file a demurrer to the petition, no action having been taken thereon by the court; second, that the trial court erred in entering judgment because the facts stated in the petition were not sufficient to constitute a cause of action; and, third, that the decree of the trial court is contrary to law.

It is disclosed by the record that on October 23, 1901, and on the same day the default was entered, plaintiff in error filed in the office of the clerk of the district court a general demurrer to the petition. A copy of the appearance docket, which has been made a part of the record, discloses that the decree of foreclosure, properly signed by the trial judge, was filed in the office of the clerk before the demurrer of plaintiff in error was filed. In the decree entered by the court is found this language: "This cause coming on to be heard on this 23d day of October, 1901, and it appearing to the court that the defendant John Grant has been duly and legally served with summons, commanding him to appear and plead herein, and it further appearing that the said defendant John Grant has failed to appear and plead herein within the time allowed by law and the rules of this court, he is now adjudged to be in default for want of any appearance, and default is hereby entered against the defendant John Grant." It is contended on behalf of plaintiff in error that the demurrer was in fact filed in the morning of October 23, and before the entry of the decree. If this is true, it does not so appear in the record. It is the settled rule that error must affirmatively appear. It can never be presumed. The trial court found and adjudged plaintiff in error to be in default for want of any appearance, and this finding must be taken as true, espe-

cially in the absence of any showing that the demurrer was actually on file in the clerk's office when the decree was entered. Again, it is disclosed that plaintiff in error did not in any manner bring this question to the attention of the trial court. If a motion had been filed, calling the attention of the trial court to the fact, if it was a fact, that the demurrer was properly on file when the default was entered, we have no doubt that the default would have been set aside and plaintiff in error have been given a hearing on his demurrer. It is very clear from the record before us that the first contention of plaintiff in error can not be sustained.

Is the judgment erroneous because of failure to state a cause of action in the petition? The petition sets up the execution and delivery of the promissory notes by plaintiff in error to defendant in error, copies of the notes being set out, and also alleges that "each one of said promissory notes aforesaid is now wholly due and unpaid." It is disclosed by the petition that one of these notes was a demand note, and there is no allegation that a demand had been made. Again, it is urged that there is no allegation setting out the agreement under which it was proposed to sell the shares of stock. Regarding the first contention, it may be said that it does not appear to be necessary that the demand be alleged in order to entitle plaintiff to recover on a promissory note payable on demand. As to the other proposition, it seems rather to be an objection going to the certainty and particularity of the allegations, and as such, comes too late after judgment. Plaintiff in error, if he desired a more specific and certain statement, should, by proper application, have asked the trial court to require a more definite and specific statement. Neither of these contentions can be sustained.

It is next contended that the decree is not according to law, because it in terms directs the sheriff to assign and transfer the shares of stock to the purchaser before it contains the provision that the sale must be reported to the trial court. That portion of the decree is in the words fol-

lowing: "And it is further ordered, adjudged and decreed that the plaintiff be allowed to bid for and purchase said shares of stock at said sale, and the said sheriff is hereby ordered to assign and transfer said shares to the purchaser thereof at said sale by writing indorsed on the back of or attached to said certificates, and to report said sale to this court, and that this cause be retained for such other and further proceedings as the parties hereto may be entitled to take." We are of opinion that the objections of plaintiff in error in this regard can not be sustained. The mere fact that that portion of the decree directing the sheriff to transfer the stock is made to appear before the provision directing the sheriff to report the sale to the trial court is wholly immaterial. Plaintiff in error filed no motion for a new trial, and did not in any way seek to bring any of the alleged defects to the attention of the trial court. In this state of the record, this court will certainly not presume error for any of the reasons urged. While it may probably have been unnecessary for plaintiff in error to file a motion for a new trial in order to review the errors complained of, a much better practice, particularly under the facts herein, would have been to call the attention of the trial court to the matters complained of, and to have given that tribunal an opportunity to rectify such errors as might upon a hearing have appeared.

There seems to be no error in the record, and it is therefore recommended that the judgment of the trial court be affirmed.

HASTINGS and LOBINGIER, CC., concur.

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

AFFIRMED.

HERMAN GROSS V. CHRISTIAN F. SCHEEL.

CHRISTIAN F. ZIEMAN V. CHRISTIAN F. SCHEEL.

FILED JANUARY 21, 1903. No. 12,507.

Commissioner's opinion, Department No. 2.

1. **Conversion**: DEMAND: EVIDENCE. In an action to recover damages for the conversion of goods, the only purpose of a demand is to establish the fact of a conversion. Where a wrongful conversion is established by other testimony a demand need not be shown.

2. **Reply**: ANSWER: DEFECTIVE PLEADING: MOTION: WAIVER: DENIAL IN REPLY OF ALLEGATIONS IN ANSWER INCONSISTENT WITH PLAINTIFF'S PETITION. A reply to an answer denying each and every allegation contained in the answer inconsistent with the statements of plaintiff's petition is defective, and an insufficient denial of the allegations of the answer, and, upon a motion to make more specific, will be held bad, and unless amended so as to conform to the Code will be treated as no denial. But if upon such denial the parties go to trial treating it as a sufficient denial, it must be so treated in all stages of the case. *Herdman v. Marshall*, 17 Nebr., 252, approved and followed.

3. **Evidence**: MEMORANDUM. A memorandum in the form of an inventory of goods may be used by a witness to refresh his memory in order to enable him to testify as to the particular items of a stock of goods, and their value, which he claims has been converted. And an itemized statement in the form of a memorandum of goods purchased and added to the stock described in the inventory may be used in the same manner and for the same purpose, and where the witness testifies that he made such memoranda himself and that they are correct, they may be introduced in evidence to corroborate his testimony.

4. ———: ———: CASH REGISTER: USE BY WITNESS. Where a memorandum is kept in connection with a cash register, upon which, in the usual course of business, are entered all of the sales in a mercantile establishment, both cash and credit, at the time when such sales are made, it may be used by a witness to refresh his memory as to the amount of goods sold; and when he can testify, as a matter of fact, that such memorandum is correct, it may afterwards be put in evidence, not to prove anything of itself, but as a detailed statement of the items testified to by the witness.

5. **Evidence**. Evidence examined, and *held* sufficient to sustain the verdict.

Syllabus by court; catch-words by editor.

6. Action for Conversion: VERDICT: EVIDENCE: JUDGMENT. Where an action is brought against several persons for the conversion of a stock of goods and a verdict is rendered against all of them, and the evidence is not sufficient to sustain it as against one or more of them, their motion for a new trial may be properly sustained, and judgment rendered on the verdict against the other defendants. *Hayden v. Woods*, 16 Nebr., 306, approved and followed.

ERROR from the district court for Saline county. Action for the conversion of a stock of goods. Tried below before STUBBS, J. Verdict for plaintiff. Each defendant moved for a new trial. Judgment on the verdict against Herman Gross and Christian Zieman, from which judgment they separately bring error. *Affirmed.*

George H. Hastings, William G. Hastings and *Robert Ryan*, for plaintiffs in error.

Fayette I. Foss and *A. R. Scott, contra.*

BARNES, C.

This case was commenced in the district court for Saline county by Christian Scheel against Herman Gross, Ernst Gross, Otto Lindekugel and Christian F. Zieman, to recover the value of a certain stock of goods consisting of hardware, tinware, saddlery, harness goods, leather, blankets, furniture, coffins and funeral furnishings, situated, on and before the 23d day of December, 1895, in a store building in the village of Western, in said county. It was alleged in the petition that on or about the 23d day of December, 1895, the defendants obtained possession of the property, to wit, the goods and merchandise in the store building, and then and there unlawfully and wrongfully converted them to their own use, to the plaintiff's damage in the sum of $3,500. An application was made by the defendants to require the plaintiff to make his petition more definite and certain by attaching thereto a bill of particulars, or inventory describing the goods in question, and this was accordingly done. Thereupon the defendants filed their

amended answer to the plaintiff's petition, which contained, first, a general denial of each and every allegation contained therein; second, it was alleged, in substance, that on the 8th day of January, 1896, the defendant Christian Zieman, by the request and solicitation, and on the procurement of the plaintiff, and with his full consent and participation, purchased for a valuable consideration, of the People's Bank of Western, Nebraska, and its cashier, a stock of goods like that mentioned in the plaintiff's petition, but of a value not to exceed $600; that plaintiff was, thereby, wholly estopped to deny the title of said defendant Zieman or his grantors in said purchase; that on said 8th day of January, 1896, the defendant Herman Gross, with the full knowledge and assent of the plaintiff at that time, for a valuable and adequate consideration, to wit, the sum of $600 then paid by him, purchased and received the said stock of goods from the defendant Christian Zieman, with the full knowledge and assent of the plaintiff, and upon plaintiff's express declaration that he had no interest in said goods and merchandise, and that plaintiff was wholly estopped to assert any title therein as against the defendants, or either of them. To this amended answer a reply was filed as follows: "Now comes the plaintiff and for reply to the said defendants' amended answer denies each and every allegation in said amended answer contained that in any way conflicts or contradicts the allegations in plaintiff's petition." No motion was filed to require this reply to be made more definite and certain; it was not demurred to, and no motion was made for a judgment on the pleadings, but it was treated at the time and during the whole of the trial as though it was sufficient, and fully denied the allegations of the defendants' answer. Upon the issues above stated the cause was tried to a jury and resulted in a verdict in favor of plaintiff and against all of the defendants for the sum of $2,107.54. Each of the defendants filed a motion for a new trial. These motions were sustained as to the defendants Ernst Gross and Otto Lindekugel, but were overruled as to the

defendants Herman Gross and Christian F. Zieman, and thereupon a judgment was rendered on the verdict in favor of the plaintiff and against the last-named defendants. From that judgment the defendants prosecute error to this court, and hereafter they will be called the plaintiffs, and the plaintiff in the court below will be called the defendant.

It was made to appear that at and before the 19th day of November, 1895, the defendant owned the stock of hardware, harness goods, saddlery, tinware, coffins and undertakers' goods in question, and had for some years before that time been conducting a store in a building owned by his wife, situated in the town or village of Western, in Saline county; that he was indebted to the People's Bank of Western to the amount of about $800; that the plaintiff Zieman had signed his notes to the bank as surety, and was interested in the payment thereof; that on or about the said 19th day of November one Butler, the cashier of the bank, took a mortgage from defendant upon the stock of goods in question as additional security for the payment of said debt; that immediately after the execution of the mortgage the bank took possession of the goods, locked up the store, put a notice in the window that the stock had been seized and was held under a chattel mortgage, and advertised the goods for sale. On the 23d day of December following, there was an attempt made to sell the goods under the chattel mortgage. One Robert Gross, a brother of one of the plaintiffs, bid the sum of $600 for the stock, and the auctioneer, or person conducting the sale, struck it off to him. Butler, acting for the bank, thereupon retired from the store and locked it up, retaining possession of the key. Gross refused to make his bid good,—refused to accept and pay for the goods,—and the matter remained in that situation until the 8th day of January, 1896. On that day plaintiff Christian Zieman executed a bill of sale of the stock of goods to plaintiff Herman Gross for the alleged consideration of $600. This money was turned over to the bank. The cashier of that institution delivered the key to Herman Gross, who took possession of the

property, and has ever since retained it, and claims to own the same under the bill of sale from Zieman. It appears that the auctioneer at the sale, when Robert Gross refused to make his bid good and pay over the money for the goods, without the knowledge or consent of the defendant, and at a time subsequent to the 23d day of December, 1895, at Butler's solicitation made out a bill of sale by which he purported to convey the stock of goods to the plaintiff Christian Zieman. It is shown, however, that the defendant had nothing to do with it and had no knowledge of the transaction. It further appears that the defendant was present in the bank on the 8th day of January, when Zieman executed the bill of sale to Gross, and refused to sign it, or have anything to do with the matter. It further appears that he made a bill of sale of his tinner's tools to Gross about that time, in consideration of the payment of the agreed price thereof. Matters remained in that situation until this action was commenced by the defendant to recover the value of the goods.

1. It is contended that it was necessary for the defendant to make a demand for the possession of the goods before he could maintain his action. Defendant admits that he personally made no demand, but testified that he sent his wife to the store for that purpose. She testifies that she made such demand, while plaintiff Gross testifies that she only demanded the possession of the defendant's diploma, which was in the store; and we are unable to say that, as a matter of fact, no demand was ever made. It is evident that upon this conflicting evidence the jury found for the defendant, and such finding will not be set aside. It may be suggested, however, in a case like this, where the defense pleaded was the ownership of the property in question, that no demand was necessary in order to maintain the action.

In *Wright v. Greenwood Warehouse Co.*, 7 Nebr., 435, it was held: "In an action to recover damages for the conversion of goods, the only purpose of a demand is to establish the fact of conversion. Where a wrongful conversion is es-

tablished by other testimony, a demand need not be shown."

"When the conversion is direct, as by an illegal taking of the chattels, or a wrongful assumption of property, or a misuse of it, the conversion is complete without a demand." 4 Am. & Eng. Ency. Law [1st ed.], p. 115.

A demand is not necessary if the taking is tortious, or the actual conversion is otherwise proved. In any event, the jury having determined this question upon conflicting evidence, the plaintiffs, so far as this contention is concerned, must fail.

2. It is claimed that the reply failed to controvert the new matter of defense set up in the answer, and that therefore judgment should have been rendered for the plaintiffs. It will be observed, however, that no motion for a judgment on the pleadings was made by them. They never asked to have the reply made more definite and certain, but upon the trial of the case treated it as amply sufficient to put in issue the averments of the answer. It has been repeatedly held by this court that where the pleading has been thus treated by a party he can not take advantage of its insufficiency after trial.

In *Albion Milling Co. v. First Nat. Bank of Weeping Water,* 64 Nebr., 116, it was held that where an answer is faulty, but is replied to, and treated by the plaintiff as sufficient during the whole trial and proceedings, the court should refuse to instruct a jury, at the plaintiff's request, that certain of the facts alleged in the petition were not denied by such answer.

In *Rosenbaum v. Russell,* 35 Nebr., 513, it was decided that an answer, although faulty, will be held to be sufficient when assailed for the first time by a motion for a new trial.

In *Herdman v. Marshall,* 17 Nebr., 252, this court, having under consideration a question identical with this one, said: "A reply to an answer denying each and every allegation contained in the answer inconsistent with the statements of plaintiff's petition, is defective and an insuffi-

cient denial of the allegations of the answer, and upon motion to make more specific will be held bad; and unless amended so as to conform to the Code will be treated as no denial. But if upon such denial the parties go to trial, treating it as a sufficient denial, it must be so treated in all stages of the case."

In this case the reply to the answer was treated as sufficient during the trial in the district court, and the objection is made to it for the first time in plaintiffs' brief. The objection comes too late. The pleadings will be treated in this court in the same way they were treated by the parties in the trial court. The plaintiffs are not entitled to a new trial on this ground.

3. It is urged that the court erred in admitting Exhibits A and B in evidence over plaintiff's objections. Exhibit A appears to be a copy of the bill of particulars, or inventory, attached to the petition in the court below at their request. It is not a book account, but is an inventory, taken by the defendant of the stock of goods in his store on the 1st day of January, 1895. After he had testified to the value of the goods in question, he was permitted to introduce this inventory to corroborate his statement and show the particular items of goods which he claimed had been converted. After the introduction of this inventory, defendant testified as to the amount of goods purchased by him and placed in the store after the inventory, Exhibit A, was made out. Exhibit B is an itemized statement of the goods purchased and added to the stock described in Exhibit A. The defendant thus established the amount of goods, kind and value, that he would have had in stock at the time they were alleged to have been converted by the plaintiffs, if no sales had been made. These exhibits were not book accounts, therefore plaintiffs' objection to them on that ground is not tenable. They, rather, come under the head and designation of a memorandum made by the witness himself, and were therefore admissible in evidence after the witness had testified that he made them, and that they were correct at

the time they were made. It was proper for the witness to refresh his recollection from these documents, and after testifying to the facts contained therein, and that they were correct, it was proper to receive them in evidence to corroborate his testimony. It has been held, where a stock of goods is wrongfully seized, and an action is brought to recover for the conversion, as there are thousands of items and no witness could carry all of them in his mind and the value to be attached to them, that in such a case a witness may make a list of all the items and their value, and he may aid his memory, while testifying, by said list. He must be able to state that all of the articles named in the list were seized, and they were of the value stated therein, and he may use the list to enable him to state the items. After the witness has thus testified, the memorandum which he has used may be put in evidence, not to prove anything of itself, but as a detailed statement of the items testified to by the witness. The manner in which the memorandum, in such a case, may be used, is very much in the discretion of the trial judge. Bradner, Evidence [2d ed.], p. 470; *St. Paul Fire & Marine Ins. Co. v. Gotthelf,* 35 Nebr., 351. We hold, therefore, that these exhibits were properly admitted in evidence.

4. It is next contended that the court erred in admitting in evidence Exhibits C, D, E and F. It was made to appear when these exhibits were offered, that in the usual course of defendant's business he kept and used a cash register, with an attachment thereto which contained a roll of paper upon which every sale of goods which occurred was entered; that every time payment was made therefor it was entered on the roll, and the money was turned into the cash register; that in case the sale was on credit the roll above described was the first place where the charge was made against the purchaser. The above-mentioned exhibits were the rolls used in connection with this cash register, from the date when the inventory, Exhibit A, was taken, to the time when the goods were seized and taken from the possession of the defendant

under the chattel mortgage given to the bank. These rolls were introduced for the purpose of showing the amount of sales, both in cash and on credit, and, as stated by the defendant in his evidence, contained an accurate account of all sales of goods made during the time they were so kept, which he knew to be correct; that the entry on these rolls had been made either by himself or his clerk in the usual course of business. These exhibits, composed of said memoranda, were offered to show the amount of goods sold, and the decreased value of the stock by reason of such sales, and were competent evidence to be received for the purpose for which they were introduced, under the rule above announced. And we hold that they were properly received in evidence, and the plaintiffs are not entitled to a new trial on that ground.

5. Many other assignments are discussed under different heads, but all of them bear upon the question of the sufficiency of the evidence to sustain the verdict. An examination of the bill of exceptions discloses that there was some conflict in the evidence but that it is sufficient to sustain the verdict. It was clearly established that there was no sale under the chattel mortgage; that the person who attempted to make the sale, after it was over and the bidder to whom the goods had been struck off had refused to make his bid good, had, without the knowledge or consent of the defendant, assumed to make a bill of sale thereof to the plaintiff Christian F. Zieman. It is established beyond question that Zieman never purchased the goods at the chattel mortgage sale; that for some days he refused to have anything to do with the matter, but at last was persuaded by Butler, the cashier of the bank, and others, to take the bill of sale from the auctioneer and convey the goods to the plaintiff Gross. This he did, and no one contends that the defendant, Scheel, ever gave any direct authority therefor. Some of the witnesses testified that Scheel was present at the bank when Zieman executed the bill of sale to Gross. No one, however, pretends to say that Scheel gave his direct consent thereto or said anything about it. It is contended, however, that he gave

his consent by his mere presence and failure to object. Scheel testifies that he did object, that they asked him to sign a bill of sale and he refused to do so. It can not be contended that the bank, by virtue of the chattel mortgage, had any right to procure the bill of sale to be made from Grimm, the person who conducted the sale, to Zieman. It is evident that Zieman had no authority under the chattel mortgage, or any of the proceedings in relation to its attempted foreclosure, to take possession of the goods. By his bill of sale to Gross he conveyed no title to him, and, so far as it appears, the action of Zieman and Gross amounted to a conversion of the property in question. The defendant gave evidence of the value of the goods, which was not disputed, and his wife testified that she made a demand for the possession thereof from the plaintiff Gross. We are therefore unable to say that the verdict of the jury was not supported by the evidence, or that it was clearly wrong, and for that reason it will not be set aside.

6. Lastly, it is contended that the court erred in sustaining the motions of two of the defendants for a new trial. The evidence shows that neither Ernst Gross nor Otto Lindekugel ever intermeddled with the defendant's stock of goods in any manner. They were present when Zieman gave the bill of sale to Herman Gross, but took no part in the transaction, and had no interest therein. The evidence was not sufficient to sustain a verdict against either of them, and their motion for a new trial was properly sustained. *Hayden v. Woods*, 16 Nebr., 306.

An examination of the instructions discloses that the questions involved in this case were correctly submitted to the jury. The case seems to have been fairly tried, and we recommend that the judgment of the district court be affirmed.

OLDHAM and POUND, CC., concur.

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

AFFIRMED.

W. M. WARNER, ADMINISTRATOR OF THE ESTATE OF LEOAN RICHARDSON, DECEASED, v. MODERN WOODMEN OF AMERICA.

FILED JANUARY 21, 1903. No. 12,529.

Commissioner's opinion, Department No. 2.

1. **Member of Fraternal Beneficial Society:** PROPERTY IN CERTIFICATE: TRUST IN FAVOR OF ESTATE OR CREDITORS. A member of a fraternal beneficial society has no such interest or property in the proceeds of a certificate therein, as will impress such proceeds with a trust in favor of his estate or his creditors.

2. **Provision of Certificate:** WIDOW: HEIR: BLOOD RELATIVE: FIANCEE: DEPENDENT: STATUTE: BY-LAWS: NON-EXISTENCE OF BENEFICIARY: ESTATE: ADMINISTRATOR. Where a certificate in such an association provides that payment thereof shall be made only to the family, widow, heirs, blood relatives, affianced wife or persons dependent upon the member, and the by-laws of the association, as well as the statutes of the state under which it is organized, contain the same provisions, the death of such member, without the existence of any one who is entitled to be made a beneficiary under his certificate, creates no interest in his estate to the fund mentioned therein, and his administrator can not recover against the association on such certificate.

3. ———: HEIRS: EQUITABLE RIGHT: CREDITORS: TESTAMENTARY BENEFICIARY: REVERSION TO SOCIETY. Where, under such circumstances, the certificate is payable to the legal heirs of the member, and he dies, leaving no heirs, without designating any other beneficiary, and it appears that there is no one in existence who could legally become such beneficiary, no equitable rights accrue to either the creditors or the estate of the deceased member, and the fund contemplated by the certificate will revert to the society.

ERROR from the district court for Lancaster county. Action by administrator upon a benefit certificate issued by the defendant in error to plaintiff's intestate. Demurrer by defendant. Tried below before FROST, J. Judgment on demurrer. *Affirmed.*

Ricketts & Ricketts, for plaintiff in error.

John G. Johnson, Adolphus R. Talbot and *Thomas S. Allen, contra.*

Syllabus by court; catch-words by editor.

BARNES, C.

On or before the 20th day of April, 1896, one Leoan Richardson became a member of the local camp of the Modern Woodmen of America situated at Maquon, Illinois, and on that day made application to said camp for a benefit certificate therein for the sum of $1,000. Upon the payment of the required charges and fees such certificate was issued and delivered to him; and the association, thereby, promised to pay said sum, on the death of the said Richardson, to his legal heirs, the beneficiaries named therein. Richardson, during his lifetime, complied with all of the rules, conditions, regulations and by-laws of the association, and paid all dues and assessments made or demanded of him. On the 27th day of June, 1900, he departed this life in Seward county, in this state, leaving no last will and testament. He had never designated any change in the beneficiary under his said certificate; and after his death it was ascertained that he left no children, relatives, kindred, legal heirs or others sustaining such relation to him as would entitle them to become beneficiaries under the terms of the certificate and the by-laws of the association. Thereupon the plaintiff herein was appointed administrator of his estate, and commenced this action in the district court of Lancaster county upon said certificate to recover the amount due thereon as a part of said estate. It was alleged in the petition that the defendant is a corporation, duly organized under the fraternal insurance laws of the state of Illinois; that it has a large number of lodges organized in the state of Illinois, and other states; that the primary purpose and object of the principal organization is to issue benefit certificates to members of its several lodges in the nature of life benefit certificates of life insurance, payable on the death of the member to the beneficiaries named in the certificate; that the persons who may become beneficiaries, are defined in section 40 of the by-laws of said association as follows:

"Section 40. Benefit certificates shall be made payable

only to the family, widow, heirs, blood relatives, affianced wife, or persons dependent upon the member, and to such others whom the applicant shall designate in his application."

It was alleged that it was also provided in section 41 of the defendant's by-laws that the certificate holder may change the beneficiary designated in the original application, but that it confines the beneficiaries to those named in section 40 above quoted; that the beneficiaries named in section 40 are in substantial accord with the beneficiaries named in the fraternal insurance laws of the state of Illinois, under which the defendant is organized; and that the certificate contained the following recital:

"This certificate issued by the Modern Woodmen of America, a corporation organized and doing business under the laws of the state of Illinois, witnesseth: That Neighbor Leoan Richardson, a member of Maquon Camp, No. 3618, located at Maquon, Illinois, is, while in good standing in this fraternity, entitled to participate in its benefit fund, to an amount not to exceed $1,000, which shall be paid, at his death, to his legal heirs, related to him as heirs, and subject to all the conditions of this certificate and by-laws of this order, and liable to forfeiture if said member shall not comply with said conditions, laws, and such by-laws and rules as are, or may be, adopted by the head camp of this order from time to time, or the local camp of which he is a member."

The death of Richardson was properly alleged in the petition, the appointment of the plaintiff herein as administrator was set forth therein, and all of the facts necessary to constitute a cause of action, if one could be maintained by the plaintiff, were pleaded. And it was further alleged "that by reason of the premises there is a resulting trust in favor of the plaintiff as administrator of the intestate, and there is now due and owing this plaintiff, in his representative capacity, from the defendant on said benefit certificate, the sum of $1,000, together with interest thereon at the rate of seven per cent. per annum from the 1st day

of November, 1900," for which the plaintiff prayed judgment. To this petition the defendant filed a demurrer, based on the following grounds: First, the plaintiff has not legal capacity to sue; second, the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. The trial court sustained the demurrer. The plaintiff elected to stand upon his petition, refused to further plead, and thereupon a judgment was rendered dismissing the plaintiff's action, and from that judgment the plaintiff prosecutes error to this court. This brings before us the single question as to whether or not the plaintiff, as administrator of the estate of the deceased, is entitled to maintain this action against the defendant herein to recover the sum alleged to be due upon the benefit certificate set forth in his petition.

Plaintiff in error bases his whole contention on the theory that by reason of the facts hereinbefore stated, a trust fund was created which he was entitled, in his representative capacity, to recover. His argument is, in substance, as follows: The defendant was the trustee of the fund which it is alleged was created by the benefit certificate; the deceased was the trustor, and his legal heirs were, by such certificate, made the beneficiaries or the *cestuis que trustent;* that, there being a failure of beneficiaries contemplated by the parties, he, as administrator of the estate of the trustor, would be entitled to recover the trust fund.

This contention can not be sustained, for several reasons. The purposes and objects of this beneficiary organization are vastly different from those of ordinary life insurance companies. The so-called old-line insurance companies, immediately on issuance of a policy, confer on the beneficiary a valuable right, which can not be divested without his consent. Such policies may be pledged or assigned by the beneficiary as security for the debts of the insured. These policies often by law have a marketable or cash-surrender value, making them a form or kind of

property. This is not the case with certificates in fraternal beneficiary societies. They are mere expectancies. The beneficiary has no vested rights in them, and the insured any time, at his option, may change the beneficiary, provided only he keeps within the limitation established by the rules of the society and complies with its laws respecting such change. These certificates have no cash-surrender value. The intestate had no property in the fund. The fund, in fact, was never his property. He had power of appointment, only, and such power did not create any property in him. The only interest he had in the association was his membership interest. *Fisher v. Donovan,* 57 Nebr., 361, 44 L. R. A., 383. The purpose of these certificates excludes the claim that there was any property interest therein in the insured member. *Fisher v. Donovan, supra; Northwestern Masonic Aid Ass'n v. Jones,* 154 Pa. St., 99, 26 Atl. Rep., 253; *Rollins v. McHatton,* 16 Colo., 203, 27 Pac. Rep., 254, 25 Am. St. Rep., 260; *Hellenberg v. Order of B'Nai Berith,* 94 N. Y., 580; Bacon, Benefit Societies, 237-241; *Eastman v. Provident Mutual Relief Ass'n,* 62 N. H., 555; *Keener v. Grand Lodge A. O. U. W.,* 38 Mo. App., 543; *Maryland Mutual Benefit Society v. Clendinen,* 44 Md., 429; 22 Am. Rep., 52; *Arthur v. Odd Fellows' Beneficial Ass'n,* 29 Ohio St., 557.

It follows that if Richardson had no property in the certificate in question, he had no right or interest therein upon which he could impress a trust; it became, upon his death, no part of his estate, and his administrator could have no right, title or interest therein. The defendant was organized to issue certificates of indemnity, calling for the payment of a certain sum, known and defined, in case of death, to the family, widow, heirs, blood relations, affianced wife, or persons dependent upon the member only. The by-laws of the defendant provide that "the objects of this fraternity are to promote true neighborly regard and fraternal love, and bestow substantial benefits upon the family, widow, heirs, blood relations, affianced wife, or persons dependent upon the member and such

others as may be permitted by the laws of the state of Illinois." These provisions are strictly in accordance with the statutes of that state under which the defendant association was organized. None of these designations include the administrator of the estate of the deceased member, his estate or his creditors. Section 94 of chapter 43 of the Compiled Statutes of this state (Annotated Statutes, sec. 6486) provides: "No fraternal society created or organized under the provisions of this act shall issue beneficiary certificates of membership to any person under the age of eighteen years, nor over the age of fifty-five years. Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife, or to persons dependent upon the member." Not only will it be presumed that the statutes of Illinois are the same as the statutes of this state, but the petition shows that they are identical. It is therefore plain that if the deceased during his lifetime had changed the beneficiary so as to include either his estate, the administrator thereof, or his creditors, such designation, under the by-laws and rules of the association and the statutes of the state where it was organized, together with the statutes of this state where he departed this life, would have been absolutely void and would have conferred no rights whatever upon the persons designated therein. A person not of the class for whose benefit a mutual benefit association is organized, can not be a beneficiary. *Fisher v. Donovan, supra; Wolf v. District Grand Lodge,* 102 Mich., 23, 60 N. W. Rep., 445; *Britton v. Supreme Council,* 46 N. J. Eq., 102, 19 Am. St. Rep., 376, 18 Atl. Rep. 675; *National Mutual Aid Ass'n v. Gonser,* 43 Ohio St., 1, 1 N. E. Rep., 11; *Alexander v. Parker,* 144 Ill., 355, 33 N. E. Rep., 183, 19 L. R. A., 187; *Norwegian Old People's Home Society v. Willson,* 52 N. E. Rep. [Ill.], 41.

If Richardson during his lifetime could by no act of his confer the right to recover the amount named in the certificate upon his estate, the administrator thereof, or his creditors, it is plain that his death could in no manner

operate to create such a right. It appears on the face of the petition that at the time of his death, diligent search was made, and so far as could be ascertained, he had no legal heirs. We thus have a case where the situation is the same as though the death of the beneficiary had occurred before that of the insured, and no new beneficiary had been named by him. It is earnestly contended by the plaintiff that although the beneficiary was not in existence, still such fact would not defeat a recovery, and that as a matter of equity, the right to recover would be transferred to the administrator of the estate of the deceased member; and several cases are cited in support of this contention. A careful examination discloses that although in each of them the death of the beneficiary had occurred, and the member had made no other designation, there was some one in existence who could have been made a beneficiary under the terms of the certificate, and the statutes under which the association was organized.

In the case of *Ryan v. Rothweiler,* 50 Ohio St., 595, 35 N. E. Rep., 679, the insurance company abandoned all claim to hold the proceeds of the certificate. The question as to the right of the administrator to take the proceeds was waived. There was but one question for the court to decide, and that was, which of the administrators had the better right to the fund? This question was finally decided by the application, to the contract, of the statute of the state, which was as follows:- "But if there are no children upon the death of the wife, such policy shall revert to and become the property of the party whose life is insured, unless it has been transferred as hereinafter provided."*

In *Schmidt v. Northwestern Life Ass'n,* 83 N. W. Rep. [Ia.], 800, 51 L. R. A., 141, 84 Am. St. Rep., 323, the question before the court was who among the three claimants had the most equitable claim to the money. In that case the wife, who was named as the beneficiary, had murdered her husband, and was in the penitentiary for life. In the body of the opinion it was pointed out clearly that the statutes

*2 Bates's Annotated Statutes, sec. 3629.

of Iowa prescribed certain rules from which beneficiaries in such certificates may be named, and it was held that where there was a failure of beneficiary, as was decreed therein, a resulting trust was created in favor of some one within the class named in the statutes; that while the administrator of the murdered member is entitled to recover, he can only hold the fund recovered as a trustee for claimants who might bring themselves within the class of beneficiaries named in the statutes. It can scarcely be contended that this case supports plaintiff's claim. The statutes, both of this state and of the state of Illinois, specify the classes from which may be selected the beneficiaries in such contracts as the one in suit, and thus exclude the estate, the administrator, and the creditors of the insured.

In *Rindge v. New England Mutual Aid Society,* 146 Mass., 286, the member had distinctly made a creditor his beneficiary, in violation of the statutes of the state and of the by-laws of the association. The court held that whereas the statutes of the state provided that the orphans of a member might be beneficiaries under such certificates, and the certificate itself provided that on the death of the named beneficiaries, prior to the death of the member, and the failure of the member to name other beneficiaries, the insurance should be for the benefit of the heirs of the member, that the administrator could maintain an action on the certificate for the benefit of the heirs.

In the case of *Shea v. Massachusetts Benefit Ass'n,* 160 Mass., 289, 39 Am. St. Rep., 475, it was held that where the named beneficiaries can not take the amount due, the certificate would be payable to claimants who might bring themselves within the classes of beneficiaries named in the by-laws, and as heirs were within such by-law provisions, an executrix might recover, but only for their benefit.

In *Burns v. Grand Lodge,* 26 N. E. Rep. [Mass.], 443, the original designation of the beneficiary was invalid. The constitution and by-laws of the defendant provided

that in case of death of all the beneficiaries the money should be paid to the heirs at law of the insured, and therefore it was held that an action could be maintained upon the certificate to recover the amount due thereon for such heirs.

It will thus be seen that in all cases where a recovery has been had under circumstances similar to those in the case at bar, there has been some one in existence who might have been designated as a beneficiary under the by-laws of the association and the statutes under which it was organized. According to the plaintiff's petition, the deceased designated in his benefit certificate that his legal heirs should be the beneficiaries; at the time of his death he was unmarried; and he left no children, relatives or kindred, or others sustaining such relation to him as would entitle them to become beneficiaries under the by-laws of the defendant association. There being no one competent to become a beneficiary and the deceased having failed to execute the power of designation, there was a total lapse of the power. The certificate in this case was neither payable to the deceased, nor to any one, except as named by him. He had named his legal heirs as beneficiaries. It is not alleged in the petition that no persons were in existence who could have become Richardson's legal heirs at the time he made his designation and the certificate was issued; the allegation is that at the time of his death no such heirs could be found. It is not claimed that he named any other beneficiary, and why he did not do so, it is unnecessary to inquire. He may have intended that his associate members should not be called upon to contribute the sum required to fulfill the contract. As we have before stated, it could not go to the administrator, nor be subject to the payment of the debts of the member. Where there is a failure to designate a beneficiary, or there is a void designation, or the death of the beneficiary occurs before that of the insured, and no new beneficiary is named, the association is not liable; and if no disposition of the fund is provided for in the contract with the association, it

reverts to the society. *Hellenberg v. Order of B'Nai Berith*, 94 N. Y., 580; *McElwee v. New York Life Ins. Co.*, 47 Fed. Rep., 798; *Maryland Mutual Benefit Society v. Clendinen*, 44 Md., 429, 22 Am. Rep., 52; *Skillings v. Massachusetts Benefit Ass'n*, 15 N. E. Rep. [Mass.], 566; *Highland v. Highland*, 109 Ill., 366; *Daniels v. Pratt*, 143 Mass., 216, 221; *Eastman v. Provident Mutual Relief Ass'n*, 62 N. H., 555; *Swift v. San Francisco Stock & Exchange Board*, 67 Cal., 567, 569, 8 Pac. Rep., 94.

In the case of *National Mutual Aid Ass'n v. Gonser*, *supra*, where a certificate of membership was issued by an association organized under the statutes of the state of Ohio for the purposes of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased member, the petition failed to bring Gonser within the operation of the terms of the certificate, or the statutes under which the association was organized, and the certificate failed for want of a proper designation. It was held that the plaintiff could not recover, and the court would leave the parties to the contract where it found them.

We must not forget that, as a matter of fact, there was no trust fund actually in the hands of the association, with which to pay the certificate, at the time of Richardson's death. It is true that equity will presume that that is done which ought to be done, but this is an action at law to recover on a contract, and if a recovery is had at all, it must be authorized thereby, either by operation of law or by the express terms thereof. It is provided therein that after the death of the insured member, the fund to pay the beneficiary shall be raised by an assessment of the members of the association; that neither the estate of the deceased, his administrator, nor his creditors, have any interest in the contemplated fund; nor can any of them become the beneficiary under the contract, the laws of the state of Illinois, where the association was formed, or the laws of this state, where this action is pending. Therefore equitable principles can not be invoked to set

aside the contract rights of the parties, and authorize a recovery which is prohibited by law, as well as by the certificate itself.

For the foregoing reasons we hold that the plaintiff as administrator of Richardson's estate has no cause of action against the association on the certificate in question, and that the judgment of the trial court, sustaining the defendant's demurrer and dismissing the action, was right, and we therefore recommend that said judgment 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.

MARTIN LANGDON V. JAMES CONLIN.

FILED JANUARY 21, 1903. No. 12,537.

Commissioner's opinion, Department No. 2.

Attorney at Law: CONTRACT: PROCURER: THIRD PERSON: DIVISION OF FEES WITH PROCURER: PUBLIC POLICY. A contract between an attorney at law and one who is not such an attorney, by which the latter agrees to procure the employment of the former by third persons for the prosecution of suits in courts of record, and also to assist in looking after and procuring witnesses whose testimony is to be used in the cases, in consideration of a share of the fees which the attorney shall receive for his services, is against public policy and void.

ERROR from the district court for Cuming county. Action on contract for services in securing employment of defendant as an attorney at law. Tried below before GRAVES, J. *Reversed and dismissed.*

Martin Langdon, for himself, and *Constantine J. Smyth* and *Milton McLaughlin*, with him.

Anderson & Keefe, contra.

Syllabus by court; catch-words by editor.

OLDHAM, C.

In this case the plaintiff in the court below brought his action against the defendant alleging, among other things, that the defendant was a resident and practicing attorney of Omaha, Nebraska; that "on or about the 1st day of November, 1893, plaintiff, at request of defendant, entered into the services of the defendant to get parties in this and adjoining counties, or from any place, who wished the services of an attorney for litigation or for advice, to employ said defendant as their attorney, and said plaintiff was also to assist the defendant in looking after and procuring proper and legitimate witnesses, whose testimony was to be used in said cases; that for such services the defendant was to pay to plaintiff twenty-five per cent. of the fees charged by the defendant, Martin Langdon, in said cases; that said fee of twenty-five per cent. was to be due and payable from the defendant to the plaintiff as soon as the attorney fees in said cases brought by virtue of the above contract were due and payable to the defendant, Martin Langdon; that the plaintiff was to enter upon his duties under said contract immediately after the same was entered into as above set forth; that the plaintiff did enter upon said services at once and continued to work for said defendant under said contract until about the 1st day of December, 1898; that on or about the 10th day of February, 1894, Bridget McGreavy, guardian of John McGreavy, insane, through the advice and influence of plaintiff, employed said defendant, Martin Langdon, as her attorney to bring an action for her as such guardian against W. G. Waters and others, to set the conveyance aside, for her ward, made by him to said W. G. Waters and others, the land in said conveyance being situated in Cuming county, Nebraska." The petition then sets out that after Bridget McGreavy, as guardian, had employed the defendant, the plaintiff assisted defendant in procuring legitimate witnesses, testimony and evidence to be used in behalf of said Bridget McGreavy in the district

court of Cuming county, Nebraska; that the case was finally adjudicated and settled by the defendant as attorney for the said Bridget McGreavy; that the defendant received the amount of $700 as an attorney fee in said cause, and that by reason of the contract between plaintiff and defendant, plaintiff was entitled to the sum of $175 of this fee from the defendant. The defendant filed an answer to this petition, denying that he ever entered into such a contract, and alleging that the contract was against public policy, and other special defenses which need not here be noticed. On issues thus formed there was a trial to a jury, verdict for plaintiff, judgment on the verdict, and defendant brings error to this court.

Numerous errors in the proceedings of the cause in the court below are called to our attention in the brief of plaintiff in error, only one of which it will be necessary to discuss; and that is whether or not this contract is against public policy and good morals and therefore void. The substance of the contract is that the plaintiff, not an attorney at law, made an agreement with an attorney and counselor at law by which he was to procure litigants to employ the attorney, and procure legitimate witnesses to testify in behalf of the clients which he had solicited and persuaded to employ the defendant, and that as compensation for such services he was to receive twenty-five per cent. of the fees earned by the defendant. Courts should only declare contracts void as against public policy when expressly or impliedly forbidden by the paramount law, or by some principle of the common law, or by the provisions of a statute. What the public policy is must be determined by the constitution, the laws, the course of administration, and decisions of the courts of last resort of the states. *License Tax Cases,* 72 U. S. [5 Wall.], 462, 469, 18 L. Ed., 497, 500; *Lux v. Haggin,* 69 Cal., 255, 308. Hence, to determine what the public policy of this state is with reference to contracts of the nature of the one at issue it is necessary to first examine such legis-

lative enactments of this state as are declarative of the rights and duties of attorneys and counselors at law.

Section 1, chapter 7, Compiled Statutes,* provides that "no person shall be admitted to practice as an attorney or counselor at law, or to commence, conduct, or defend any action or proceeding in which he is not a party concerned, either by using or subscribing his own name, or the name of any other person, in any court of record in this state, unless he has been previously admitted to the bar by order of the supreme court, or of two judges thereof," etc. Section 2 then provides for the examination of candidates for admission to the bar. Section 3 provides for the admission of practicing attorneys from other states. Section 4 requires that every attorney shall take an oath to support the constitution of the United States, the constitution of the state, and to faithfully discharge the duties of an attorney and counselor. Section 5 provides, among other things, that it is the duty of attorneys and counselors "to maintain the respect due to the courts of justice and to judicial officers. II. To counsel or maintain no other actions, proceedings, defenses, than those which appear to him legal and just, except the defense of a person charged with a public offense. * * * VI. Not to encourage the commencement or continuance of an action or proceeding from any motive of passion or interest." Section 6 provides for the disbarment of attorneys who are guilty of deceit or collusion, and consent thereto, with the intent to deceive a court, or judge, or a party to an action; and section 7 defines the powers of attorneys with reference to the execution of bonds for appeal and other papers necessary and proper for the prosecution of a suit, and confers the right to bind the client by agreement in respect to any proceeding within the scope of his proper duties and powers, and the right to receive money claimed by the client during the pendency of the action before his discharge. Section 8 provides a

* For provisions in regard to attorneys, see 2 Cobbey, Annotated Statutes, p. 1396, ch. 5.

lien for his services, and section 13 makes it the duty of an attorney to indorse his name on any original paper filed in the proceeding.

Even a cursory examination of these excerpts from the statute is sufficient to plainly indicate that it was the policy of the legislature of this state to absolutely exclude every one who has not complied with the provisions of chapter 7, *supra,* from engaging either directly or indirectly in the practice of law in any court of record in this state in any case in which such person is not a party in interest. It is also apparent that it was the policy of the legislature to fix a high standard of professional ethics to govern the conduct of attorneys in their relations with clients and courts and to protect litigants and courts of justice from the imposition of shysters, charlatans and mountebanks. It seems to us that the contract in issue is but a thinly veiled subterfuge by which the plaintiff, who it is conceded was not a member of the bar, and who had never complied with any of the provisions of chapter 7, *supra,* for the purpose of authorizing him to engage in the practice of law, undertook to break into the conduct of proceedings in a court of record, to which he was not a party, by attempting to form a limited and silent partnership with one who had complied with the provisions of the law and was entitled to the emoluments of the profession. Under a statute with no more stringent regulations governing the practice of law than our own, a contract on all fours * with the one in the instant case, was declared void, as against public policy and good morals, in *Alpers v. Hunt,* 86 Cal., 78, 9 L. R. A., 483, 21 Am. St. Rep., 17, 24 Pac. Rep., 846. The case is supported in principle by the holdings in *Burt v. Place,* 6 Cow. [N. Y.], 430; *Munday v. Whissenhunt,* 90 N. Car., 458.

Where, as in the case at bar, a part of the consideration of the contract in issue was an agreement to furnish evidence in litigation to be commenced, the supreme court of

* This expression may be criticised, but Cicero was its author.—W. F. B.

New York, in *Lyon v. Hussey,* 82 Hun, 15, 16, 31 N. Y. Supp., 281, said: "It is clear that such a contract is against public policy. The recognition of contracts of this character, would be the introduction of all sorts of fraud and deception in proceedings before courts of justice, in order that parties might receive compensation out of the results of their successful manufacture of proofs to be presented to the court, thus holding out a premium upon subornation. The mere statement of the proposition seems to show that such a contract could never be recognized in any court of justice." See also *Lucas v. Allen,* 80 Ky., 681; *Getchell v. Welday,* 4 Ohio Dec., 65.

We are therefore of the opinion that the contract on which this cause of action is founded is against public policy and good morals, and recommend that the judgment of the district court be reversed and that plaintiff's petition be dismissed.

BARNES 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 petition dismissed.

REVERSED AND DISMISSED.

NOTE.—*Contingent and Exorbitant Fees—Legal Ethics.*—As to the ethics of compensation for professional services, see 16 American Law Review, 240. For an excellent article on contingent and exorbitant fees, see 22 American Law Review, 390. See, also, The Ethics of Compensation for Professional Services—an address before the Albany Law School—and An Answer to Hostile Critiques, by Edwin Countryman. Albany: W. C. Little & Co., 1882.—W. F. B.

EDWARD P. HATCH, APPELLANT, V. NATHANIEL B. FALCONER ET AL., APPELLEES.

FILED JANUARY 21, 1903. No. 12,559.

Commissioner's opinion, Department No. 2.

1. **First Mortgagee in Possession:** SUBSEQUENT MORTGAGEE: TENANCY. A first mortgagee in possession of the mortgaged premises, is not the tenant of subsequent mortgagees.
2. ——: ——: ——: RENTAL VALUE: ACCOUNTING. It is the duty of a mortgagee in possession to account to subsequent mortgagees for the full and fair rental value of the premises while controlled by him.

APPEAL from the district court for Douglas county. Action of foreclosure and for accounting. Heard below before DICKINSON, J. Judgment of foreclosure of certain mortgage liens. Plaintiff appeals. *Affirmed.*

Charles Ogden and *Joel W. West,* for appellant.

Edgar M. Morsman, Jr., and *Westel W. Morsman, contra.*

OLDHAM, C.

At and prior to December 14, 1895, Nathaniel B. Falconer was engaged in the mercantile business in Omaha, Nebraska, and was the owner of a leasehold interest in a business property in that city. The lease was made July 1, 1890, and was for a term of fifty years, upon rent reserved equivalent to $3,850 per annum, payable in quarterly instalments of $962.50 each. The lease provided, among other things, that the lessee should pay all taxes during the term, keep the property insured, make all necessary repairs, and rebuild in case of fire. On October 14, 1895, Falconer failed, and gave mortgages on his leasehold interest in this property to secure certain creditors for the following amounts: George A. Wilcox (first lien), $13,067.42; M. E. Smith & Co. (second lien), $886.-

Syllabus by court; catch-words by editor.

71; Tootle, Wheeler & Motter (third lien), $2,761; Lord & Taylor (fourth lien), $3,500; James McCreary & Co. (fifth lien), $500; Sherman, Cecil & Co. (sixth lien), $285.44; Lord & Taylor (seventh lien), $2,288.43; James McCreary & Co. (eighth lien), $1,518.70. At the time of the failure Falconer was in default for two quarterly instalments of rent and had allowed the taxes to become delinquent, and the insurance to lapse. In the December following the failure each of the above-named mortgagees signed an agreement reciting the giving of the mortgages in the order of their priority as above set forth, and the fact that Wilcox, the first mortgagee above named, had paid for the protection of his lien the taxes, insurance and rent, amounting to $2,895.10. The parties agreed that Wilcox should take an assignment from Falconer of the ground lease, and that such assignment should not operate as a merger of his first lien, or of his right to be reimbursed for the money already paid by him for the protection of his lien; that there should be no foreclosure of any of the mortgages during the period of four years; that Wilcox should during that time collect the rents of the building; that the rent so collected should be applied to the rent, insurance and other charges provided for in the ground lease, and to reimburse Wilcox for the money already advanced, and the balance in payment of the first mortgage. It was also agreed that if at any time during the four years the first mortgage should be fully paid, then the money received should be applied to the other mortgages in the order of their priorities as above set forth. There were other conditions in this agreement, which are not material to any question now in controversy and need not be recited. Wilcox, in conformity to this agreement, took an assignment of the leasehold interest from Falconer and wife as an additional security for his mortgage, and leased the property to Thomas Kilpatrick & Co., and collected the rents and applied the same to the charges arising under the lease and to his mortgage indebtedness, and continued in the possession of the property until April 18,

1890, when there was still due and unpaid on his first mortgage the sum of $5,396.44. He then assigned his mortgage debt and leasehold interest and rights under the agreement between him and the several mortgagees to Harriet N. Kilpatrick. Mrs. Kilpatrick then took possession of the premises, and continued to lease the same to Thomas Kilpatrick & Co., and collected the rent and continued to pay the charges arising under the principal lease, and applied the surplus to the payment of the Wilcox mortgage debt, of which she had become the owner. June 19, 1900, M. E. Smith & Co.'s second mortgage was assigned to Thomas Kilpatrick, and on November 24, 1889, the Tootle, Wheeler & Motter third mortgage lien was also sold and assigned to Thomas Kilpatrick; and on April 9, 1900, the Sherman, Cecil & Co.'s sixth mortgage lien was also assigned to Thomas Kilpatrick.

On May 16, 1900, the plaintiff in this cause of action, Edward P. Hatch, sole trader under the name and style of Lord & Taylor, and owner of the fourth and seventh mortgage liens, instituted the instant suit in the district court for Douglas county, setting out in his petition his ownership of the fourth and seventh mortgage liens, the amounts alleged to be due thereon, and asking for an accounting and decree of foreclosure, and also setting up the agreement between the several mortgagees substantially as above set forth, and alleged that the time fixed for the trusteeship of defendant Wilcox had expired, and asked for an accounting with Wilcox for the money collected and disbursed during the time of his trusteeship, and that a receiver be appointed by the court to take charge of the property and collect the rents, and for all other equitable relief. James McCreary & Co., the owner of the fifth and eighth mortgage liens, above set forth, answered the petition, setting up their mortgage liens, and joining in the prayer for an accounting and for a receiver.

Harriet N. Kilpatrick filed an answer to this petition, alleging her ownership of the Wilcox mortgage; the amount due and unpaid thereon; that it was the first mort-

gage lien; the assignment of the leasehold interest to her as additional security for said lien; that she is collecting the rents of the building at its full rental value and applying the same to the preservation of the property by paying the insurance and ground rent and taxes, and applying the remainder in discharge of the sum due to herself as assignee of the first mortgage lien. She denied that the interest and rights of other creditors are in jeopardy, and alleged that a receiver is unnecessary; that she is ready and willing, and has at all times been, to transfer all her rights in the leasehold of the premises to any junior lienholder who will pay all liens prior to his own; and that plaintiff has never offered to do so. Her answer also contains a cross-petition, asking for the foreclosure of her first mortgage.

Thomas Kilpatrick and Thomas Kilpatrick & Co. filed a joint answer, denying the averments of plaintiff's petition for the appointment of a receiver, alleging that the premises were rented at full value; that the rent was promptly paid each month to Harriet N. Kilpatrick; that it was prudently and punctually applied to the preservation of the property; all to the advantage and security of herself and all other parties in interest. The answer then alleges the making and transfer of the mortgages given to M. E. Smith & Co., Tootle, Wheeler & Motter and Sherman, Cecil & Co. to Thomas Kilpatrick by procurement of Thomas Kilpatrick & Co., and prays that any decree that may be rendered in the cause be so framed as to find and fix the priority of the several mortgages held by plaintiff and the several defendants, and the amount due thereon, and for all other equitable relief.

Plaintiff filed a reply to the answers of Harriet N. Kilpatrick and the joint answer of Thomas Kilpatrick and Thomas Kilpatrick & Co., in the nature of a general denial.

The application for a receiver was denied and the cause tried to the court, which found that the premises had been rented for their full rental value during all the time they were under the control of defendants Wilcox and Harriet

N. Kilpatrick; that the proceeds had been properly applied to the discharge of the conditions of the ground lease and the partial payment of the first mortgage lien of Harriet N. Kilpatrick. The court then found the amount still due on the first mortgage lien, the amount due on each of the subsequent mortgages, and entered a decree of foreclosure of the various mortgage liens. From this decree Edward P. Hatch, sole trader under the name and style of Lord & Taylor, prosecutes an appeal to this court.

An examination of the evidence contained in the bill of exceptions shows that the findings of the learned trial judge of the facts in this cause are fully supported by the testimony; consequently, the only question to be determined is whether or not the law has been properly applied to the facts in the judgment rendered. The appellant's prayer for a foreclosure of his mortgage and an accounting with the mortgagee in possession was granted, and the complaint in his brief is directed against the relief granted the senior mortgagees on their cross-petitions, his contention being that Thomas Kilpatrick & Co. was the tenant of the junior mortgagees Lord & Taylor and James McCreary & Co., that as such tenant it had no right to purchase through Harriet N. Kilpatrick and Thomas Kilpatrick the adverse title of the senior mortgagees to the ground-rent lease, that when it did so these purchases should be construed as having been made for the use of the landlord, and that at most the holders of these senior mortgages should only have been allowed, as against their landlords, the junior mortgagees, an accounting for the amount they had actually paid for the senior mortgages. It seems to us that this contention is wholly unfounded in principle. It proceeds on the theory that Wilcox, in the first instance, got control of the mortgaged premises by virtue of the contract which he entered into with his junior mortgagees, when in fact he got possession of the property by consent of the mortgagor, and no contract that he might have made with the junior mortgagees of this ground-rent lease could have given him possession of the mortgaged property. He

could only procure possession of the mortgaged premises either by consent of the mortgagor or by decree of a court of competent jurisdiction. An examination of the contract which Wilcox made with the subsequent mortgagees, shows that he gained no right or advantage by that contract which he did not already have by reason of the priority of his mortgage; nor did he undertake to do anything which it would not have been his duty to have done had he taken possession of the mortgaged premises without any contract with them except the agreement to forbear legal proceedings on his mortgage for the period of four years. Wilcox, as first mortgagee, had a right to procure an assignment of the ground-rent lease from the common mortgagor as an additional security to his mortgage, and hold such assignment as an additional security, without having it merged in his mortgage. He had the right, as a first mortgagee in possession, to collect the rents and apply them exactly in the manner set forth in the contract. In fact, the contract amounted to nothing more nor less than an agreement among the different mortgagees that, as between themselves, Wilcox should take possession of the mortgaged property and apply the proceeds of the rent of such property in the manner that the law would have required him to have applied them in case no agreement had been entered into with the subsequent mortgagees.

From this view of the case it follows that Thomas Kilpatrick & Co. was the tenant of Wilcox and his assignee as first mortgagee in possession, and that it was not the tenant of any of the subsequent mortgagees. It is also apparent that Thomas Kilpatrick, even if he acted at the instance and request of Thomas Kilpatrick & Co., did not do anything adverse to the interest of the junior mortgagees when he purchased the two senior mortgages, for it could make no difference to the junior mortgagees who the owners of the senior mortgages were. The junior mortgagee had a right, if he so desired, to redeem from these mortgages and be subrogated to the rights of the senior mortgagees, no matter who the owners were. He also had

a right to have the first mortgagee in possession account for the full and fair rental value of the property while in his possession, and apply the rents in the manner that the learned trial court directed them to be applied at the trial of the cause.

The question of the necessity of a receiver for the protection of the mortgaged property *pendente lite* was tried on conflicting testimony to the trial court and the issue found against the contention of the appellant. We therefore conclude that the judgment of the trial court is fully sustained by law, and we recommend that it be affirmed.

BARNES and POUND, CC., concur.

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

AFFIRMED.

LEADORE I. RANDALL V. JOHN GROSS.

FILED JANUARY 21, 1903. No. 12,699.

Commissioner's opinion, Department No. 2.

1. **Replevin**: ANSWER: RULES OF PLEADING. In an action in replevin the defendant may, if he so desires, plead his defenses specifically; and when he does, his answer will be subject to the ordinary rules of pleading in other civil cases.

2. **Herd Law**: COMMON-LAW LIABILITY. The enactment of the herd law does not take away the common-law liability of owners of stock for damages on account of trespasses committed by such stock on cultivated lands.

3. ———: ARBITRATION: CONSTRUCTION. Under the provisions of the herd law, "the object of the provision for arbitration is to afford a speedy and inexpensive mode of ascertaining the damages sustained by trespass of stock upon cultivated lands. Courts construe proceedings of this kind with great liberality in all matters except as to the jurisdiction." *Haggard v. Wallen*, 6 Nebr., 271, followed and approved.

4. **Procedure Under Herd Law**. In proceedings under the herd law, the filing of a notice and proof of damages with a justice of the

Syllabus by court; catch-words by editor.

peace is sufficient to give him jurisdiction, without the issuance and service of a summons.

5. Statute: PROCEDURE: ACTION IN REM. *Held*, that sections 3, 4, 5 and 6, article 3, chapter 2, Compiled Statutes (Annotated Statutes, secs. 3130, 3131, 3132 and 3133), entitled the "Herd Law," provide a reasonable method of procedure in the nature of an action *in rem* against trespassing stock, and that proceedings under these sections are not in conflict with constitutional guaranties.

ERROR from the district court for Lancaster county. Action in replevin to recover possession of impounded swine. Plea of herd law. Demurrer by plaintiff. Sustained. Tried below before FROST, J. Judgment for possession and one cent damage. *Reversed.*

William L. Browne and *Frank B. Sidles*, for plaintiff in error.

George M. Nicholson, contra.

OLDHAM, C.

This action was a suit in replevin for three hogs alleged to have been the property of the plaintiff. The petition was in the ordinary form. The defendant, instead of availing himself of the ordinary method of pleading in replevin, by filing a general denial, pleaded specially, alleging that at the time of the commencement of the action he was rightfully in possession of the property in dispute; that he is the owner of certain cultivated lands (describing them), a large part of which was at the time the action accrued in growing corn; that the hogs claimed by the plaintiff were trespassing upon his said premises, damaging and destroying the corn, to his injury in the sum of $10, when they were taken up and impounded by him. The answer then sets out the provisions of the herd law, under which defendant claimed a lien on the animals, and alleges that two hours after he had taken the animals up, and before he had had time to ascertain the owner and serve notice, as required by the statute, the plaintiff instituted the replevin action and took the property under process in said suit

without making any tender or payment of damages demanded by the defendant. Plaintiff demurred to this answer, alleging that it failed to state facts sufficient to constitute a defense and further alleging that article 3, chapter 2, Compiled Statutes (Annotated Statutes, secs. 3128-3140), entitled the "Herd Law," was in violation of the provisions of the constitution and contrary to the public policy of the state of Nebraska. This demurrer was sustained by the court and defendant refusing to further plead, plaintiff was given judgment for the possession of the property in dispute and one cent damages and costs of the action, and defendant brings error to this court.

While it is the general and approved practice in this state for a defendant in a replevin action to interpose his defenses under a general denial, yet this method of pleading is not compulsory upon the defendant. If he desires to plead specifically his defenses, he may do so; in which event the ordinary rules of pleading will be applied to his answer. *Westover v. Vandoran,* 29 Nebr., 652. Consequently we must treat the answer of defendant filed in this case as we would an answer in any other civil action, and determine whether or not any sufficient defense was pleaded to plaintiff's cause of action.

At common law the owner of live stock was bound, at his peril, to keep his stock within his own enclosures, and was liable for injuries committed by them while trespassing upon the lands of others, and such stock were liable to be impounded damage-feasant by the owner of the lands on which they were found trespassing; hence, if the common-law liability against stock trespassing upon the premises of others exists in this state, it is self-assertive that the answer in the case at bar did state a good defense to the cause of action. Section 1, article 3, chapter 2, Compiled Statutes (Annotated Statutes, sec. 3128), commonly known as the "Herd Law," provides, in substance, that owners of cattle, horses, mules, swine and sheep in this state shall be liable for damages done by such stock upon the cultivated lands in this state, as herein

provided by this act; and section 2 (3129) of the act, gives the person whose property is damaged a lien upon the trespassing animals for the amount of the damages and costs. With reference to these sections of the herd law, it has been said by this court, in the case of *Lorance v. Hillyer*, 57 Nebr., 266, 268, "The herd law was not enacted to do away with the common-law liability of the owners of stock for damages and trespasses committed by them. The object of that act was to give one injured by animals trespassing upon his cultivated lands the right to take possession of such animals, invest him with a lien thereon, and the right to hold such animals until his damages were adjusted. But even the remedy afforded by the herd law to one injured by trespassing animals is not an exclusive remedy. *Keith v. Tilford*, 12 Nebr., 271; *Laflin v. Svoboda*, 37 Nebr., 368." Section 3 (3130) of this act provides, in substance, that "when any such stock shall be found upon the cultivated lands of another, it shall be lawful for the owner or person in possession of said lands, to impound said stock," and that, if the owner of the stock can be found and is known to the taker-up, he shall notify the owner by leaving a written notice at his usual place of residence, with some member of his family over the age of fourteen, or, in the absence of such person, by posting a copy of such notice on the door of said residence, of the taking up the stock, describing it, and stating the amount of damage claimed, also the name of his arbitrator, and requiring the owner within forty-eight hours after receiving said notice to take said property away, after making full payment of all damages and costs to the satisfaction of the taker-up of the trespassing animals. This section, then, prescribes a form of notice, and provides that no claim for damages shall be maintained by the taker-up unless the notice, contemplated in this section, shall have been given, when the owner is known. Section 4 (3131) provides, in substance, that if the owner of the stock shall refuse, within forty-eight hours after receipt of the notice in writing, to pay the damages

claimed, or appoint an arbitrator to represent his interest, said animal or animals shall be sold upon execution, as required by law, when the amount of the damages and costs have been filed with a justice of the peace in the county within which said damage may have been sustained. Section 5 (3132) provides, in substance, that where the parties can not agree to the amount of damages and costs, each party may choose a man, and if the two can not agree, they may choose a third, who, after being duly sworn, shall proceed to assess the damages, possessing for the purpose the general powers of arbitrators. Section 6 (3133) provides, in substance, that the arbitrator or arbitrators shall make an award in writing, which, if not paid within five days after the award has been made, may be filed with any justice of the peace in the same county, and shall operate as a judgment, and the judgment shall be a lien upon the stock taken up, and that execution may issue upon said stock for the collection of the damages and costs as in other cases, and provides that either party may have an appeal from the judgment, as in other cases before justices of the peace. It also provides that if, before the trial by said arbitrator or arbitrators, the owner of the stock shall tender to the person injured an amount in lieu of said damages and costs which may have accrued which shall equal the amount of damages afterward awarded by the arbitrators, court or jury, or shall offer in writing to confess judgment for the same, and if notwithstanding the said injured party, refusing said offer, causes the trial to proceed, he shall pay the costs, etc.

It is claimed by counsel for defendant in error that the provisions of sections 3, 4, 5 and 6 (3130, 3131, 3132 and 3133) of this act, which have been quoted in substance, are contrary to the provisions of the constitution of the state of Nebraska and to the fourteenth amendment to the constitution of the United States, in permitting the taking of property without due process of law. It is also urged against these provisions that they

contemplate the sale of property without the judgment of a court of competent jurisdiction, and that they oust courts of a proper jurisdiction by compelling arbitration of the amount of damage, and are generally contrary to the public policy of the state.

In the first place, the provisions of these sections do not prescribe an exclusive, but, rather, a cumulative remedy, for recovering damages caused by trespassing stock, and there is nothing in any section of the act that prevents the owner of the stock from having his rights determined by a court of competent jurisdiction. Section 3 (3130), above quoted, is but a reasonable provision under which the party damaged may make his lien effective; and the primary requirement of that section is that he shall serve notice on the owner of property, when found in the county, and that in his notice he shall state the amount of damages which he claims, and that he shall name an arbitrator to whom he is willing to submit the question of fixing the damages. This section leaves it entirely optional with the owner of the stock whether he will name an arbitrator or not. Section 4 (3131) simply provides that if after receipt of the notice the owner of the property refuses for forty-eight hours to either appoint an arbitrator or pay the amount of damages claimed, then the injured party may proceed in his absence, and file proof of the notice and amount of damages claimed with a justice of the peace in the county where the damages have been sustained. The provisions of section 5 (3132) are not compulsory upon either of the parties. This section simply points out a method of arbitration by agreement, of which the interested parties may, if they desire, avail themselves. Section 6 (3133) provides that where an arbitration has been had, either party dissatisfied with the award of the arbitrators may appeal from the judgment of the justice with which such award has been filed, as in any other case before a justice of the peace. So there is nothing in any of these sections that compels the owner of property to submit his cause to arbitration

against his will, nor is there anything that prevents him from having a full and fair trial of his right of property before a court of competent jurisdiction. Section 6 further provides that the owner of property, when notified, may either pay such sum or offer to confess judgment for such sum as he believes is fair for the damage done by his stock, and if the plaintiff refuse the offer and continue either the arbitration or trial of the cause, it must be at his own costs, unless he recovers a greater amount than the sum offered. So, even under the provisions of this section, the owner of stock, after tendering the proper amount of damages sustained, might replevin the stock and prevail in the action, unless the owner of the land would show himself entitled to a greater amount of damages than the sum tendered. In short, we see nothing in the various provisions of this statute which attempts to do anything other than to provide a reasonable and an expedient means of protecting the lien which the owner or occupant of cultivated lands has on stock found trespassing on his premises. *Holmes v. Irwin,* 17 Nebr., 99. With reference to the provisions for arbitration in this statute, it was said by this court, in the case of *Haggard v. Wallen,* 6 Nebr., 271, that "the object of the provision for arbitration is to afford a speedy and inexpensive mode of ascertaining the damages sustained by trespass of stock upon cultivated lands. Courts construe proceedings of this kind with great liberality in all matters except as to the jurdisdiction." In *Holmes v. Irwin, supra,* it was held that the filing of proof of damages and service of notice with the justice was sufficient to give him jurisdiction, without the issuance and service of summons. It is plain from the cases already cited that this court has long looked upon the provisions of this statute as reasonable, constitutional and binding; and an examination of the adjudications of sister states on statutes similar in kind leads us to the conclusion that where the statute makes reasonable provisions and gives an opportunity for judicial investigation and provides for notice, either personal or by publication, to the owner of

the trespassing animals before final judgment, the strong trend of authority is to hold that such statutes constitute a reasonable procedure in the nature of an action *in rem* against trespassing stock, and that proceedings under them are due process of law, and not in conflict with constitutional guaranties. Ingham, Law of Animals, p. 309; *Campbell v. Evans*, 45 N. Y., 356; *Hellen v. Noe*, 3 Ired. Law [N. Car.], 493.

It follows from this course of reasoning that the learned trial judge erred in sustaining the demurrer to defendant's answer, and we therefore recommend that the judgment of the lower court be reversed, and the cause remanded for further proceedings.

BARNES 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 for further proceedings.

REVERSED AND REMANDED.

NOTE.—*Estray—Taker-Up—Use of Animal.*—The taker-up of an estray can not use it except when necessary for its preservation or for the benefit of the rightful owner, and if the taker-up do so he forfeits his claim for compensation, besides subjects himself to an action of trespass. *Weber v. Hartman*, 7 Colo., 13, 1 Pac. Rep., 230, 49 Am. Rep., 339; *Barrett v. Lightfoot*, 1 T. B. Monroe [Ky.], 241, 15 Am. Dec., 110. See, also, *Butler v. Cook*, 14 Ala., 576.—W. F. B.

FREMONT, ELKHORN & MISSOURI VALLEY RAILROAD COMPANY V. GEORGE GAYTON ET AL.*

FILED JANUARY 21, 1903. No. 12,463.

Commissioner's opinion, Department No. 2.

1. **Owner of Land:** ARTIFICIAL ARRANGEMENTS: ADVANTAGE OF ONE PART OVER ANOTHER: SEVERANCE. Where an owner of land by any artificial arrangements effects an advantage for one portion as against another, upon severance of the ownership the grantees of the two portions take them respectively charged with the easement and entitled to the benefit openly and visibly attaching at the time of the severance.

2. **Railroad Company:** NUISANCE: SURFACE-WATER: DUTY TOWARD OWNERS ONLY. Unless in cases where the standing water is a nuisance, a railroad company is not negligent in so constructing and maintaining its road as to cause surface-water to be discharged upon a portion of its own land; it is under a duty in this respect toward other owners only.

3. ———: CONSTRUCTION: ITS OWN LAND: EMBANKMENTS: BRIDGES: DITCHES: SURFACE-WATER. Hence, where a railroad company constructs its road across its own land and in so doing erects embankments and bridges and digs ditches and borrow-pits, by reason whereof surface-water is or may be collected and discharged upon a particular portion of the tract, subsequent grantees of that portion can not maintain an action against the company by reason of the maintenance of such embankments, bridges, ditches and borrow-pits in their original condition. *Fremont, E. & M. V. R. Co. v. Harlin*, 50 Nebr., 698, 36 L. R. A, 417, 61 Am. St. Rep., 578, distinguished.

ERROR from the district court for Dodge county. Action in the nature of case, to recover for diverting of water by the landowners onto the premises of another. Tried below before GRIMISON, J. Judgment for plaintiff. *Reversed.*

Benjamin T. White, James B. Sheean, Clark C. McNish and *Andrew R. Oleson*, for plaintiff in error.

Frederick W. Button, contra.

Syllabus by court; catch-words by editor.

* The Sioux City & Pacific Railroad Company is the codefendant in error. It also filed a separate petition in error, making Gayton and the plaintiff above defendants in error. Both error proceedings are involved in this opinion.

POUND, C.

The Sioux City & Pacific Railroad Company and the Union Pacific Railway Company, became the owners of the land involved in this controversy in 1873, through a grant from the general government. The Sioux City & Pacific Company constructed its road over the land, and in so doing built an embankment, dug certain ditches and borrow-pits, and put in bridges and culverts. After constructing its road, it conveyed the land to the Union Pacific Company, reserving a right of way 200 feet wide across that portion of the tract occupied by its road. Many years afterwards the Union Pacific Company conveyed the land to Solomon Gayton, lessor of the plaintiff, subject to said right of way. It is claimed that the Fremont, Elkhorn & Missouri Valley Railroad Company is operating the road. In the summer of 1898, George Gayton, the plaintiff, as tenant of said Solomon Gayton, was cultivating a portion of the tract, and had planted a crop of corn thereon. This action was brought to recover damages for injury to the corn by discharging surface-water upon the land from and through the ditches and borrow-pits in consequence of the manner in which the bridges and embankment had been built and maintained. The plaintiff's claim is that the bridges, embankment and road-bed were so negligently constructed and the ditches so negligently maintained that quantities of surface-water were collected from the surrounding land and discharged upon his field in a body. The defendants pleaded, among other things, the facts above set forth as to the original ownership of the land, and also that the embankment, bridges, ditches and borrow-pits were, in 1898, in the same condition in which they were originally constructed, and that there had been no change from that time until the time of the injury. At the trial, an instruction was requested to the effect that if, at the time the road was built and the embankment, bridges, ditches and borrow-pits constructed, the Sioux City & Pacific Company was the owner of the whole tract,

and the borrow-pits, bridges and embankments were in the same condition in 1898, at the time of the destruction of the plaintiff's crops, as when they were built and constructed, and as they were at the time the land was conveyed to said Solomon Gayton, the plaintiff could not recover. This instruction was refused and its refusal, among other things, is assigned as error.

We think the instruction should have been given. The evidence that the Sioux City & Pacific Company originally owned the whole tract and that plaintiff's lessor obtained title through mesne conveyances from that company, after the road was built, is undisputed. The defendants introduced evidence tending to show that the only change which had taken place from the time the road was built until 1898, was that some dirt had been dug out of the borrow-pits and used upon the grade. One witness, however, testified that the dirt had washed down from the track and was merely excavated and thrown back. It is true one of the plaintiff's witnesses states that a change at one of the bridges was made "in the winter of 1897 or 1898." Counsel for defendants in their brief construe this as referring to changes admittedly made after the injury complained of. Counsel for the plaintiff insists that it refers to a change before the injury. As this testimony stands it is ambiguous and would not require us to hold that the evidence conclusively shows a material alteration, in the face of the positive evidence adduced by the defendants. At most there would be a question for the jury whether a change had taken place prior to the injury, and whether such change contributed to or caused the damage and amounted to negligence on the part of the railroad company. Where an owner of land, by any artificial arrangements, effects an advantage for one portion as against another, upon severance of the ownership the grantees of the two portions take them respectively charged with the easement and entitled to the benefit openly and visibly attaching at the time of the severance. *Lampman v. Milks,* 21 N. Y., 505; *Janes v. Jenkins,* 34

Md., 1, 6 Am. Rep., 300; *Cihak v. Klekr,* 117 Ill., 643, 7 N. E. Rep., 111.

In 2 Washburn, Real Property [5th ed.*], *29, it is said: "Though, as already remarked, a man can not have an easement in his own land, and ordinarily the union of title and possession of two estates in one owner extinguishes any prior existing easement in the one for the benefit of the other, there are cases where two estates have been so used in relation to each other, that, if the owner parts with one of them, he has been held to impliedly grant or reserve an easement in the one in favor of the other." The case at bar appears to come within this rule.

In *Lampman v. Milks, supra*, the owner of land across which there was a flowing stream diverted the stream so as to relieve a portion of the land which had formerly been overflowed. It was held that upon conveyance of such portion, neither he nor subsequent grantees of the portion retained could return the stream to its former bed to the injury of the first grantee. The court said (p. 507): "The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts. But the moment a severance occurs, by the sale of a part, the right of the owner to redistribute the properties of the respective portions ceases; and easements or servitudes are created, corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if, instead of a benefit conferred, a burden has been

*6th ed., sec. 1235.

imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts."

A distinction is doubtless to be made between cases where the easement so created is obvious and permanent and those where it is not equally open and visible to the purchaser. In the latter class of cases, it is usually held that the easement must be reasonably necessary to the enjoyment of that portion of the land for which it is claimed, or else must be reserved in the deed. *Cihak v. Klekr, supra.* But where the easement is attended by some alteration in the land, which in its nature is obvious and permanent and may be seen on inspection by any person who views the land, it is not required that it be necessary nor that it be expressly reserved. *Lampman v. Milks, supra.* In the case at bar the deed to Gayton and the deed to Gayton's grantor were expressly subject to the right of way of the Sioux City & Pacific Company. Its road-bed and the embankments, bridges, ditches and borrow-pits were obvious and permanent alterations of the land, which could not escape the notice of a purchaser. If they were so constructed as to discharge surface water upon the portion of the tract originally owned by the company, that also was a fact which the purchaser could not fail to observe, and doubtless entered materially into the purchase price.

We see nothing to change our conclusion in the many cases in which this court has held that the grant of a right of way does not release the company from liability for subsequent negligent construction and maintenance of its roadway. This is not a case where the owner of a tract has granted the company a right of way across it, but is one where the company has built its road across its own land. If it so constructed its road as to do no damage to adjoining landowners, the effect of the manner of construc-

tion upon its own land was a matter concerning no one but itself. Unless in cases where the standing water is a nuisance, a railroad company is not negligent in so constructing and maintaining its road as to cause surface water to be discharged upon a portion of its own land; it is under a duty in this respect toward other owners only. This prosposition appears to us self-evident; but *Omaha & R. V. R. Co. v. Martin,* 14 Nebr., 295, is not without relevance thereto.

The case of *Fremont, E. & M. V. R. Co. v. Harlin,* 50 Nebr., 698, 36 L. R. A., 417, 61 Am. St. Rep., 578, which is chiefly relied upon by the defendant, was a case where a landowner had conveyed a right of way across his land to a railway company. The court said expressly that if the release would have estopped the original owner, had he retained the land, it would likewise estop his grantee who brought the action. Not only is the *Harlin Case* readily distinguishable from the case at bar, for the reason that there the original construction of the road was negligent, and its maintenance so as to cause injury to the land across which the right of way had been granted was actionable in the first instance, but this case comes squarely within the exception announced by the court. Here the original owner of the Gayton tract was the company, and the company clearly had no standing to complain against itself of its own acts in the construction and maintenance of its road. Gayton took from the grantee of the company, who was in no position to complain; and if, as the company asserts and its evidence tends to prove, there had been no material change from the time the road was built until the injury occurred, the company was entitled to a verdict.

For the error in not submitting this defense to the jury, we think the judgment of the district court should be reversed and the cause remanded, and we so recommend.

BARNES 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 is remanded for a new trial.

REVERSED AND REMANDED.

WILLIAM DOUGHERTY ET AL., APPELLANTS, V. EMMA KUBAT ET AL., APPELLEES.

FILED JANUARY 21, 1903. No. 12,500.

Commissioner's opinion, Department No. 2.

1. **Stare Decisis.** *Glynn v. Glynn*, 62 Nebr., 872, followed.

2. **Title to Act:** SPECIAL LEGISLATION: CONSTITUTION. Sections 70-73, chapter 73, Compiled Statutes (chapter 58, Session Laws, 1889; Annotated Statutes, secs. 10275-10278), as construed in *Glynn v. Glynn, supra*, are not unconstitutional as being broader than the title of the act, nor as special legislation.

3. **Redemption from Foreclosure Sale.** A person who is entitled to redeem from a sale under decree of foreclosure to which he was not a party, must pay the full amount of the mortgage lien, though the land may have sold for a less sum.

4. **Tenant in Common:** FORECLOSURE SALE: REDEMPTION: PART PAYMENT: ENTIRE INCUMBRANCE. A tenant in common who was not made a party, and is therefore entitled to redeem from a foreclosure sale, may not compel the mortgagee or his successors to accept a part of the debt and relieve his interest only of the burden, but must offer to redeem the whole by discharging the entire incumbrance.

5. **Mortgage Debt:** EQUITABLE PROPORTION: PAYMENT: REDEMPTION OF INTEREST. But it is equitable to allow the plaintiff in an action for redemption to redeem his interest by paying his equitable proportion of the mortgage debt, and the defendant may, if he sees fit, allow the plaintiff to do so.

6. ———: ———: ———: ———: DEBT A UNIT: PARTIAL INTEREST: RIGHTS OF REDEMPTOR. As the rule that the debt is a unit, so that redemption of a partial interest only can not be imposed upon the mortgagee, is solely for the benefit and convenience of the latter, if he chooses to accept a portion of the debt and allow redemption of a partial interest, and such course is equitable under the circumstances, the holder of such partial interest can not insist upon redeeming the whole.

Syllabus by court; catch-words by editor.

APPEAL from the district court for Douglas county. Action by heirs of their intestate to redeem property sold under a decree of foreclosure. Heard below before FAWCETT, J. Judgment for defendants. *Reversed.*

Howard H. Baldrige, William A. De Bord, A. H. Murdock and *J. M. Kerr,* for appellants.

James H. Van Dusen, Timothy J. Mahoney, C. H. Kubat, Elmer E. Thomas, Thomas J. Nolan and *Arthur C. Wakeley, contra.*

POUND, C.

One John Dougherty mortgaged the property in controversy, a lot in the city of South Omaha, to the Nebraska Savings Bank. Afterwards he conveyed the property to his brother, Eugene Dougherty, a resident of Colorado. John Dougherty, the original mortgagor, and Eugene Dougherty, his grantee, each died intestate and without issue. There were, however, several brothers and sisters surviving, namely, Margaret Ahearn, formerly Dougherty, a British subject, resident in Ireland; Catherine Dougherty, a citizen of Massachusetts; Patrick Dougherty, a British subject, resident in Ireland; and Cornelius Dougherty, Ellen Dougherty and Edmund Dougherty, citizens of Nebraska. In addition, there were left surviving six children of a deceased brother, Michael Dougherty, who at his death was a British subject, resident in Ireland, of whom three were non-resident aliens. Among these were an Edmond Dougherty and a Margaret Dougherty. Suit was brought to foreclose the mortgage, in which personal service was had upon Cornelius "Doherty" and "Ella Doherty," and service by publication upon "Edward Doherty," and Patrick, Margaret and Catherine "Doherty," and answers were filed on behalf of such defendants. Decree of foreclosure was rendered in due course, and the

property was sold, for less than the mortgage debt, to the Packer's Savings Bank, under which the other defendants in the present suit claim as grantees. This suit is brought by children of Michael Dougherty, and by Edmund Dougherty, Ellen Dougherty, Patrick Dougherty, Margaret Ahearn, and Catherine Dougherty, brothers and sisters of said Eugene Dougherty, to redeem. The district court found for the defendants and the plaintiffs appeal.

Without passing on the questions raised as to the proceedings in the foreclosure suit and the sufficiency of the published notice in other respects, it is evident that both Edmund Dougherty, the brother, and Edmond Dougherty, the nephew, were not served by the notice to "Edward Doherty," and that the notice to "Margaret Doherty" could not apply both to Margaret Ahearn, formerly Dougherty, the sister, and Margaret Dougherty, the niece. Moreover, there still remain children of Michael Dougherty not made parties or attempted to be served in any way. As to these persons, it was urged below, and the district court held, that, being either non-resident aliens or the children of a non-resident alien, claiming through one who could not inherit, they were not heirs of Eugene Dougherty and had no interest in the property. This holding was prior to and is in direct conflict with the decision of this court in *Glynn v. Glynn,* 62 Nebr., 872, in which section 73, chapter 73, Compiled Statutes (Annotated Statutes, sec. 10278), was construed to mean that non-resident aliens were able to inherit estate in land within the corporate limits of cities and villages. If that decision is adhered to, the decree of the district court must be reversed, and it will be necessary to consider but one further point, as the other questions involved are not likely to present serious difficulties on another hearing.

Counsel for appellees have urged a reconsideration of *Glynn v. Glynn,* both upon the merits of the construction there adopted and on the ground that the statute, so construed, is unconstitutional. But the court appears to have given that cause full and careful consideration.

Hence we shall confine ourselves to the constitutional objections, as these alone present questions not already passed upon. It is argued first that the title of the act, "An act restricting non-resident aliens and corporations not incorporated under the laws of Nebraska, in their right to acquire and hold real estate," must necessarily limit its operation to restriction and prohibition, and can not cover a provision conferring a power to acquire and hold property in cities and villages, which aliens did not possess at common law. But it is obvious that chapter 15*a*, Compiled Statutes (Annotated Statutes, sec. 6950), of itself, without any supplementary legislation, was enough to exclude and prohibit ownership of real property by aliens, and that an act leaving them free to acquire and hold city property, while continuing their common-law disabilities as to agricultural lands, is, in substance, a restriction of their power as to ownership of lands, substituted for a prohibition. The legislature seems to have assumed that all men had a natural, if not a legal, right to acquire and hold property, and the meaning evidently was that such natural right was to be restricted by law. The common law gave no legal right, and the existing statute in this state, which was repealed, prohibited alien ownership without any exceptions. Hence there was no legal right to restrict. Taking the words in the sense in which they must have been intended, the title does not conflict with the construction this court has put upon the statute. The other objection is that a statute operating only upon lands without the corporate limits of cities and villages, and not extending to all lands in the state, is local and special legislation, contrary to section 15, article 3, of the constitution. It is well settled that the legislature may make a reasonable classification, resting on grounds of public policy, or some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. *State v. Farmers & Mer-*

chants' Irrigation Co., 59 Nebr., 1; *Cleland v. Anderson*,* 66 Nebr., 252. If the statute operates equally upon all persons or objects of a class so constituted, it is enough. In this case there is an obvious and reasonable distinction between lots in the corporate limits of cities and villages and the larger tracts outside which, in this state, are agricultural or grazing lands. No particular mischief might flow from alien ownership of city property, while alien ownership of agricultural lands is a well-known source of political and social disturbance. It can not be said that the classification adopted is arbitrary or unreasonable.

Conceding that the plaintiffs, or some of them, are entitled to redeem, the question arises, what they may redeem, and how much they must pay. It is contended on their behalf that they may redeem the whole property from the sale, while appellees contend that they are tenants in common with the defendants as successors to the interests of their co-tenants under the foreclosure sale, and hence must contribute as to the portion of the mortgage debt satisfied by the sale, and redeem as to the remainder. We are unable to agree entirely with either. In such a case as this the redemption is from the mortgage, not the sale. Counsel for plaintiffs cite *Day v. Cole*, 44 Ia., 452, and *Tuttle v. Dewey*, 44 Ia., 306. But those cases arose under a practice where redemption is allowed, as of course, within a year after sale, and is a statutory redemption from the sale. They do not apply to suits to redeem governed solely by the principles of equity. When a person

* Three opinions have been filed in this case, two by POUND, C., of date November 6, 1902, and July 3, 1903, respectively; the last by SEDGWICK, J., March 17, 1904. This last overrules the other two on a single point, and reverses the judgment; BARNES, J., dissents. Mr. Commissioner POUND'S opinions held that the interest of a bankrupt in an action pending which he might sell or assign, was "property" within the meaning of the national bankrupt act rather than a "right of action," as that term is used in the same act, and held the cause pending to come under that definition of "property." Judge SEDGWICK'S opinion held the cause of action—conspiracy—to be a tort and the injury personal to the plaintiff. As to the purpose for which it is cited in this case, *Cleveland v. Anderson* stands unreversed. —W. F. B.

who is entitled to redeem comes into equity to enforce his right, he must relieve the land of the incumbrance; and he can do this only by paying the full amount of the mortgage lien, though the land may have sold for a less sum. *Evans v. Kahr,* 60 Kan., 719, 57 Pac. Rep., 950; *Collins v. Riggs,* 14 Wall. [U. S.], 491, 20 L. Ed., 723; *Large v. Van Doren,* 14 N. J. Eq., 208; *Bradley v. Snyder,* 14 Ill., 263, 58 Am. Dec., 564; *Iowa County v. Beeson,* 55 Ia., 262, 7 N. W. Rep., 597. In *Collins v. Riggs, supra,* Bradley, J., says (p. 493): "To redeem property which has been sold under a mortgage for less than the mortgage debt, it is not sufficient to tender the amount of the sale. The whole mortgage debt must be tendered or paid into court. The party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed and is still in existence. Therefore he can only lift it by paying it. The money will be subject to distribution between the mortgagee and the purchaser, in equitable proportions, so as to reimburse the latter his purchase-money and pay the former the balance of his debt."

The plaintiffs undoubtedly took the proper course in offering to redeem the whole property, not merely their respective undivided shares therein. A tenant in common who was not made a party, and is, therefore, entitled to redeem from a foreclosure sale, may not compel the mortgagee or his successors to accept a part of the debt and relieve his interest only of the burden, but must offer to redeem the whole, by discharging the entire incumbrance. 3 Pomeroy, Equity Jurisprudence, sec. 1220; *McQueen v. Whetstone,* 127 Ala., 417, 30 So. Rep., 548; *Buettel v. Harmount,* 46 Minn., 481, 49 N. W. Rep., 250; *Lyon v. Robbins,* 45 Conn., 513; *Crafts v. Crafts,* 13 Gray [Mass.], 360; *Eiceman v. Finch,* 79 Ind., 511. Nevertheless, as it is equitable to allow the plaintiff in an action for redemption to redeem his interest by paying his equitable proportion of the mortgage debt, the defendant may, if he sees fit, allow the plaintiff to do so. *Kerse v. Miller,* 169

Mass., 44, 47 N. E. Rep., 504; *Van Vronker v. Eastman*, 7 Met. [Mass.], 157; *Gibson v. Crehore*, 5 Pick. [Mass.], 146. The rule that the debt is a unit so that redemption of a partial interest only, can not be imposed upon the mortgagee, is solely for the benefit and advantage of the latter. He can not be compelled to accept his money in driblets, and may insist upon payment of the entire mortgage debt. But if he so insists, and one tenant in common relieves the entire estate of the incumbrance, the benefit accrues to the other tenants in common, subject to a charge upon their several interests for their respective shares of the incumbrance paid off. 3 Pomeroy, Equity Jurisprudence, sec. 1220. Hence it must be evident that the requirement that the whole incumbrance be discharged is merely an incident of the right of the tenant in common to relieve his individual share, arising from the fact that, with due regard to the equities of others, he can relieve it in no other way. If the difficulties arising from the rights of the mortgagee are obviated, there is no reason why he should be permitted or required to redeem more than his interest. We think, therefore, that if the mortgagee or his successors choose to accept a portion of the debt and allow redemption of a partial interest, and such course is equitable under the circumstances, the holder of such interest can not insist upon redeeming the whole.

We recommend that the decree be reversed, and the cause remanded for further proceedings in accordance with the views above expressed.

BARNES 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 is remanded for further proceedings in accordance with said opinion.

REVERSED AND REMANDED.

ALLEN E. GOBLE ET AL. V. EDWARD W. SIMERAL ET AL.

FILED JANUARY 21, 1903. No. 12,526.

Commissioner's opinion, Department No. 2.

1. **Statute Adopted from Another State.** If a statute adopted from another state had been construed by the courts of that state prior to its adoption here, the same construction should be given ordinarily in this state in the absence of any indication of a contrary intention on the part of the legislature.
2. **Construction of Statute:** RELUCTANCE OF COURTS: LEGISLATIVE INTENT. The reluctance of courts to construe a statute so as to permit it to operate harshly in particular cases, must yield to plain and unequivocal indications of legislative intent.
3. **Guardian:** WARD: MINORITY: DISCHARGE IPSO FACTO. A guardian is discharged, within the purview of section 32, chapter 34, Compiled Statutes, (Annotated Statutes, 5402), when the ward becomes of age.
4. **Statute of Limitations.** As to the sureties upon the guardian's bond, the period of limitation provided in said section begins to run from the date of such discharge, not from the time when a cause of action has accrued upon final settlement. If no cause of action accrues within the period fixed, by reason of failure to take or complete the necessary steps, the sureties do not continue to be liable.

ERROR from the district court for Douglas county. Action upon guardian's bond. Plea of statute of limitations. Tried below before BAXTER, J. Judgment for defendants. *Affirmed.*

L. D. Holmes, J. J. Boucher, Herbert S. Crane, Thomas D. Crane and *O. S. Erwin,* for plaintiffs in error.

Edward W. Simeral, for himself, *Charles J. Greene, Ralph W. Breckenridge* and *J. C. Kinsler,* with him.

POUND, C.

Section 32, chapter 34, Compiled Statutes (Annotated Statutes, sec. 5402), provides that "no action shall be maintained against the sureties in any bond given by the guardian unless it be commenced within four years

Syllabus by court; catch-words by editor.

from the time when the guardian shall have been discharged." The question involved in this case is whether an action may be maintained against the sureties more than four years after the ward comes of age, in case the amount due from the guardian is not ascertained upon final settlement of his accounts until such period has expired. We think the question must be answered in the negative.

It appears that the statutory provision under consideration originated in Massachusetts. Afterwards it was adopted by Michigan. Thence it passed to Wisconsin, and from Wisconsin it came to Nebraska. This history is sufficiently clear from inspection of the several statutes themselves, but has been carefully worked out by the supreme court of Wisconsin in *Paine v. Jones,* 93 Wis., 70, 67 N. W. Rep., 31. The court say (p. 74): "The statute seems to have originated, or been first adopted in this country, in the state of Massachusetts, where it is first found in the Revised Statutes of 1836,* * * * since which time, without material change, it has continued a part of the law of that state. Michigan adopted substantially the same statute from Massachusetts. *Campau v. Gillett,* 1 Mich., 416, 53 Am. Dec., 73, Revised Statutes, 1838, pt. 2, tit. 7, ch. 5, sec. 25. And without material change it has since continued to be the law of that state. It was adopted by this state from Michigan in 1849." But long before the statute was taken over in Nebraska, the courts of Massachusetts had construed it in *Loring v. Alline,* 9 Cush. [Mass.], 68, and the construction adopted in Massachusetts has been followed since in Michigan and Wisconsin. It is a general canon of construction that if a statute adopted from another state had been construed by the courts of that state prior to its adoption here, the same construction should be given ordinarily in this state. *Coffield v. State,* 44 Nebr., 417; *Forrester v. Kearney Nat. Bank,* 49 Nebr., 655; *Parks v. State,* 20 Nebr., 515; *O'Dea v. Washington County,* 3 Nebr., 118. This rule has not always been fol-

*Chapter 79, sec. 36.

lowed, however, and has been modified to some extent in recent cases.

In *Nebraska Loan & Building Ass'n v. Marshall,* 51 Nebr., 534, the court declined to apply the general rule because of another provision in the statutes which indicated a different intention on the part of the legislature, and because the courts of the state from which the statute had been taken had since altered their opinion as to its construction.

Also, in *Morgan v. State,* 51 Nebr., 672, it was held that the prior construction had no more force than would be allowed to a previous decision of this court construing the statute, and hence might be rejected for reasons which would require such course had the decision been rendered here originally.

In *Rhea v. State,* 63 Nebr., 461, this proposition was somewhat restricted, and alteration of the statute by subsequent amendment, as to a point on which the prior construction largely rested, was held to afford ground for independent interpretation.

In view of these later decisions, we think the rule may be formulated thus: Ordinarily the adopted statute should be construed here as the courts of the state from which it was taken had construed it prior to its adoption, in the absence of any indication of a contrary intention on the part of the legislature. The decisions in Michigan and Wisconsin were subsequent to our adoption of the statute here in question, and have persuasive authority only. *Myers v. McGavock,* 39 Nebr., 843, 42 Am. St. Rep., 627. For these reasons, it may be proper to treat the question as in some measure a new one, and to indicate the considerations which move us to adopt the construction given by the courts of Massachusetts.

In *Loring v. Alline, supra,* the court said (p. 70): "By the term 'discharged,' in this statute, is intended any mode by which the guardianship is effectually determined and brought to a close, either by the removal, resignation, or death of the guardian, the marriage of a female guardian,

the arrival of a minor ward to the age of twenty-one, or otherwise." This construction is followed in *Probate Judge v. Stevenson,* 55 Mich., 320, 21 N. W. Rep., 348; *Paine v. Jones,* 93 Wis., 70, 76, 67 N. W. Rep., 31; *Berkin v. Marsh,* 18 Mont., 152, 44 Pac. Rep., 528, 56 Am. St. Rep., 565, and in effect in *Harris v. Calvert,* 2 Kan. App., 749, 44 Pac. Rep., 25. The objection urged against it by counsel is that, in effect, the former ward may be barred of his action before he is able to maintain it; that if the settlement or final accounting for any reason is delayed or protracted beyond four years, there is no remedy against the sureties. But we think the purpose of the statute was to require the accounts to be settled, so far as the sureties were to be held, with reasonable expedition and within the prescribed period. Undoubtedly, as a general proposition, courts will be loth to construe a statute so as to deprive a person of a cause of action by limitation before he is in a position to assert it. The ordinary statutes of limitations provide for this by dating the limitation from accrual of the cause of action. But here the provision is special, meant to cover a special case, and governed by special considerations.

As the court said in *Hudson v. Bishop,* 32 Fed. Rep., 519, 521, construing the statute of Wisconsin: "This is a special limitation for the benefit of the sureties, and does not affect the right to recover from the guardian. The limitation begins to run 'from the time the guardian shall be discharged.'" The purpose is "to fix a time certain, for the benefit of the sureties, so that they may know definitely when their obligations as sureties will terminate." *Paine v. Jones, supra.* No other meaning can be given to the language used. As the court say in the case just cited (p. 76): "To say the term 'discharged' is synonymous with 'settlement of the guardian's account with the proper court, or with the ward,' would seem to do violence to the language used. * * * We are unable to see wherein a mere settlement of the guardian's account, without actual compliance with the order of the court, operates as a discharge, in any sense."

In *Probate Judge v. Stevenson*, *supra*, the court say (p. 323): "The 'discharge' can not very well have more than one of two meanings. It must mean either the end of the guardianship office, or the discharge from liability. It can not mean the latter, because that would preclude any occasion for resort to the bond." Hence courts generally hold, under statutes like our own, that the purpose of the legislature was to require the amount due from the guardian to be ascertained and suit to be brought therefor within the period fixed, and that, as the time allowed is reasonable, negligence or other cause of delay in settling the account can not extend it. As the court said in *McKim v. Mann*, 141 Mass., 507, 509, 6 N. E. Rep., 740: "If no right of action has accrued within the four years for want of necessary preliminary steps, that is the fault or the misfortune of those interested in the estate." It has been remarked in some of the cases cited that this construction may sometimes work a hardship in particular cases. But the reluctance of courts to construe a statute so as to permit it to operate harshly in particular cases must yield to plain and unequivocal indications of legislative intent. *State v. Moore*, 45 Nebr., 12; *Morrill v. Taylor*, 6 Nebr., 236. Statutes of limitations running from some specified act or event and not from the accrual of plaintiff's cause of action, are not uncommon; and where such is clearly the legislative intent, the plaintiff is bound to complete the requisite preliminaries and bring his action in the time required. *First Nat. Bank of Garretsville v. Greene*, 64 Ia., 445, 17 N. W. Rep., 86, 20 N. W. Rep., 754. We are therefore of opinion that a guardian is discharged, within the purview of section 32, chapter 34, Compiled Statutes (Annotated Statutes, sec. 5402), when the ward becomes of age, and that as to the sureties upon the guardian's bond, the period of limitation provided in said section begins to run from the date of such discharge, not from the time when a cause of action has accrued upon final settlement. Such is the express language used, and such is the construction given to like

statutes elsewhere. *McKim v. Mann,* 141 Mass., 507, 6 N. E. Rep., 740; *Probate Judge v. Stevenson,* 55 Mich., 320, 21 N. W. Rep., 348; *Paine v. Jones,* 93 Wis., 70, 76, 67 N. W. Rep., 31; *Berkin v. Marsh,* 18 Mont., 152, 44 Pac. Rep., 528, 56 Am. St. Rep., 565. As the court say in *Berkin v. Marsh* (p. 162): "If it be objected that we are thus holding that the statute of limitations commences to run before the cause of action arises, the answer is simply that this statute of limitations is different from the ordinary ones, and specifically provides that which is unusual, viz.: that the limitation shall commence at the discharge or removal of the guardian, and not at the time of the accruing of the cause of action." It follows that if no cause of action accrues within the period fixed, by reason of failure to take or complete the necessary steps, the sureties do not continue to be liable. The hardship involved is apparent, rather than real. It can happen but rarely that a guardian's accounts can not be settled finally within four years from his discharge. The order of the county court stands as a judgment, as against the guardian, and is directly enforceable. *Lydick v. Chaney,* 64 Nebr., 288. If the guardian takes the cause to the district court, he must give an appeal bond; and he can not suspend enforcement of a judgment of the latter tribunal by going to the supreme court unless he gives a supersedeas bond. Should the delay involved operate to relieve the sureties on the original undertaking, the ward is not left without a remedy so long as these bonds remain for his protection. In the absence of such appeals, there is nothing to prevent final ascertainment of the amount due long before the statute has run.

We recommend that the judgment be affirmed.

BARNES and OLDHAM, CC., concur.

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

AFFIRMED.

NOTE.—*Rule That by Adopting a Statute the Legislature Adopts Whatever Construction Has Been Placed Thereon by the Highest Tribunal of the State from Which It Was Taken, and This Whether the Language of the Two Statutes Be Identical or Synonymous.—Daily v. Swope*, 47 Miss., 367; Sutherland, Statutory Construction, 256; *Hess v. Pegg*, 7 Nev., 23. March 28, 1864, Lyman Trumbull reported, as chairman of the judiciary committee of the United States senate, the thirteenth amendment proposing the abolition of slavery.* It was the language of the ordinance of 1787 for the government of the Northwest Territory. Mr. Sumner had argued for the language of the French constitution, *equality before the law*. Jacob Merritt Howard, of Michigan, pointed out the advantage of adopting the language of the ordinance, for the reason, among others, that the ordinance had received judicial interpretation and the French constitution had not. Congressional Globe, March 29 to April 8, 1864. The reasons for the rule set out at the head of this note, are most cogent and the effect of the rule is most salutary. The legislature, in borrowing a statute or constitutional provision, is presumed to have adopted the construction with the language. The effect is to minimize litigation in the state of the adoption. See a different rule laid down by Hemphill, J., in *Snoddy v. Cage*, 5 Tex., 106, but note the vigorous dissent by Wheeler, J., at page 115.—W. F. B.

NORTHERN ASSURANCE COMPANY OF ENGLAND V. AUGUST D. BORGELT.

FILED JANUARY 21, 1903. No. 12,563.

Commissioner's opinion, Department No. 2.

1. **Foreign Corporation:** BUSINESS IN THIS STATE: COMPLIANCE WITH CONDITIONS: DEMURRER. Where the record discloses affirmatively that the plaintiff, a foreign corporation, has been doing business in this state without complying with the conditions prescribed by the statutes, a demurrer is properly sustained.

2. ———: ———: ———: ———: DEFENSE SET UP IN ANSWER. But where such fact does not appear affirmatively, a demurrer will not lie because the petition fails to allege that the statutory conditions have been complied with. In such case non-compliance is a defense to be set up by answer. *Commonwealth Mutual Fire Ins. Co. v. Hayden*, 60 Nebr., 636, distinguished.

3. **Bond:** CAUSE OF ACTION: DEFAULT: LIMITATION. A cause of action accrues upon a bond conditioned to do a certain act as soon as there is a default in the performance, whether the obligee has suffered damage or not, and the statute of limitations begins to run from that date.

Syllabus by court; catch-words by editor.

* See appendix.

4. ———: ———: ———: ———: CONDITION: INDEMNITY: DAMAGE. If, however, the bond is conditioned to indemnify, damage must be shown before the party indemnified is entitled to recover, so that a cause of action accrues, and the statute begins to run, not from the date of the act which causes damage, but from the time when pecuniary loss ensues therefrom.

5. ———: CONSTRUCTION: GENERAL PURPOSE: INTEREST OF PARTIES: FORM OF WORDS. Courts incline strongly to construe bonds as contracts of indemnity only, and will attach more importance to the general purpose of a bond, as shown by its provisions as a whole and the interests of the parties in the subject-matter, than to the precise form of words employed.

6. ———: BREACH: STATUTE OF LIMITATIONS: SUBSEQUENT BREACH. Although a cause of action for a prior breach of a bond furnished by an agent for the protection of his principal may have been barred by limitation, such fact will not bar an action for another and subsequent breach; the statute of limitations runs as to each breach from the time when it takes place.

7. **Principal and Agent**: INSTRUCTIONS: NEGLIGENCE: LOSS: RECOVERY. It is the duty of an agent of limited authority to adhere faithfully to the instructions of his principal, and if he exceeds, violates or neglects them, and loss results to his principal as a natural and ordinary consequence, it is his duty to make such loss good.

8. **Insurance Agents**: BOND: CONDITION: CANCELATION OF POLICY: DUTY OF AGENT: LIABILITY: CONTRACT OF INDEMNITY. A bond furnished by insurance agents to the company was conditioned that the agents should "in all respects observe and fulfil the instructions of the said company" and that they should "in all other respects well and faithfully perform their duties as such agents." The agents neglected to cancel a policy when directed so to do, and the company was afterwards compelled to pay a loss upon the policy. In an action on the bond, *held* (1) that, as to the condition last mentioned, the bond was to be construed as a contract of indemnity; (2) that even if not a contract of indemnity, as it was the duty of the agents to make good any loss which accrued to the company through their neglect or violation of their instructions, the condition that they would fully perform their duties as agents was broken when they failed to repay to the company the amount it was compelled to pay out through their misconduct, and hence, in either view, the cause of action was not barred until five years from the time when loss to the obligee ensued.

ERROR from the district court for Lancaster county. Action by a foreign insurance company upon the bond of

an agent. The facts appear in the opinion. Tried below before FROST, J. Judgment on demurrer to plaintiff's petition. *Reversed.*

Charles J. Greene, Ralph W. Breckenridge and *J. C. Kinsler,* for plaintiff in error.

Frank A. Boehmer, contra.

POUND, C.

A firm of insurance agents furnished a bond to one of the companies which they represented, conditioned, among other things, that the agents should "in all respects observe and fulfill the instructions of the said company" and that they should "in all other respects well and faithfully perform their duties as such agents." The agents, it is alleged, neglected to cancel a policy when directed so to do; and the company was afterwards compelled to pay a loss upon the policy. Thereupon the company brought an action upon the bond, alleging these facts. It appeared from the petition that the neglect to comply with the order to cancel the policy took place more than five years prior to the time when the cause was begun, but the action was brought within five years from the time when it was ascertained that the company was liable for a loss under the policy and was compelled to pay such loss. Demurrers were sustained in the district court, and the company brings the case here on error.

Two points are made in support of the demurrer,—that the plaintiff, as appears on the face of the petition, is a foreign insurance company, and does not allege that it has complied with the statutory prerequisites to transaction of business in this state, and that the cause of action is barred by the statute of limitations. In support of the first point, we are cited to *Commonwealth Mutual Fire Ins. Co. v. Hayden,* 60 Nebr., 636, 83 Am. St. Rep., 545. But we think a manifest distinction is to be made between the two cases. Where the record discloses

affirmatively that a plaintiff, a foreign insurance company, has been doing business in this state without complying with the conditions prescribed by the statutes, a demurrer is proper. *Commonwealth Mutual Fire Ins. Co. v. Hayden* was such a case. We have examined the record in that cause and find the petition alleged that the plaintiff had made contracts in Massachusetts, to be governed by the laws of that state, insuring property in Nebraska, and that copies of the policies were filed and inserted in the record. From the pleadings and instruments filed, it appeared affirmatively that the transactions involved were in violation of the statutes of this state. In the case at bar this is not true. There is an omission to allege that the statutory conditions had been observed, but there is nothing to show affirmatively that they were not in fact fully satisfied. The petition shows that the company had been doing business in the state in the ordinary manner by regular resident agents. The question is whether we shall presume that it was doing so unlawfully. On this point the authorities are numerous and uniform. Where it does not appear affirmatively that the plaintiff has done business in the state in contravention of the statutes, a demurrer will not lie because the petition fails to allege that the statutory conditions have been complied with. In such case non-compliance is a defense to be set up by answer. *Smith v. Weed Sewing Machine Co.*, 26 Ohio St., 562; *New England Fire & Marine Ins. Co. v. Robinson*, 25 Ind., 536; *Sprague v. Cutler & Savidge Lumber Co.*, 106 Ind., 242, 6 N. E. Rep., 335; *Nickels v. People's Building, Loan & Savings Ass'n*, 93 Va., 380, 25 S. E. Rep., 8; *Nelms v. Edinburgh American Land Mortgage Co.*, 92 Ala., 157, 9 So. Rep., 141; *American Button Hole, Overseaming & Sewing Machine Co. v. Moore*, 2 Dak., 280, 8 N. W. Rep., 131; *New England Mortgage Security Co. v. Vader*, 28 Fed. Rep., 265. In *Cassaday v. American Ins. Co.*, 72 Ind., 95, the court said (p. 98): "Where the complaint is silent on the subject, it can not be presumed that the appellee and its

agent had not complied with the provisions of the statute at the time of the execution of the contract. In the absence of any showing to the contrary, it seems to us that we may fairly presume that both the appellee and its solicitor had complied with the requirements of the statute before and at the time the policy was issued and the note in suit was given therefor. At all events, we are of the opinion that the complaint ought not to be held insufficient on a mere presumption that the appellee and its agents may not have complied with the provisions of the statute." Counsel cite several cases where non-compliance with the statute was held a good defense. But those cases accord with the rule as above stated.

In order to determine whether the action is barred by the statute of limitations, it becomes necessary to ascertain when plaintiff's cause of action accrued,—whether at the time the agents failed to cancel the policy, as directed, or at the time when loss to the company ensued as a result of their neglect or violation of instructions. A clear distinction is made between bonds conditioned to pay a certain sum of money or to do a certain act, and bonds conditioned to indemnify. A cause of action accrues upon a bond conditioned to do a certain act as soon as there is a default in performance, whether the obligee has suffered damage or not. If, however, the bond is conditioned to indemnify, damage must be shown before the party indemnified is entitled to recover, so that a cause of action accrues, not from the date of the act which causes damage, but from the time when pecuniary loss ensues therefrom. *Wilson v. Stilwell*, 9 Ohio St., 468, 75 Am. Dec., 477; *American Building & Loan Ass'n v. Walcen*, 52 Minn., 23, 53 N. W. Rep., 867; *Gilbert v. Wiman*, 1 N. Y., 550, 49 Am. Dec., 359; *Wicker v. Hoppock*, 6 Wall. [U. S.], 94, 18 L. Ed., 752; *Hicks v. Hoos*, 44 Mo. App., 571, 579; *Terre Haute & I. R. Co. v. Peoria & P. U. R. Co.*, 81 Ill. App., 455. It follows that in the one class of cases the statute begins to run from the date of default, in the other it runs from the time when loss or damage is

entailed upon the obligee. In the one class, if the act is done afterwards, or for other reasons, the damages may be nominal only, and at common law *non damnificatus* was not a proper plea. In the other, damage is the gist of the case; without it there is no cause of action, and *non damnificatus* might be pleaded at common law. Consequently, if the sole condition in the bond were that the agents should perform certain specified and well-defined acts, the statute would undoubtedly run from the time when they failed in performance. But, without attempting to refer the condition that the agents fulfil the instructions of the company to the one class or the other, we think the action maintainable upon the condition that they should "in all other respects well and faithfully perform their duties as such agents." This would be so whether the statute had run as to the other condition or not. Although a cause of action for a prior breach of a bond given by an agent for protection of his principal may have been barred by limitation, such fact will not bar an action for another and subsequent breach. The statute of limitations runs for each breach from the time when it takes place. *Deposit Bank v. Hearne,* 48 S. W. Rep. [Ky.], 160. Hence, if there was a breach of the bond when loss accrued to the company by reason of the misconduct of its agents, the fact that there had been a prior breach of another condition at the time they disobeyed their instructions would not affect the running of the statute.

The rule that where the bond is conditioned to do a certain act a cause of action accrues and damages are recoverable upon default in performance, although no actual loss has yet resulted, has been criticised justly as an effort to engraft on the courts of common law a species of specific performance, irregular and illegitimate, and which neither their forms of procedure nor the general arrangement of their system enable them to exercise without great danger of injustice and abuse. 2 Sedgwick, Damages [7th ed.], 307-311. Under the code sytsem,

many of the difficulties suggested disappear. *Wilson v. Stilwell*, 9 Ohio St., 468, 470, 75 Am. Dec., 477. Yet it must be admitted that contracts of pure indemnity are more in accord with present legal conceptions. Originally courts were governed strictly by the precise terms of the instrument, and held that *non damnificatus* could not be pleaded in an action on a bond conditioned for the doing of a certain act, even though it appeared that the bond was given by way of indemnity. *Holmes v. Rhodes*, 1 Bos. & Pul. [Eng.], 638; *Neville v. Williams*, 7 Watts [Pa.], 421; *American Building, Loan & Investment Co. v. Booth*, 17 R. I., 736, 24 Atl. Rep., 779. At present the tendency is otherwise. Courts now incline strongly to construe bonds as contracts of indemnity only, and will attach more importance to the general purpose of a bond, as shown by its provisions as a whole, and the interests of the parties in the subject-matter, than to the precise form of words employed. *American Building & Loan Ass'n v. Walcen*, 52 Minn., 23, 53 N. W. Rep., 867. "The nature of the duty of the obligor, and character of the obligee, will be regarded as explanatory of the intent of the parties." *Strawbridge v. Baltimore & O. R. Co.*, 14 Md., 360, 367, 74 Am. Dec., 541. Looking at the situation of the parties, the nature of the acts to be done, and the terms of the instrument, we have no doubt that a principal purpose was to indemnify the company against any loss that might ensue from misconduct of the agents, and we should be justified in treating the bond in suit as a contract of indemnity. In that case, the cause of action could not be held to have accrued until the company was compelled to pay a loss under the policy wrongfully left outstanding. But if the other view were taken, by reason of the terms of the condition to "well and faithfully perform their duties as agents" in all other respects, we think the same result would follow. It is the duty of an agent of limited authority to adhere faithfully to the instructions of his principal, and if he exceeds, violates, or neglects them, and loss results to his principal as a natural and ordinary consequence, it

is his duty to make such loss good. *Phœnix Ins. Co. v. Frissell,* 142 Mass., 513, 8 N. E. Rep., 348; *Whitney v. Merchants' Union Express Co.,* 104 Mass., 152, 6 Am. Rep., 207; Mechem, Agency, sec. 474; 1 Am. & Eng. Ency. Law [2d ed.], 1058. As counsel express it aptly, it is an implied or expressed term of every contract of agency that the agent will reimburse the principal for any loss that he may sustain through the neglect of the agent. When a loss results from the agent's misconduct, this general duty becomes a specific duty to pay the amount of the damage. This is as much one of the agent's duties as the duty to obey instructions, and we think it fairly and clearly covered by the general language of the bond in question. As it was the duty of these agents to make good any loss which accrued to the company through their neglect or violation of the instructions given them, the condition that they would fully perform their duties as agents was broken when loss accrued under such circumstances and was not made good, and the cause of action would not be barred until five years from the time when loss to the obligee resulted from their misconduct.

We recommend that the judgment be reversed and the cause remanded with directions to overrule the demurrers.

BARNES 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 overrule the demurrers.

REVERSED AND REMANDED.

ALMERIA IRRIGATION CANAL COMPANY, APPELLEE, V. TZSCHUCK CANAL COMPANY ET AL., APPELLANTS.

FILED JANUARY 21, 1903. No. 12,522.

Commissioner's opinion, Department No. 3.

1. **Contract:** IRRIGATION COMPANIES: LIEN RESERVED. A contract entered into between two irrigation companies by the terms of which one company sells and conveys its canal to the other, reserving a lien on the property sold as security for a balance of the consideration remaining unpaid, may, in default of the payment of such consideration, be foreclosed as a mortgage.

2. ———: ———: ——: PAYMENT IN WATER RIGHTS: FORECLOSURE OF LIEN. The contract provided that that part of the consideration secured by a lien on the property should be paid in water rights issued to the vendor or to such party or parties as the vendor should designate, and such latter-named parties were also to have a lien on the property for their security. *Held*, That on foreclosure of the contract and a sale of the property, the lien of such parties would still continue as against the purchaser at the foreclosure sale.

3. **Purchasing Company:** IRRIGATION CANAL. The purchasing company owned an irrigation canal constructed through the country below the canal which it had purchased, and after the purchase connected the two so that they became one system. *Held*, That the lien reserved by the vendor company might, notwithstanding this, be foreclosed and that part of the canal covered by said lien sold.

4. **Water Rights:** PURCHASERS' RIGHTS. Parties owning water rights purchased from the vendee company along the lower part of the canal sought to intervene in the action. *Held*, That they had no such right or interest in the foreclosure proceedings as entitled them to do so.

APPEAL from the district court for Loup county. Action for accounting and foreclosure under a contract, with a prayer for general equitable relief. For judgment, see opinion. Heard below before PAUL, J. *Affirmed.*

Edward W. Simeral and *A. S. Moon*, for appellants.

Alphonso M. Robbins, contra.

Syllabus by court; catch-words by editor.

DUFFIE, C.

This is an appeal from a decree entered by the district court for Loup county declaring a contract entered into between one of the appellants and appellee for the sale of an irrigation canal a mortgage, ordering a foreclosure of the same and a sale of the property described in the contract. The appellants did not preserve the evidence taken on the trial by a bill of exceptions, and we have nothing before us but a copy of the pleadings and the decree entered, and can therefore only consider and determine whether the decree is supported by the pleadings in the case.

The petition and the contract made between the parties a copy of which is attached as an exhibit, are quite voluminous and we will endeavor to set out the substance of each without copying the same at length. It is alleged in the petition that the Almeria Irrigation Canal Company is a corporation and that on June 17, 1897, it was the owner and operator of an irrigation canal in Loup county commencing at the point of diversion and connecting with the North Loup river in the northwest quarter of section 24, township 22, range 20, and running thence southeasterly across certain lands which are particularly described; that on said date it entered into a contract with the defendant, which is also an irrigation company, for the sale to the latter of said canal for the sum of $6,250, $1,000 of which was paid in cash and the balance was to be paid in water or water rights, either annual or perpetual; that these rights were to be furnished by the defendant to the plaintiff, or to such parties and at such times as the plaintiff might designate, and at prices which were agreed on and set out in the contract; that for its security the plaintiff should have a good and valid lien upon all the property conveyed, which should not be impaired in any manner by any incumbrance by the defendant company, and which lien might be enforced in case of default made in the payment of the $5,250, in manner and form as provided in the contract, by proceedings either at law or in

equity, and the same lien and right to enforce the same should extend to the holder of any water-right certificates. The contract further provided that in order to protect the security the defendant company would, until payment in full of the consideration, keep said canal in a good state of repair and not allow the same to go to waste, etc. It is then alleged that the defendant company has made default in performing the contract according to its terms, and instances of failure to furnish water and water rights and to keep the canal in repair and good condition are recited. It is claimed that there is still unpaid on the contract the sum of $4,663.12, for which a decree was asked and allowed by the court.

We have no doubt that this contract, which specially reserves a lien in favor of the plaintiff, may be foreclosed by proceedings in equity upon default in payment, and that when such default occurs the payments should be treated as a money demand for the purpose of foreclosure proceedings. It will be noticed that by the terms of the contract the water rights, in which the $5,250 still due upon the contract was to be paid, were to be issued to the plaintiff or to such parties as the plaintiff might designate. The petition discloses that certain water-right certificates were, at the request of the plaintiff, issued to certain parties living along the line of the canal, and it is insisted that the rights of these parties and of other parties holding water rights owning land further south than this canal extended, but along the line of a canal connecting with it and constructed by the defendant, who sought to intervene in the action, were not protected by the court in its decree.

We will hereafter notice the case made by the parties seeking to intervene in the action, and now dispose of the claim made that the decree is faulty in not protecting the interest of the parties who held water rights issued to them at the instance of the plaintiff and in part payment of the consideration named in the contract. These parties, by the express terms of the contract, held a lien on the

canal for their protection. This lien was given them by the contract which was being foreclosed and it was not sought in this action to cut off or in anywise affect this lien. If the plaintiff should become the purchaser of the canal on a sale made to satisfy the decree, we think on equitable principles it would be compelled to recognize this lien, which is given by the very instrument on a foreclosure of which it obtains title, and no third party purchasing at the sale could acquire a better right than could the plaintiff itself. The foundation of the title of a purchaser at the foreclosure sale is the instrument which gives these parties a lien on the canal for their protection, and until that lien is divested by some proceeding in which they are made parties their rights can not be affected.

It seems from the matters disclosed by the record and by the briefs of counsel, that prior to the making of this contract between the parties the Tzschuck Canal Company had commenced and partially completed a canal which lay south and east of the one sold to it by the plaintiff; that this canal was originally intended to par allel the plaintiff's, and to connect with the Loup river at or near the point where plaintiff's ditch did or was to connect with that river. There was apparently some trouble between the two companies over the right to take water from the river, and this may have been the occasion of the sale and contract. The plaintiff's canal is about eleven miles in length, and after the sale the defendant company made a connection between the one which it was constructing and the one purchased from the plaintiff, thus forming a ditch some thirty-three miles in length, the part constructed by the plaintiff being, as before stated, about eleven miles in length, while the part constructed by the defendant is about twenty-two miles in length. Several parties living along the line of that part of the ditch constructed by the defendant company, had purchased water rights from the defendant, and these parties sought to intervene in the action and filed peti-

tions setting up the facts and showing to the court that the whole water supply on which they must depend came from the Loup river through that part of the canal constructed by the plaintiff, and that to foreclose the lien claimed by the plaintiff and sell that part of the canal covered by the lien would in effect destroy the use of the larger part of the canal. An estoppel as against the plaintiff to enforce its lien was also claimed on the ground that at the time of making the sale the plaintiff knew that the defendant company had expended a large sum of money in constructing its ditch and had sold a large number of water rights, and that by making the sale and allowing the two canals to become connected and consolidated, the plaintiff had implicitly agreed that those parties living adjacent to that part of the canal constructed by the defendant company should have at all times free flowage of water through the part so sold. The court sustained a demurrer to these intervening petitions and this is alleged as error.

We do not think that the interveners have any cause of complaint from the action of the court. If it were to be conceded that an implied agreement of the kind asserted by the interveners could be read into a written contract plain and express in all its terms, there is still no reason to believe that the plaintiff or any other purchaser at the foreclosure sale would refuse to carry it into full effect. Until the parties have been wronged, until their rights are invaded, they have no cause for complaint and no cause to trouble the court or the other parties to the suit with matters which are not at present a grievance and may never grow into a legal cause of complaint.

The appellants insist that instead of foreclosing its lien and selling the property the plaintiff should apply for a receiver to take charge of the property, repair the same and put it in operation, such receiver to carry out the contract according to its terms. It is also urged that by the purchase of the canal constructed by the plaintiff, that canal and the one made by the defendant became con-

solidated and must now be regarded as a unit, no part of which can be separately sold and allowed to pass into the control of a party who might attempt to operate it independently of the part not sold; that the public interest requires the canal to be operated as a whole and not divided in sections, each independent of the other. This question has arisen in cases where a railroad company has executed separate mortgages on distinct divisions of its line to separate parties. In such case, where the whole line is covered by the separate mortgages and all the mortgagees ask a foreclosure of their lien, and the circumstances of the case satisfy the court that a sale of the whole property as a unit will be most beneficial to all concerned, then the road is ordered sold as a whole and the fund divided among the several parties. Judge Bradley, in *Campbell v. Texas & N. O. R. Co.*, 2 Wood [U. S. C. C.] 263, 269, a case where different divisions of a railroad were mortgaged to separate parties, remarked: "Cases often occur when a sale of the property out and out and a subsequent adjustment of claims upon the fund is the only just method which can be pursued. But whenever a specific property on which a separate incumbrance exists can be sold separately, without injury or sacrifice of that or other property, it ought to be thus sold, so as to secure to every incumbrancer, if practicable, the right of protecting his security without involving himself in onerous engagements, or being subjected to onerous conditions, and if a decree is made in plain disregard of this rule, I think it ought to be corrected." In the same paragraph of the opinion he says: "It seems to me, however, to be very material to a party holding a first incumbrance on property, not to be deprived of the right of bidding that property up to the amount of his claim. This he can not do when the property is sold together with other property, or when his right to priority is left in dispute." In the present case but one section of the canal was incumbered, and that alone is the only part which the court could affect by its decree. We know of no way open to the court

to sell the whole canal, and we know of no legal principle which can be invoked to change the contract made by the parties themselves or to prevent its enforcement.

Section 47, article 2, chapter 93*a*, Compiled Statutes of 1901 (Annotated Statutes, sec. 6801), in our opinion, is a clear grant of power to make the mortgage in question, and being a legal mortgage, it should be enforced in the usual and ordinary way. As irrigation canals are made works of internal improvement, they are subject to public control and legislation the same as other works of that nature, and the rights of those parties owning land covered by the lower part of this canal, if not recognized by the purchaser of that portion ordered sold by the decree, can in future proceedings for that purpose be fully protected.

We recommend the affirmance of the decree.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the decree appealed from is

AFFIRMED.

HENRY A. PIERCE ET AL. V. ALICE E. ATWOOD.

FILED JANUARY 21, 1903. No. 12,900.

Commissioner's opinion, Department No. 3.

Mortgages: FORECLOSURE: FIRST LIEN: SECOND LIEN: MOTION FOR RESTITUTION. Pierce and Mrs. Cotterell, each holding a mortgage on the property of Mrs. Atwood, foreclosed their mortgages; the decree awarding Pierce a first lien on the property and Mrs. Cotterell the second lien. Pending an appeal to this court taken by Mrs. Atwood, the property was sold, and the proceeds of the sale, after satisfying the costs, were paid to the mortgagees. The amount was sufficient to satisfy the claim of Pierce, but not that of Mrs. Cotterell. This court reversed the decree of the district court so far as it awarded Pierce a lien on the property, holding that his mortgage could not be enforced against it, and affirmed the decree so far as it awarded a lien to Mrs. Cotterell. After this Mrs. Atwood filed a motion

Syllabus by court; catch-words by editor.

in the district court to compel Pierce to make restitution of the money paid to him. Mrs. Cotterell also appeared and made claim to the fund to the extent that her claim was unpaid. The district court ordered the whole amount paid to Mrs. Atwood. *Held*, That this was error and that Mrs. Cotterell was entitled to sufficient of the fund to satisfy her decree.

ERROR from the district court for Dodge county. Action to foreclose mortgage, brought by Pierce against defendant in error. Cross-petition by Cotterell. See opinion. Judgment awarding money received by plaintiff to defendant. Both Pierce and Cotterell bring error. Tried below before HOLLENBECK, J. *Reversed.*

Courtright & Sidner, for plaintiffs in error.

Enos F. Gray, contra.

DUFFIE, C.

Henry A. Pierce and Emeline L. Cotterell, the plaintiffs in error, each held a mortgage on premises owned by Mrs. Atwood. Pierce commenced foreclosure proceedings and Mrs. Cotterell filed a cross-petition asking a foreclosure of her mortgage. A decree was entered foreclosing both mortgages; Pierce being found entitled to a first lien and Mrs. Cotterell to a second lien. Mrs. Atwood appealed. Pending the appeal the building on the property was damaged by fire and the court required an increased supersedeas bond, which Mrs. Atwood failed to give. Thereupon the property was sold and the proceeds disposed of in the following manner: (1) To the payment of the costs; (2) to the payment of the amount found due Pierce upon his mortgage; (3) to the payment of the amount found due Mrs. Cotterell on her mortgage. The proceeds of the sale paid the costs and the Pierce mortgage, but were insufficient to pay the full amount due upon Mrs. Cotterell's claim. On the appeal this court reversed the decree of the district court so far as the Pierce mortgage was concerned, holding that his mortgage could not be enforced against the property, and affirmed the decree as

to Mrs. Cotterell's mortgage. See *Pierce v. Atwood*, 64 Nebr., 92. Upon the case being remanded, Mrs. Atwood filed a motion for restitution, claiming that the entire amount received by Pierce should be returned to her. Mrs. Cotterell intervened, claiming sufficient of the amount in Pierce's hands to satisfy her decree. Pierce does not deny that he should make restitution of the amount received by him, but he asked to be allowed to pay the amount into court and to be discharged, leaving Mrs. Atwood and Mrs. Cotterell to settle between themselves their right to the fund. The court refused to allow Pierce to pay the fund into court and to be discharged, and made an order requiring him to pay to Mrs. Atwood the full amount received by him on a sale of the mortgaged premises. From this order Pierce and Mrs. Cotterell have taken error to this court.

Upon the reversal of a judgment, the party procuring such reversal is entitled to restitution to the extent that he has been damaged by the error of the court. That Mrs. Atwood is entitled to restitution, is not denied by any of the interested parties; but the extent to which restitution should be made to her is the matter in dispute. If the district court had refused to recognize Pierce's mortgage as a lien upon Mrs. Atwood's property, then Mrs. Cotterell's mortgage would stand as a first lien thereon and the proceeds of the sale would have been paid to her to the full extent of her lien. To the extent that her lien remained unpaid, she, instead of Mrs. Atwood, is entitled to the fund in Pierce's hands. Mrs. Atwood is only entitled to such part of the fund paid to Pierce as may remain after satisfying Mrs. Cotterell's decree. To that extent only has she been damaged by the error of the district court. That is all she would have received from the proceeds of the sale had the district court committed no error, and she can not claim restitution beyond the amount to which she has been damaged.

In *Ranck v. Becker*, 13 Serg. & R. [Pa.], 41, it was held that where the defendant's land had been sold under a

reversed judgment, but was bound also by several judgments subsequent in date, justice required that the younger judgments, which were liens, should be protected upon the reversal of the older judgments; and accordingly the court, while ordering restitution, directed the restored money to be brought into court, after which it was to be applied to the discharge of all liens on the defendant's land according to their legal priority, and then the remainder, if any, paid to the defendant. This was what should have been done in this case. The money in Pierce's hands was the proceeds of a sale of property upon which Mrs. Cotterell had a mortgage which had been foreclosed and the amount unsatisfied. Her right to this fund to the extent of her unpaid lien can not be questioned.

The rule of the Pennsylvania court is the just and equitable one, and we recommend that the order complained of be reversed and the case remanded to the district court with directions to proceed in accordance with this opinion.

AMES and ALBERT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the order complained of is reversed and the case remanded to the district court with directions to proceed in accordance with this opinion.

REVERSED AND REMANDED.

MARY A. LANGAN ET AL. V. THOMAS WHALEN ET AL.

FILED JANUARY 21, 1903. No. 12,509.

Commissioner's opinion, Department No. 3.

1. **Dedication of Private Property to Public Use: EVIDENCE.** The allegation that private property has been dedicated to a public use, can only be established from declarations or circumstances showing that the owner intended to make the donation in question.

Syllabus by court; catch-words by editor.

2. **Highway**: ESTOPPEL: DEMAND FOR DAMAGES. A person is not estopped to deny the existence of a lawful public road by the fact that he demanded damages on account of the taking of his land therefor, which demand was wholly ignored by the public board authorized by law to ascertain such damages.

3. **Intention**: DISPUTED AND AMBIGUOUS CIRCUMSTANCES: JURY. When the intention of a party is to be ascertained from disputed or ambiguous circumstances, the necessary inferences to be drawn are for the determination of the jury.

ERROR from the district court for Hall county. Action in ejectment. Plea of highway. Tried below before MUNN, J. *Reversed.*

Othman A. Abbott, for plaintiffs in error.

Charles G. Ryan, O. M. Quackenbush and *Leo Cleary, contra.*

AMES, C.

Plaintiff in error Mary Langan owns a tract of land lying within what are now the corporate limits of the village of Wood River. Crossing the tract at about the middle is a strip called by the parties a "turning row"; that is, a strip of unplowed ground lying between plowed fields on each side, and upon which the teams used in cultivating the fields are turned around. Since the beginning of 1882, if not longer, this strip has been used by the public continuously, to some extent, as a roadway, and in May of that year proceedings were begun by the county board for the establishment of a highway including it, but were carried no further than the making of a survey and staking out the road. At that time the plaintiff in error Thomas Langan, the owner of the land, gave to the county clerk, for filing, a claim for compensation in the sum of $200. This claim, however, did not find its way to the commissioners' records and the road was declared established, but in October of the same year the premises were included in the village corporation and the further prosecution of the proceedings was abandoned. Afterwards Langan, having as-

certained that jurisdiction of the matter had passed to the village board, made several ineffectual demands of that body for the payment of the compensation he required, but whether he ever succeeeded in filing a formal demand therefor with the village clerk is not certain. At all events, his wishes in this respect remained unsatisfied and he repeatedly protested to the officials of the village, and to individuals, against the use of the strip as a public road until his damages should be paid. In harmony with this protest, he forbade the village authorities to improve or repair the passageway, and built and maintained for more than ten years a fence along the centre of what would have been the public road as attempted to be established by the county board. In August, 1899, he built a fence across the strip for the purpose of keeping off intruders, and the village authorities tore it down and took possession of the ground as a public highway. The premises are a homestead, and Thomas and his wife, Mary A., began this action in ejectment to recover possession. Upon proof of substantially the above-recited facts, which are not in dispute, the court instructed the jury to return a verdict for the defendant.

This proceeding is for the reversal of a judgment entered upon the verdict. The principal contentions in support of the judgment are, first, that the conduct of Thomas Langan, especially his filing, as it is insisted, of one claim for damages with the county board, and of three others with the village trustees, amounted to a dedication of the ground to the public as a highway. The impression the circumstances make upon our own minds is exactly the contrary. The filing of the claims, if any were filed, shows a willingness on his part that his land should be appropriated for public use, provided and upon condition that he should be compensated therefor as prescribed by the constitution and statutes of the state; but otherwise not. In other words, his state of mind, as indicated by his own conduct, was not that of one who intends to dedicate, in the sense of to donate, give, bestow without compensation, but of one who was persistent in making it known

that he did not entertain any such intention or purpose. As is said by the court in *Forbes v. Balenseifer*, 74 Ill., 183: "In all [such] cases it must appear from declarations or convincing circumstances that the owner intended to dedicate the use of the land to the public." Evidence of such intention is, we think, wholly absent from this record. But it is insisted by defendant that by filing his claims for damages the plaintiff, in effect, began an action for the recovery of compensation, and is therefore estopped to deny the existence of the road, under the authority of *Hawver v. City of Omaha*, 52 Nebr., 734. Whether he did file any such claims is a disputed question, which, if material, should have been left to the jury. But the claims, in any event, having been ignored by the public boards, we think the filing of them is immaterial, except as negativing the idea that Langan intended to donate the ground. The constitutional guaranty against the taking or damaging of private property for public use without just compensation, would be of but little practical protection if it were held to be satisfied by the course said to have been followed in this case. The contention of the defendant amounts to saying that a man waives his rights by the very act of demanding them. Doubtless, if a sum as damages, however inadequate, had been assessed and allowed to him in the manner prescribed by law, he would have had to be content with accepting it or prosecuting an appeal. But to say that to deny or ignore his rights altogether deprives him of any suitable remedy at law or in equity for the protection of his possession, would be to annul the constitution.

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 the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and a new trial granted.

REVERSED.

BANKERS' UNION OF THE WORLD v. OTTO C. SCHWERIN.

FILED JANUARY 21, 1903. No. 12,540.

Commissioner's opinion, Department No. 3.

1. **Falsus in Uno, Falsus in Omnibus:** QUESTION FOR JURY. The questions whether a witness has in the course of his examination wilfully and intentionally testified falsely, and if so, what effect that fact should have upon the credibility of his other testimony, are, under proper instructions by the court, exclusively for the determination of the jury.

2. **Conflicting Evidence.** An inquiry of fact decided by a jury from conflicting evidence will not be examined upon error by this court.

ERROR from the district court for Douglas county. The case is stated in the opinion. Tried below before BAXTER, J. *Affirmed.*

Weaver & Giller, for plaintiff in error.

C. W. De Lamatre, contra.

AMES, C.

This is an action upon a policy or contract of accident insurance. The insured lost the sight of one eye. He made the usual proof of loss, in which he said that the cause of the injury was unknown. Afterwards he brought this action, alleging that his blindness was caused by an accident. On the trial he testified that the accident happened while he was taking up or digging out some trees on the 26th day of April, 1900, the injury being the result of one of the trees having fallen upon him. The testimony of a physician was introduced, which tended to show that he treated the plaintiff's eye on the 4th day of April, before he became engaged in the occupation mentioned, and there were other circumstances which tended somewhat to discredit the testimony of the plaintiff in this particular. The case was submitted to the jury upon instructions

Syllabus by court; catch-words by editor.

which, if they are in the record, are not complained of in the brief of plaintiff in error, and a verdict was returned for the plaintiff below. This proceeding is prosecuted to reverse a judgment upon the verdict.

It may be true, as the plaintiff in error contends, that from the evidence contained in the record "it is impossible to say what caused this injury," and it certainly is true, as it further says, that "the burden of proof was upon the insured to show that his injury resulted from an accidental cause," but it is not complained that the jury were not properly instructed as to the burden of proof, and the weight and credibility of testimony are within their exclusive province for determination. It every day occurs that the decisive facts in lawsuits can not be proved with certainty, or by positive evidence, or beyond a more or less satisfactory degree of probability. It was to decide upon the decree of probability and to choose the preferable inference that the institution of jury trials was established. Again, the plaintiff in error urges that the right of recovery is almost solely dependent upon the testimony of the insured, that the record convicts him of falsehood, and that, therefore, his testimony should be wholly excluded under the maxim, *Falsus in uno, falsus in omnibus.** The objection is not, however, so conclusive as counsel seem to think. In the first place, the question whether the witness was guilty of an intentional falsehood affecting his credibility was for the jury and not for the court to answer; and in the second place, if he were so guilty, it was for the jury to say in what degree his guilt impaired his credibility. It is undoubtedly true that if the jury were convinced that the witness had in the course of his examination been guilty of a willful falsehood, they were at liberty to reject his entire testimony, but they were not bound so to do; or, in other words, it was not competent for the trial court, nor is it for this court, to strike his entire testimony from the record in considering the question whether the verdict is sustained by suffi-

* *Stoppert v. Nierle*, 45 Nebr., 105.

cient evidence. It is not complained that the trial judge neglected or refused to give any requested instructions touching the credibility of the witness, and he therefore can not be charged with error in this respect. Counsel point out no specific error in the record, nor do they contend that there was not a conflict of evidence with respect to the cause of the injury. They merely disagree with the jury as to the conclusion to be drawn from the evidence, and as to the weight of the testimony and the credibility of witnesses. It has been decided in a multitude of cases that these are questions with which, in suits at law, this court is incompetent to deal.

It is recommended 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, it is ordered that the judgment of the district court be

AFFIRMED.

RELIANCE TRUST COMPANY V. H. A. ATHERTON.*

FILED JANUARY 21, 1903. No. 12,350.

Commissioner's opinion, Department No. 3.

1. **Statute of Limitations**: DATE OF ISSUANCE OF SUMMONS: SERVICE OF SUMMONS. An action is not deemed commenced, within the meaning of the statute of limitations, at the date of the issuance of a summons, unless such summons is served on the defendant.

2. ———: ———: VOLUNTARY APPEARANCE: DATE OF COMMENCEMENT OF ACTION. Where a summons is issued, but not served, and the defendant enters a voluntary appearance, the commencement of the action, within the meaning of such statute, dates from the entry of such appearance.

ERROR from the district court for Fillmore county. Action in county court upon a coupon note; special ap-

Syllabus by court; catch-words by editor.
* Opinion denying rehearing, page 309, *post*.

pearance sustained. General appearance; plea of the statute of limitations; judgment for plaintiff. Error to district court, assigning (1) overruling of demurrer to plaintiff's petition; (2) overruling certain objections. Heard below before STUBBS, J. Judgment below affirmed. *Affirmed.*

George B. France and *Arthur G. Wray,* for plaintiff in error.

F. B. Donisthorpe, contra.

ALBERT, C.

For the sake of brevity and clearness we shall call the plaintiff in error the plaintiff, and the defendant in error the defendant, as we may have occasion to refer to them in what follows.

On the 1st day of September, 1900, the plaintiff filed a petition in the county court asking judgment against the defendant and another in the sum of $408.95 on a promissory note and interest coupons, both dated September 1, 1890, and both due and payable September 1, 1895. The petition shows on its face that the debt had been secured by a real estate mortgage, of even date with the note, and that such mortgage had been foreclosed and the net proceeds credited on the principal note September 6, 1899. A summons issued for the defendants in that action on the date of the filing of the petition, and was returned on the 27th day of September, 1900. The officer's return thereto, omitting the venue, signature and statement of costs, is as follows: "I hereby certify that on the 27th day of September, 1900, I served the within writ of summons on the within named H. A. Atherton [the defendant] by delivering at residence a true copy of this summons with all the indorsements thereon as required by law. Austin M Atherton [the other defendant] not in said county." On the date of the return of the summons the defendant entered a special appearance in the case and objected to

the jurisdiction of the court on the ground that "no summons as required by law had been served on him." The objection was sustained, whereupon, on the same day, namely, September 27, 1900, the parties, in open court, agreed to a continuance of the case, and no further attempt at service on the defendant was made. Afterward, the defendant demurred to the petition on the grounds that the court had no jurisdiction of the subject-matter, and that the facts stated in the petition were insufficient to constitute a cause of action. The demurrer was overruled; the defendant then answered, relying on the statute of limitations as a defense. Upon a trial of the issues, the court found for the plaintiff and gave judgment accordingly. The defendant prosecuted error to the district court, where the judgment of the county court was reversed and the case dismissed. From the judgment of the district court the plaintiff brings the case here by petition in error.

Counsel have not confined themselves in their argument strictly to the record, and we can not undertake to follow them further than their arguments are drawn from the record presented to this court.

The principal question in this case, is whether the county court erred in overruling the demurrer to the petition, and that question depends on whether it appears on the face of the petition that the cause of action was barred by the statute of limitations. The note and coupon, as before stated, both became due and payable on the 1st day of September, 1895. The statute of limitations, therefore, unless interrupted in some way, would have run against the cause of action not later than the 5th day of September, 1900. There is nothing on the face of the petition to show that the running of the statute had ever been interrupted. It is true there is a credit indorsed on the principal note, but the language of the indorsement and of the petition show that it was not a voluntary payment on the part of the defendant; merely a payment made by indorsing the proceeds of a sale of the property by legal process. A payment thus made does not interrupt the running of the

statute. That being true, the cause of action was barred after September 5, 1900, and the question now arises, when was the action commenced in the county court?

Section 19 of the Code of Civil Procedure, which is a part of the statute of limitations, is as follows: "An action shall be deemed commenced, within the meaning of this title, as to the defendant, at the date of the summons which is served on him; where service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication shall be regularly made." It will be observed that the mere filing of a petition and the issuance of a summons is not the commencement of an action, within the meaning of the section just quoted. The summons issued must be the summons which is actually served on the defendant. In the present case the record fails to show that the summons issued on the 1st day of September, 1900, which is the only summons issued in the case, was served on the defendant. The return of the officer is wholly insufficient to show such service. It merely recites that the summons was served "by delivering at residence a true copy of the summons with all the indorsements thereon." It does not show at whose residence the copy was left; and even if it should be claimed that the residence of the defendant is implied, —an implication which we deem wholly unwarranted,—it is still open to the objection that the statute in regard to substituted service is not satisfied by leaving the copy of the summons at the residence of the defendant. It must be left at his usual place of residence in the county. No attempt was made, so far as the record shows, to amend the return of the officer; and the county court, when its jurisdiction was assailed, properly held that it had no jurisdiction over the person of the defendant. From these facts but one inference can be drawn, and that is that the summons issued on the 1st day of September, 1900, was never served on the defendant, and therefore is not the summons contemplated by section 19, *supra*. Therefore the appearance of the defendant, after the ruling of the court on his

objection urged in his special appearance, was purely voluntary. Had the defendant refused to enter a voluntary appearance, the plaintiff, in order to give the court jurisdiction, would have been compelled to have an alias summons issue, which would have been issued too late to prevent the running of the statute. The entry of a voluntary appearance was not a waiver of the past omission to have service on the defendant, but was a waiver of a present right to insist on the issuance and service of an alias summons, and should not be held to place the defendant in any worse position than he would have occupied had he awaited the issuance and service of an alias summons. In our opinion, therefore, the action was not commenced, within the meaning of the statute of limitations, until the defendant entered a general appearance, which was after the cause of action was barred. The overruling of the demurrer to the petition by the county court was error, and justifies the judgment of reversal in the district court.

It is therefore recommended 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.

The following opinion, denying a motion for rehearing, was filed July 3, 1903:

ALBERT, C.

An opinion was filed in this case at the present term, which is reported on page 305, *ante*. A motion for rehearing has been filed in which a vigorous assault is made on a proposition contained in the opinion to the effect that a return showing service of a summons by leaving a copy at the residence of the defendant does not satisfy the

statute requiring a copy to be left at his usual place of residence. But the question is not necessarily involved in this case; hence the opinion is to that extent dictum. By the return in this case it is left uncertain to whom, and at whose residence, the copy was delivered. The legality of the service was put in issue by the objections of the defendant to the jurisdiction of the court. The court sustained those objections, and it was thereby established as one of the facts in the case that there had been no legal service of the summons issued September 1, 1900. Consequently, it is true, as stated in the former opinion, that the appearance of the defendant in the case after his objections were sustained was voluntary.

We do not overlook the fact that the court, in passing on the merits of the case, found that "the summons served on the defendant herein was delivered to the sheriff for service September 27, 1900." The phrase "served on the defendant" is not to be taken as a finding that there had been due and legal service thereof, thereby vacating the order of the justice sustaining the objections to his jurisdiction, but rather as a means of identifying the summons to which he referred. No motion was made to amend the return to the summons; timely objections were lodged against the service, which were properly sustained by the justice; there is no record of any other service. We must therefore hold, as heretofore, that the general appearance of the defendant was voluntary, and was the commencement of the action within the meaning of the statute of limitations. As such appearance was entered more than five years after the cause of action had accrued, the claim was barred when the action was commenced.

Complaint is made in the motion that it is held in the opinion as a matter of law that the payment relied upon to interrupt the running of the statute was not voluntary. The question arose on a demurrer to the petition. The petition does not allege a payment, but merely that the note bears an indorsement of a credit of the proceeds of a foreclosure sale. Under such circumstances the question pre-

sented is one of law, namely, whether such a credit is a voluntary payment within the meaning of the statute of limitations. The court has held that it is not. *Moffitt v. Carr,* 48 Nebr., 403.

It is recommended that the motion for rehearing be denied.

DUFFIE and AMES, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the motion is denied.

MOTION DENIED.

HENRY B. SHULL ET AL. V. JOHN BARTON ET AL.

FILED JANUARY 21, 1903. No. 12,682.

Commissioner's opinion, Department No. 3.

Attachment: REPLEVIN: SEIZURE. Where property is attached at the suit of creditors bringing separate actions, and such property is taken from the sheriff on a writ of replevin issued at the suit of a third party, to whom the property is delivered after the statutory bond is given and approved, and a part of the attaching creditors, while the action in replevin is pending and undetermined, cause the same property, in the same condition and of the same value, to be taken by the sheriff on execution for the debts for which they had attached it, such seizure on execution is a complete defense, as to all the attaching creditors, in an action on the official bond of the officer serving the writ of replevin, for negligently approving an insufficient replevin bond.

ERROR from the district court for Saline county. Case stated in syllabus. Tried below before STUBBS, J. *Reversed.*

Fayette I. Foss, A. S. Sands, John D. Pope, Ben V. Kohout and *R. D. Brown,* for plaintiffs in error.

George H. Hastings, Tibbets Bros., Morey & Anderson, contra.

Syllabus by court; catch-words by editor.

ALBERT, C.

This case is before this court for the fourth time. The first opinion is reported under the present title in 56 Nebr., 716. A rehearing was granted and the opinion on rehearing appears in 58 Nebr., 741. After a second trial in the district court the cause again reached this court, under the title of *Barton v. Shull*, and the third opinion is reported in 62 Nebr., 570. The facts sufficiently appear in those opinions. The last trial in the district court resulted in a verdict and judgment in favor of the sheriff and those of the attaching creditors on whose judgments no executions were issued and levied on the property, and in favor of the defendants as to the rest of such creditors. The defendants bring error.

The principal question, and one which we regard decisive of this case, is whether the subsequent seizure by the sheriff, under execution, of the same goods, in the same condition and of the same value as when taken by the coroner under the writ of replevin, constitute a complete defense, not only as to the plaintiffs whose executions were thus levied on the property, but as to all of the plaintiffs. This question has already been before this court, on the former hearings of this case.

In the first opinion filed in this case, the court lays down this rule: "Where a creditor attaches personal property as that of his debtor, and it is taken in replevin from the sheriff and delivered to the claimant, the statutory bond being given and approved, and the creditor, pending the replevin suit, causes the same property to be taken on execution for the same debt for which he had attached it, such seizure of the property on execution is a defense for the coroner in a suit against him by the creditor for negligently approving an insufficient replevin bond."

A rehearing was granted after that opinion was filed, and NORVAL, J., who prepared the opinion on rehearing, after quoting the rule above stated, uses this language (p. 746): "The retaking of the identical property by the

sheriff under the executions might or might not be a competent defense in favor of the coroner for the approval of an insufficient bond. If the chattels were in the same condition and of the same value as at the time the same were seized under the replevin writ, the defense would be complete; otherwise it would not be. The taking of the property by the sheriff would constitute a defense *pro tanto,* and we erred in holding in the former hearing that the levy of these executions defeated a recovery in the present action."

In the third opinion, HOLCOMB, J., speaking for the court, says (p. 582): "The defendant, by virtue of his attachment writ, had a special property which he could enforce when he obtained his judgment in the replevin action. Instead of enforcing this right when judgment was obtained in the main case and in the replevin action, an execution is issued and levied on the same property, by which he gains possession of the same property lost in the replevin action. This practically works an abandonment or waiver of the attachment lien for the purpose of enforcing the execution. He obtains possession of the same property and the conditions of the replevin undertaking are presumably good and altogether sufficient to indemnify and save him harmless. The office of the replevin undertaking is to take, in a limited sense, the place of the property replevied and protect the person from whom taken either by a return of the property or the payment of its value with interest. Now, the sheriff, having regained possession of the property first replevied, or such of it as he in fact seized under the executions issued for the benefit of the same attaching creditors, has accomplished all that he can rightfully demand of the sureties on the replevin bond and has no cause of complaint against them so far as a return of such property is concerned, nor can he complain in that respect of the approving officer who approved the undertaking. If the property is again taken from him, then the law furnishes him an adequate remedy on the bond which must be given before he can rightfully be deprived of its possession. He has the full

benefit of the property which the undertaking, alleged to be insufficient and negligently taken, provides shall be returned to him, in the possession of the property itself or the execution of another undertaking for its return to him in case a return is adjudged in his favor. While the multiplicity of suits is not to be commended, but rather condemned, the sheriff is not in a position to take advantage of this abnormal state of affairs. He was not content to rest on the lien obtained by the levy of the attachment writ but seeks also to obtain a lien on part of the same property by the levy of an execution for the purpose of satisfying the same obligation. We are, therefore, of the opinion that, notwithstanding the retaking of the property by the sheriff by the second replevin action, to the extent that he regained possession of the same property in as good condition and of equal value which was taken from him by the replevin writ first levied, and for the return of which the insufficient replevin bond was given, this constitutes a defense *pro tanto* in favor of the coroner in an action on his official bond for approving an insufficient replevin undertaking."

The language quoted, to our minds, admits of but one construction, and that is that the subsequent seizure of the same property by the sheriff on the executions, when it was in the same condition and of the same value as when taken from him by the coroner on the first writ of replevin, is a complete defense to this action, not only as to such of the creditors whose executions were levied on the property, but as to all of them. And this would appear to be right on principle. The lien of the attachments was not divested by the seizure of the property by the coroner under the writ of replevin, nor by its delivery to the plaintiffs in that action. When the sheriff regained possession of the property, such of the attachment liens as had not been abandoned by the levy of executions were still in force, and a part of the measure of the sheriff's then interest in the property. In the second action in replevin those liens might have been interposed as a legitimate

defense *pro tanto*. Whether they were thus interposed does not appear. Had not the possession of the sheriff been disturbed by the second writ of replevin, it would have been his duty to hold the property not only for the satisfaction of the amount of the executions, but for the amount of the attachment liens as well. To hold otherwise would be to say that he would be obliged to sell under the executions, and then return the residue of the property, if any, to the plaintiffs in replevin, and then proceed to enforce a return of such residue, in case a return could be had, by means of an execution issued on his judgment in replevin. This would not only involve useless circuity of procedure, but would render it well-nigh, if not wholly, impossible to adjust the equities between the several creditors. It appears, then, that by the subsequent seizure of the same property the sheriff was placed in the same position, so far as the attachment liens are concerned, as that he would have occupied had the judgment in replevin for a return of the property been formally executed. That the property was again taken from him in another action of replevin, is wholly immaterial. All his interest in the property at the time it was thus taken, including the attachment liens, was or might have been litigated in such second action, which also resulted in a judgment in his favor. That judgment is the measure of his interest in the property when it was taken from him the second time, and its enforcement is the measure of the relief to which he and the creditors for whom he acted are entitled.

The former opinions left but one question of fact in the case, namely, whether the property seized by the sheriff under the executions was the identical property, in the same condition and of the same value, as that taken from him under the first writ of replevin. That question is conclusively answered in the affirmative by the record now presented. Thus answered, it is a complete defense to this action as to all of the plaintiffs, and there appears nothing left to litigate in this case. For that reason, it is unnecessary to discuss the other questions argued by counsel.

It is recommended that the judgment of the district court 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 judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED AND REMANDED.

MARY A. MCKEE, APPELLEE, V. BRIDGET FAGAN ET AL., APPELLANTS.

FILED FEBRUARY 4, 1903. No. 12,600.

Judicial Sale: CONFIRMATION. Order confirming judicial sale, based upon fairly conflicting evidence, will be affirmed.

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

Thomas S. Nightingale, for appellants.

Aaron Wall, contra.

PER CURIAM.

This is an appeal from an order confirming a judicial sale of real estate. The ground upon which a reversal is claimed is that the appraisment was too low. We have no means of determining whether the estimate of the appraisers or that of the three witnesses who testified for appellants represents the true value of the property. The decision of the trial court is based upon conflicting evidence and must be permitted to stand. Order

AFFIRMED.

Syllabus by court; catch-words by editor.

C. C. CUYLER ET AL., APPELLEES, V. FREMONT W. TATE ET UX., APPELLANTS.

FILED FEBRUARY 4, 1903. No. 12,621.

Judicial Sale: NOTICE. Notice of a judicial sale published in every issue of a weekly newspaper for thirty days before the day of sale, is sufficient.

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

Aaron Wall, for appellants.

H. M. Mathew, contra.

PER CURIAM.

This is an appeal from an order confirming a judicial sale. Appellants contend that notice of the time and place of sale was not given for thirty days before the day of sale. The first publication was on April 26, and the last on May 24. The sale was made on May 28. The notice was published in every issue of the paper between the date of the first publication and the day of the sale. The notice was therefore sufficient. *Carlow v. Aultman,* 28 Nebr., 672.

The order of confirmation is

AFFIRMED.

DAKOTA COUNTY V. CHARLES M. BOROWSKY.

FILED FEBRUARY 4, 1903. No. 12,237.

1. **Sheriff:** PRISONERS: SERVICES: GUARDING: COMPENSATION: RECOVERY FROM COUNTY. A sheriff who has, either in person or by deputy, guarded prisoners in the county jail, is, if the services were actually necessary, entitled to recover from the county compensation for such services at the rate of $2 per day.

2. ——: ——: ——: ——: ——: ——: COUNTY BOARD: JUDGMENT OF SHERIFF: QUESTION FOR COURT. The right to de-

Syllabus by court; catch-words by editor.

termine the necessity for such services before they are rendered, does not belong to the county board. Neither is the judgment of the sheriff upon the matter conclusive. Ultimately the question is for the courts.

3. **Specific Fees: SHERIFF'S RIGHT.** The specific fees provided for in section 5, chapter 28, Compiled Statutes, 1901 (section 9031, Annotated Statutes), pertain to the office of sheriff, and the sheriff is entitled to them whether they were earned by himself or his deputy.

4. **Appeal Vacates Decision In Toto.** An appeal by a claimant from a decision of the county board upon a claim presented for adjustment and allowance vacates the decision, even though it be in part favorable to the claimant.

5. **Decision an Entirety.** When a claim is by the county board allowed in part and rejected in part, the claimant must deal with the decision as an entirety. He can not accept the part that is in his favor and appeal from the remainder.

ERROR from the district court for Dakota county. Appeal from an order of the board of county commissioners disallowing certain claims of a sheriff for fees. Tried on appeal before GRAVES, J., without a jury. Judgment for claimant. *Reversed.*

William P. Warner, for plaintiff in error.

Daniel Sullivan, Mell C. Beck and *Thomas F. Griffin, contra.*

SULLIVAN, C. J.

Borowsky, who was sheriff of Dakota county in 1899, presented to the county board of said county two claims for services rendered by him in his official capacity. One was a claim of $60 for guarding prisoners; the other a claim of $483, part of which was for guarding prisoners and part for services as jailer. The board rejected the first claim *in toto.* It also rejected the charge in the second claim for guarding prisoners, but allowed the charge for services as jailer. From both orders Borowsky appealed, but he received from the county clerk, and still retains, a warrant drawn in his favor for the amount allowed him as jailer's fees. In the district court the ac-

tions were consolidated and tried without a jury. The validity of plaintiff's claim for services rendered in guarding prisoners and the legal consequence of receiving and retaining the warrant covering the charge for jailer's fees, were the only questions raised by the pleadings and contested at the trial. There was a general finding in favor of the plantiff and upon this finding judgment was rendered.

In disposing of the case, the only points we shall consider are those which counsel have discussed. The first contention of the county attorney is that the evidence does not show an actual necessity for a prison guard. We are inclined to think it does. The jail was insecure and prisoners had previously escaped. The suggestion that the persons confined in the jail were not charged with serious crimes is not without weight, but we can not regard it as being decisive of the question. It is the duty of a sheriff to prevent the escape of prisoners in his custody whether they are charged with great or small offenses. If the services rendered were actually necessary, the plaintiff is entitled to recover the specific compensation fixed by the statute. The services, which consisted for the most part in occupying a room in the court-house next to the jail, were neither arduous nor exhausting, but it can not be said that they were without value. Those who are actively engaged are not the only servants worthy of their hire. "They also serve who only stand and wait." The jail guard did not exert himself, but he was ready for action; his time was given to the public, and it is quite probable that his nearness to the prisoners had a restraining influence upon them. At any rate the trial court was warranted in finding, as it did, that the fees charged for guarding prisoners had been earned. The plaintiff was under no legal obligation to consult with the county board before incurring the expense in question. The duty of preventing a jail delivery was his, and if he did not err in his conclusion as to the necessity for a guard, he earned, and became entitled to recover, the fees claimed.

The contention that there can be no recovery because the deputy who earned the fees had not assigned them to Borowsky is manifestly without merit. The fees pertain to the office; they belong to the sheriff; the statute makes them his. The deputy had no claim upon them and had, therefore, nothing to assign. The sheriff was entitled to the statutory fees and the county was bound to pay them, regardless of the compensation received by the deputy for his services. The cases cited by the county attorney—*Phœnix Ins. Co. v. McEvony*, 52 Nebr., 566, and *Porter v. Booth*, 47 N. W. Rep. [S. Dak.], 960—are, it seems to us, entirely irrelevant.

The final argument for a reversal of the judgment is that the plaintiff, by accepting the warrant in satisfaction of the charge for jailer's fees, lost the right to prosecute an appeal from the decision of the county board disallowing part of the second claim. This question was considered and decided in the recent case of *Weston v. Falk*, 66 Nebr., 198. It was there held that an order like the one here in question is indivisible, and that a claimant can not accept the part of it that is in his favor and appeal from the remainder. Section 37, chapter 18, article 1, Compiled Statutes, 1901 (section 4455, Annotated Statutes), provides that the claimant "may appeal from the decision of the board to the district court." The next section gives the right of appeal to any taxpayer, and section 39 provides that "such appeal shall be entered, tried, and determined the same as appeals from justice courts." It is entirely clear from these provisions of the statute that the right of appeal given to dissatisfied claimants and taxpayers is the right to appeal from the whole decision, not from part of it. If the appeal in this case had been taken by a taxpayer, its effect upon the order of the county board would, perhaps, be more readily perceived by counsel for plaintiff.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

NOTE.—*Appeal—Vacation of Decision Ipso Facto.*—As to effect of appeal in vacating judgment, *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.

Fees of County Officers—Ministerial Function of Board.—Where the compensation for services rendered for the county is definitely fixed by law, the audit of the same and [the] drawing a warrant therefor, by the board, are merely ministerial duties, unattended with the exercise of any official discretion, and therefore, in such case, the board can not make such compensation any greater or any less than that fixed by the law. Opinion by GANTT, C. J. *Kemerer v. State*, 7 Nebr., 130. Judge BARNES, in an opinion filed October 5, 1904, points out the distinction between the judicial and ministerial functions of county boards so clearly that this heretofore puzzling question ought to give no further trouble to attorneys or clients. *Maurer v. Gage County*, not yet reported.—W. F. B.

STATE OF NEBRASKA V. W. W. DE WOLFE.

FILED FEBRUARY 4, 1903. No. 13,006.

1. **Statutory Crimes.** In this state all public offenses are statutory, and no person can be punished for any act or omission not made penal by the plain import of the written law.

2. ———: COMMON-LAW DEFINITION. But while there are in this state no common-law crimes, the definition of an act which is forbidden by the statute, but not defined by it, may be ascertained by reference to the common law.

3. ———: ———: NUISANCE. A statute declaring all common nuisances to be criminal is to be construed as prohibiting every act which was by the common law indictable as a nuisance.

4. ———: ———: ———: DEFINITION: VENUE: STATUTE. By section 232 of the Criminal Code the erection, keeping up or continuing and maintaining of any nuisance to the injury of any part of the citizens of this state is declared to be a crime; and this declaration is not limited or restricted by the enumeration in the section of certain acts which are to be "construed and held to have been committed in any county whose inhabitants are or have been injured or aggrieved thereby." The first clause of the section makes all common-law nuisances crimes, and the second clause fixes the venue of some of these crimes.

5. **Criminal Procedure Under the Statute.** In a proceeding brought

Syllabus by court; catch-words by editor.

under section 515 *et seq.* of the Criminal Code, the opinion of this court affects in no manner the judgment of the court below; its only function is to determine the law of the case.

WRIT of error, on behalf of the state, from the district court for Lancaster county. The defendant was indicted for maintaining a nuisance. A demurrer to the information was sustained. Heard below before HOLMES, J. The county attorney excepted and brought error to this court. *Exceptions sustained.*

James L. Caldwell, County Attorney, William T. Stevens and *Loren E. Winslow,* for the state.

William M. Morning and *Charles A. Morning, contra.*

SULLIVAN, C. J.

De Wolfe was charged in the district court for Lancaster county with having unlawfully exposed the citizens of the villiage of Bennett to a contagious disease by negligently keeping an infected person in a public place. The defendant demurred to the information, and the court, being of opinion that the facts alleged did not constitute a crime, dismissed the prosecution. The county attorney excepted to the decision and by this proceeding challenges its correctness.

The ground of the decision is thus stated in the judgment dismissing the action: "The Code particularly sets forth what acts shall be deemed a nuisance, and provides a penalty therefor, and failing to specify the acts complained of, no prosecution can be maintained therefor." The question, then, to be considered, is whether common-law nuisances which have not been enumerated in the Criminal Code are punishable as crimes. In this state all public offenses are statutory; no act is criminal unless the legislature has in express terms declared it to be so; and no person can be punished for any act or omission which is not made penal by the plain import of the written law. Criminal Code, sec. 251; *Wagner v. State,*

43 Nebr., 1; *Smith v. State,* 12 Ohio St., 466, 80 Am. Dec., 355; *Estes v. Carter,* 10 Ia., 400. But while there are in this state no common-law crimes, the definition of an act which is forbidden by the statute, but not defined by it, may be ascertained by reference to the common law. *Smith v. State, supra; Mitchell v. State,* 42 Ohio St., 383, 385; *State v. Twogood,* 7 Ia., 252; *Estes v. Carter, supra; Pitcher v. People,* 16 Mich., 142; *Prindle v. State,* 21 S. W. Rep. [Tex. Cr. App.], 360. A statute declaring all common nuisances to be criminal is to be construed as prohibiting every act which was by the common law indictable as a nuisance. These nuisances are, as Mr. Greenleaf has said, "a species of offense against the public order and economical regimen of the state." 3 Greenleaf, Evidence, 184. They are generally under the ban of the law because the experience of ages has shown that their tendency is hurtful to the public. Perhaps the common barretor, the common eavesdropper and the common scold are no longer formidable evils, but certainly most of the other common-law nuisances are as injurious and detrimental to society now as they ever were. There is as much reason now as there ever was to repress conduct calculated to injure the health and morals of the people, or to shock their religious feelings, or their sense of decency, or to endanger their lives or property, or to disturb the peace of the neighborhood. Without a clear expression of its purpose so to do, we can not believe that it was the intention of the legislature to so limit the meaning of the word "nuisance" as to make conduct blameless which has always been considered inherently wrong and deserving of punishment. If the theory upon which the trial court decided this case is correct, a large number of common-law nuisances are not crimes in this state, and many vicious, immoral and revolting acts may be committed in public with impunity.

The section of the Criminal Code under which the information was drawn is as follows: "Every person who shall erect, keep up, or continue and maintain any nuisance, to the injury of any part of the citizens of this

state, shall be fined in any sum not exceeding five hundred dollars, at the discretion of the court, and the court shall, moreover, in case of conviction of such offense, order every such nuisance to be abated or removed. And the erecting, continuing, using, or maintaining any building, structure or other place for the exercise of any trade, employment, manufacture or other business which, by occasioning noxious exhalations, noisome or offensive smells, becomes injurious and dangerous to the health, comfort, or property of individuals or the public; the obstructing or impeding, without legal authority, the passage of any navigable river, harbor, or collection of water; or the corrupting or rendering unwholesome, or impure any water-course, stream or water; or unlawfully diverting any such water-course from its natural course or state to the injury or prejudice of others; and the obstructing or incumbering by fences, buildings, structures, or otherwise, any of the public highways, or streets or alleys of any city or village, shall be deemed nuisances; and every person or persons guilty of erecting, continuing, using, or maintaining, or causing any such nuisances shall be guilty of a violation of this section, and in every such case the offense shall be construed and held to have been committed in any county whose inhabitants are or have been injured or aggrieved thereby." Criminal Code, sec. 232. Presumably the legislature intended that every part of this section should have some force and effect. If the enumerated acts were the only ones intended to be made criminal, it was quite unnecessary to declare in the first clause that every person who should erect, keep up or continue and maintain any nuisance to the injury of any part of the citizens of this state should be punished. And it is hardly probable that the words "any nuisance" would have been used if the legislature had in mind only the few nuisances which it was about to enumerate. A more rational interpretation of the section, and one in harmony with what we conceive to be a sound and just view of legislative policy, is that the legislature had in mind two classes of nuisances—those for

which the state must prosecute in the county where they were committed and those for which it may prosecute in any county "whose inhabitants are or have been injured or aggrieved." Some of the nuisances with which the legislature was dealing were specially mentioned because there was a reason for it; others were not specially mentioned because they were too numerous, and there was no reason for particularizing. The first clause of the section made all common-law nuisances crimes and the second clause fixed the venue of some of these crimes.

Our conclusion is that the trial court erred in sustaining the demurrer and dismissing the action.

The county attorney has asked us to pass upon some other questions, but we must decline to do so as they are not properly before us for decision. This opinion affects in no manner the judgment rendered by the district court; by the express terms of the statute its only function is to determine the law of the case. Whether a new prosecution may be set on foot, and whether the first prosecution has arrested the running of the statute of limitations, are matters which we have in this proceeding no authority to determine.

EXCEPTIONS SUSTAINED.

CRAWFORD COMPANY, APPELLANT, V. HATHAWAY ET AL., APPELLEES.

FILED FEBRUARY 4, 1903. NO. 10,087.

1. **Use of Water**: DOCTRINE OF CIVIL LAW: PRIOR APPROPRIATION: BENEFICIAL USE: TERRITORY: LAWS IN FORCE IN LOUISIANA PURCHASE. The doctrine of the civil law with respect to the right of acquiring an interest in the use of water by prior appropriation and the application thereof to a beneficial use has never become a part of the laws of this state, and this without regard to whether the doctrine was ever in existence as a part of the laws in force in the territory acquired by the United States known as the Louisiana Purchase.

2. **Common Law**: RIGHTS OF RIPARIAN PROPRIETORS. The common-

Syllabus by court; catch-words by editor.

law rule with respect to the rights of private riparian proprietors has been a part of the laws of the state ever since the organization of a state government.

3. **Applicability of Common-Law Rule.** It can not be said that the common-law rule defining the rights of riparian proprietors is inapplicable to the conditions prevailing in the state because irrigation is found essential to successful agriculture in some portions thereof.

4. **Riparian's Right:** FLOW OF STREAM: PART AND PARCEL OF LAND: PROPERTY RIGHT: PROTECTION. A riparian's right to the use of the flow of the stream passing through or by his land, is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land; such right being a property right, and entitled to protection as such, the same as private property rights generally.

5. **Rights of Riparian Owners:** VESTED RIGHTS: POWER OF LEGISLATURE TO ABOLISH: RIGHT OF EMINENT DOMAIN. The legislature has not abolished, nor does it possess the power to abolish, the rights of riparian proprietors which have become vested, except as such rights be taken or impaired for a public use in an exercise of the powers of eminent domain, for which compensation must be made for the injury sustained.

6. **Condemnation:** CONSTITUTION: STATUTE: NATURAL STREAM: RIPARIAN PROPRIETOR. The provisions of section 41, article 2, chapter 93*a*, Compiled Statutes, 1901 (section 6795, Annotated Statutes), and of section 21, article 1, of the constitution, authorize the condemnation of the right of a private riparian proprietor to the use and enjoyment of a natural stream flowing past his land, or its impairment by an appropriation of such water for irrigation purposes; and such riparian proprietor may recover damages in the same way and subject to the same rules as a person whose property is affected injuriously by the construction and operation of a railroad.

7. **Irrigation Act:** PUBLIC USE: RIPARIAN OWNER: INJURY: COMPENSATION: SUITABLE ACTION. The irrigation act of 1895 authorizes and regulates the appropriation of the waters of the state for irrigation and other purposes which are declared to be a public use; and in making appropriations of water as contemplated by the act, a riparian owner whose property rights are appropriated or impaired is entitled to compensation for the injuries actually sustained, to be recovered in a suitable action or proceeding instituted for that purpose.

8. **Interstate Rivers:** MEANDER LINES: NAVIGABLE RIVERS. As to those streams of water flowing through the state which may be classed as interstate rivers, and along the banks of which meander lines have been run by the government in its survey

of the public lands, the question is left open as to whether or not the waters of such streams may not be treated as waters of navigable rivers, to which riparian rights of an adjoining landowner would not attach as against the right of the public to use the waters thereof by its appropriation and application to beneficial purposes.

9. **Riparian Right:** NATURAL FLOW OF STREAM. While, as an abstract proposition of law, a riparian proprietor has the right to the ordinary natural flow of a stream, this rule would furnish no basis for compensation where water is appropriated for irrigation purposes; in order to entitle a riparian owner to compensation he must suffer an actual loss or injury to his riparian estate, which the law recognizes as belonging to him by reason of his right to the use and enjoyment of the water of which he is deprived.

10. **Riparian Proprietor:** USE OF WATER. Ordinarily, a riparian proprietor's right to the use of water of a stream is limited to its use for domestic purposes, and, if applied to the irrigation of riparian lands, a reasonable use for such purpose in view of an equal right to use belonging to all other riparian proprietors.

11. ———: IRRIGATION: RIPARIAN LAND. The right of a riparian proprietor as such to use water for irrigation purposes is limited to riparian lands.

12. **Contiguous Land.** The right can not be extended to lands contiguous to the riparian land, nor can water be diverted to non-riparian lands which might be used on riparian lands, but is not.

13. **Definition of Riparian Land.** Land, to be riparian, must have the stream flowing over it or along its borders.

14. **Extent of Riparian Land:** AREA OF A SINGLE ENTRY: QUÆRE. The extent of riparian land can not, in any event, exceed the area acquired by a single entry or purchase from the government; and whether, in view of the policy of the government in the disposition of its public lands, such riparian land may exceed the smallest legal subdivision of a section—that is, 40 acres—or in lieu thereof, if an irregular tract, a designated numbered lot, which is bordered by a natural stream, or over which it flows, *quære.*

15. **Two Doctrines of Water Rights.** The two doctrines of water rights, one the right of a riparian proprietor, and the other the right of appropriation and application to a beneficial use by a non-riparian owner, may exist in the state at the same time, and both do exist concurrently in this state.

16. **Riparian Rights:** COMMON-LAW RULE: PRECEDENCE. The common-law rule of riparian rights is underlying and fundamental

and takes precedence of appropriations of water if prior in time.

17. **Riparian Owner:** USUFRUCTUARY INTEREST: INCIDENT TO LAND. The riparian owner acquires title to his usufructuary interest in the water when he secures the land to which it is an incident, and the appropriator acquires title by appropriation and the application of the water to some beneficial use; the time when either right attaches determining the superiority of title as between conflicting claimants.

18. **Irrigation Acts:** ABROGATION OF PRIVATE RIPARIAN RIGHTS. The The irrigation acts of 1889 and 1895 abrogated the law of private riparian rights as theretofore existing, and substituted in its stead a law providing for the appropriation of the public waters of the state and their application to the beneficial uses therein contemplated.

19. **Effect of Legislation on Vested and Future Rights.** The legislative enactments referred to did not have the effect of abolishing vested rights of riparian proprietors, but affected only such rights as might have been acquired in the future under the law as theretofore existing.

20. **Judicial Notice:** IRRIGATION: VESTED RIGHTS: QUESTION OF FACT. The court will take judicial notice of the fact that since the early settlements of the western portions of the state, where irrigation has been found essential to successful agriculture, a custom or practice has existed of appropriating and diverting waters from the natural channels thereof into irrigation canals, and the application of such waters to the soil for agricultural purposes. Whether vested rights have been acquire thereby, must depend on the facts and circumstances as disclosed in any particular case.

21. **Use of Water:** PROPERTY RIGHT: SUPERIOR TITLE: SUBSEQUENT RIGHT. The right to the use of water, when acquired by appropriation, is in its nature a property right and becomes a superior and better title to the use and enjoyment of such water than that of a riparian proprietor whose right attaches subsequently.

22. **Act of Congress:** SCOPE. The act of congress of July 26, 1866, granted to those appropriating waters on the public domain for agricultural purposes a right in and to the use of such waters when made according to local customs, or when such right is recognized by the laws of the state or the decisions of the courts.

23. **Act of 1877:** SCOPE: ACTS OF 1889 AND 1895: EXPRESS RECOGNITION. The act of 1877 (Session Laws, 1877, p. 168) was an implied recognition of the right to appropriate the waters on the public domain according to the custom prevailing in the

arid states immediately west of us, and the irrigation acts of 1889 and 1895 expressly recognized and preserved the rights of those who had appropriated the public waters and applied them to agricultural uses.

24. **State Board of Irrigation:** DUTIES: ADMINISTRATIVE, NOT JUDICIAL: CONSTITUTIONALITY OF LAW. The duties of the state board of irrigation as provided for in the irrigation act of 1895 (Session Laws, ch. 69), are administrative, and not judicial. The sections of the statute creating such board are not unconstitutional, as conferring judicial powers on executive officers.

25. **Riparian Rights:** LARGE NUMBER OF CLAIMANTS: APPROPRIATION: PRESCRIPTION: INJUNCTION: MULTIPLICITY OF SUITS. Where a large number of persons claim rights to use or divert the waters of a stream by virtue of riparian rights, appropriations, prescription or otherwise, a suit in equity to determine such rights, and enjoin infringement, under color thereof, of rights acquired under the irrigation act, may be maintained to avoid multiplicity of suits.

26. ———: ———: OFFER TO DO EQUITY: COMPENSATION TO RIPARIAN OWNER: DAMAGE PROPER SUBJECT OF INQUIRY. The plaintiff in such a suit may offer to do equity by compensating riparian owners whose rights are affected by the construction and operation of a canal without leaving them to their actions at law; and in that way the amounts due the several parties by way of damages may become a proper subject of inquiry and adjudication therein.

27. **"Domestic Purposes":** STATUTE: RIPARIAN PROPRIETOR: COMMON LAW: LITTLE INTERFERENCE: DIVERSION: LARGE QUANTITIES: CANALS: PIPE LINE. The term "domestic purposes", as used in section 43, article 2, chapter 93*a*, Compiled Statutes, 1901 (sec. 6797, Annotated Statutes), has reference to the use of water for domestic purposes permitted to the riparian proprietor at common law, which ordinarily involves but little interference with the water of a stream or its flow, and does not contemplate diversion of large quantities of water in canals or pipe lines.

28. **Common Law:** RIPARIAN OWNER: RIGHT DEFINED. The common law does not give to a riparian owner an absolute and exclusive right to the flow of all the water of the stream in its natural state, but only a right to the benefit and advantage of the water flowing past his land so far as consistent with a like right in all other riparian owners.

29. **Superior Riparian Owner:** INJUNCTION: DIVERSION. A riparian owner having a superior title to the use of the water of a stream as against an appropriator is not entitled to maintain

an injunction to prevent the diversion of the storm or flood waters of the stream, and thereby prevent its application to a beneficial use, as contemplated by the statute.

30. **Inferior Riparian Owner: RECEIVING WATER: PRESCRIPTIVE RIGHT.** There is no such thing as a prescriptive right of a lower riparian owner to receive water as against upper owners. Receiving the full flow of a stream for more than ten years does not give a prescriptive right that will prevent reasonable use of its waters by an upper owner.

REHEARING of the case reported in 60 Nebr., 754, and 61 Nebr., 317. Appeal from the district court for Dawes county. The appellant brought an action in the district court for Dawes county against Leroy Hall and others to adjudicate certain rights of the parties and to enjoin Hall, who was charged with making threats to tear down a dam erected by the appellant in White river, in Dawes county, by which nearly all the water in the river was diverted from the channel and caused to flow through plaintiff's ditch. Crawford is a village situated in Dawes county, in the arid district of Nebraska, on the banks of White river. The appellant was created for the purpose of constructing a canal which should furnish water to the village of Crawford. It was contended on the part of the appellant that the sewerage from Fort Robinson—situated above the village—ran into White river, destroying its purity and rendering it unfit for use. The appellee Leroy Hall owned a mill on White river below the village of Crawford; and as a riparian proprietor, claimed the right to the water by prescription. The appellant contended that no prescriptive right could arise from simply receiving water. Heard below before KINKAID, J. Judgment for defendants below. *Reversed.*

Francis G. Hamer, Thomas F. Hamer, Allen G. Fisher and *Justin E. Porter,* for appellant.

Samuel Maxwell, Albert W. Crites and *William H. Fanning, contra.*

John S. Kirkpatrick and *J. W. Deweese, amici curiæ.*

HOLCOMB, J.

An opinion prepared in this cause by the then chief justice, with one in its nature supplementary thereto, have heretofore been handed down by the court. *Crawford Co. v. Hathaway,* 60 Nebr., 754, and 61 Nebr., 317. The importance of the questions involved in a decision of the controversy, vitally affecting, as they do, the material interests of the state, and especially that portion of it where irrigation is necessary to successful agriculture, has induced us to grant a further hearing, and again to examine and consider the principal controverted points arising in the case. A full statement of the nature of the litigation is found in the opinion first filed, and we need not here restate it. Briefly, the appellant, who was plaintiff below, began an action, equitable in character, to have adjudicated the rights of different persons made parties to the action to the use of the water flowing in a stream called White river, and to enjoin the defendant Hall from a threatened interference with plaintiff's head-gate and works connected with an irrigating canal being constructed by it. The plaintiff claimed the right to divert the waters of the stream mentioned for irrigation purposes, and to supply the town of Crawford, situated near its proposed canal, with water for municipal purposes. Defendant Hall, owning and operating a mill adjacent to the stream, which had been utilized for power purposes, denies plaintiff's alleged right of appropriation and claims a right to the continued use of the water ordinarily flowing in the stream as a riparian proprietor. Numerous other persons, claiming some right to the use of the water as riparian owners or by appropriation, were also made defendants, with a view of having adjudicated the rights of all the parties to the litigation. The trial court refused to take jurisdiction and try the cause on its merits, for the reason that the water rights of the respective parties had not first been determined by the state board of irrigation, under the provisions of the irrigation act of 1895. On de-

fendant Hall's application on a cross-petition an injunction was granted against plaintiff restraining it from diverting the water of the stream into its irrigation canal, and the temporary injunction granted in its favor and against Hall was dissolved. From these several orders the plaintiff appeals.

The argument in this court has taken an exceedingly broad range. Narrowed to its simplest terms, the matters in dispute relate to conflicting rights and interests as between riparian owners, and those claiming as appropriators of the waters in the streams of the state for irrigation and other beneficial purposes. Incidental to the main question thus stated, there is involved the constitutionality of the irrigation act of 1895, creating and providing for a state board of irrigation, defining its duties, powers and authority, and especially the portion of the act which empowers such board to determine and adjust the amount and priority of right to the use of water by appropriation for irrigation purposes. There is also presented for consideration the correctness of the ruling of the trial court in dismissing the action begun by plaintiff without a hearing and judgment on its merits. Appreciating the fact that great interests are affected, and the far-reaching consequences of a decision regarding the matters in controversy when finally determined, more than the usual time has been taken in order that such full consideration might be given the case as the importance of the question presented seems to demand. In the former opinions we decided, in substance, that the plaintiff could not rely upon a statute for the purpose of enforcing its alleged right as appropriator and at the same time urge the invalidity of a material portion thereof on the ground of its alleged unconstitutionality, it being obvious that the invalid portion, if found invalid, formed an inducement to the passage of the entire act upon which its rights must rest if sustained; and that the act of the legislature of February 19, 1877, did not abrogate the common-law rights of riparian owners as they theretofore existed in this state.

It is also held that sections 47 and 48, article 2, chapter 93*a*, Compiled Statutes, 1897, constituted no acceptance of any supposed grant to the state by the federal government of the waters on the public domain. While some other questions of a minor character were determined, those just referred to are the only ones having a material bearing on the principal propositions we shall consider in the further examination of the case.

Much of the several briefs of counsel for plaintiff, whose rights are to be decided by the law relating to the right of appropriation of water for irrigation, is devoted to an argument in support of the contention that the doctrine of the rights of riparian owners as known and enforced at common law is inapplicable to, and has never legally become a part of, the laws of this state, and is not in force therein. It is insisted that the waters of the state, by virtue of the laws and ordinances in force when it was admitted to the Union, are *publici juris,* always have been, and may lawfully be diverted from any stream where naturally flowing, appropriated by non-riparian owners, and employed for any beneficial use; that the law of prior appropriation of water as defined by the civil law is in force in this state, and not the common-law rule of riparian proprietorship. The argument is constructed on the theory that the civil-law doctrine of appropriation of water in natural streams as belonging to the public became a part of the laws of the territory and state by reason of the Louisiana territory purchase from France, and that nothing since the acquisition of that territory has transpired which has had the effect of displacing the law as it then existed. It is said that while the enabling act for the admission of the state provided that the people inhabiting the territory forever disclaimed all right and title to the unappropriated public lands lying within the territory, and that the same should be and remain at the sole and entire disposition of the United States, yet the provision contained in the first state constitution declaring that the people of the state in their right of sovereignty are

to possess the ultimate property in and to all lands within the jurisdiction of the state, and all lands, the title to which shall fail from a defect of heirs shall revert or escheat to the people, preserved to them and to the state sovereignty and jurisdiction over the waters of the streams flowing therein, and left in force the doctrine of appropriation as theretofore existing. The scope and effect of the provisions referred to, as we view the subject, accorded to the government the primary right of disposal of the public lands, the state maintaining its sovereignty in the exercise of the powers of eminent domain and right to property resulting from escheats and forfeitures.

Without conceding or controverting the proposition of the civil law of appropriation ever being in force in the territory now comprising the state, we feel altogether clear that, in the organization of its government, the common-law rule of riparian proprietorship was established as a part of its laws. By the argument along the lines indicated, we are asked to overrule the many prior decisions of this court on the subject of water and water rights as they relate to riparian proprietors, and declare the law to be as it is applied in the arid states immediately west of us, where the waters of all the streams flowing in and through the states are held to belong to the state, in trust for the people, and subject to appropriation by any person or corporation for a beneficial purpose; the act of appropriating the water being the test of the right thereto and the use thereof, rather than the ownership of the banks between which the stream flows. The argument is not convincing, nor will it justify us in departing from sound and well-recognized principles of law in the decision of the cause. To adopt the doctrine contended for would be a most violent and radical departure from the trend of judicial decisions heretofore prevailing, and would overturn many well-settled and generally-accepted principles respecting property rights, and result in an invasion of vested private property interests which is

beyond the lawful power of the court or the legislature. To say there is no such thing as a property right of a riparian owner to the use of the stream flowing along or by his land, is to work a revolution in the jurisprudence of the state and violate fundamental principles which lie at the very foundation of the system.

In *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.,* 45 Nebr., 798, it is held that, except as abrogated or modified by statute, the common-law doctrine with respect to the rights of private riparian proprietors prevails in this country, and that such right is property, which, when vested, can be impaired or destroyed only in the interests of the general public, upon full compensation, and in accordance with established law. In speaking of the subject the court says (p. 806): "Although the contrary has been asserted in some of the arid Pacific states (see *Reno Smelting, Milling & Reduction Works v. Stevenson,* 20 Nev., 269 [4 L. R. A., 60, 19 Am. St. Rep., 364]; *Stowell v. Johnson,* 26 Pac. Rep. [Utah], 290), the common-law doctrine with respect to the rights of private riparian proprietors, except as modified by statute, prevails in this country. *Eidemiller Ice Co. v. Guthrie,* 42 Nebr., 238 [28 L. R. A. 581]; Black's Pomeroy, Water [Rights], secs. 127, 130, and authorities cited. At common law every riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of running streams through his land, undiminished in quantity and unimpaired in quality, although all have the right to the reasonable use thereof for the ordinary purposes of life (3 Kent, Commentaries, 439; Angell, Watercourses, sec. 95; Gould, Waters, sec. 204; Black's Pomeroy, Water [Rights], sec. 8), and any unlawful diversion thereof is an actionable wrong." And further on: "The right of a riparian proprietor, as such, is property, and when vested can be destroyed or impaired only in the interest of the general public, upon full compensation and in accordance with established law. *Lux v. Haggin, supra* [69 Cal., 255, 265]; *Yates v. City of Milwaukee,* 10 Wall. [U. S.],

497 [19 L. Ed., 984]; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S., 672 [4 Sup. Ct. Rep., 15, 27 L. Ed., 1070]; *Delaplaine v. Chicago & N. R. Co.*, 42 Wis., 214 [24 Am. Rep., 386]; *Bell v. Gough*, 23 N. J. Law, 624. That the state may, in the exercise of the right of eminent domain, appropriate the water of any stream to any purpose which will subserve the public interests, is not doubted, and that the reclamation of the inarable lands of the state is a work of public utility within the meaning of the constitution is a proposition not controverted in this proceeding. But even the state in its sovereign capacity is, as we have seen, within the restrictions of the constitution, and can take or damage private property only upon the conditions thereby imposed."

In *Plattsmouth Water Co. v. Smith*, 57 Nebr., 579, in a contest between riparian proprietors, where the water company was obtaining water from a watercourse flowing over its land to supply the city for domestic purposes, fire protection, etc., the doctrine is thus broadly stated: "Riparian owners upon streams of water are entitled, in the absence of grant, license or prescription, to the usual, natural flow of water in the streams, without material alteration."

In *Slattery v. Harley*, 58 Nebr., 575, it is again held: "The common law rules relative to the rights of private riparian proprietors are of force in this state, with the exceptions of statutory abrogations and changes."

With these explicit declarations respecting the rights of private riparian proprietors, made after mature deliberation, clear, indeed, should appear the soundness of a proposition which is advanced with a view of securing judicial sanction when the effect would be to overturn all the cases referred to, and many others we might cite. We do not feel justified in departing from a position so generally recognized and accepted as being correct, so well supported by reason and authority, and which it is believed is in soundness impregnable.

One branch of the argument pertaining to the subject

proceeds upon the theory that notwithstanding the different expressions of the court regarding riparian rights, only so much of the common law as is applicable, and not inconsistent with the constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature thereof, has been adopted and is in force in this state (sec. 1, ch. 15*a*, Compiled Statutes), and that the common-law rule with respect to the rights of riparian proprietors is inapplicable to the conditions prevailing here and for that reason riparian rights can not be said to have ever existed. To support this view of the law, it is said that because of the arid or semi-arid conditions prevailing in the western portions of the state, and the consequent necessity for the appropriation and application of water artificially to the soil in order that agriculture may be carried on successfully, the doctrine of the rights of riparian proprietors has no application, and should be so declared by the court. The law of necessity is appealed to, and it is urged the appropriation of water and its application to the soil for irrigation purposes is absolutely indispensable, in order that the wants of the people in the regions referred to may be supplied, agriculture carried on with success, and the country made productive, and capable of sustaining the inhabitants now residing there, and the thousands yet to come. The court is mindful of the great importance of the subject as affecting the most vital interests of the people of the localities where irrigation has by experience been found essential to successful agriculture, and its direct bearing on the material welfare of the state at large. Nor can it be doubted that it has been the policy of the legislature for many years past to encourage the development of the irrigation interests of the state by all legitimate methods which it found within its power to call into existence. In solving the problems arising in the development of this most important industry, and extending to it all legitimate encouragement and recognition which may properly come from the judiciary, we can not

lose sight of fundamental principles which should control our action, and govern in the disposition of all matters coming before the court for adjudication. Property rights, when vested, must be jealously guarded and upheld, or we do violence to the most rudimentary principles of justice. Admitting, for the sake of argument, that the law of public ownership of waters and the right of appropriation thereof for beneficial use by individual citizens and corporations is preferable to the private ownership of riparian proprietors in the western portion of the state, where irrigation is necessary, it is at once obvious that these conditions can be held to apply only to a portion of the state, and in fact to a lesser area than where irrigation is proved to be not essential to successful agriculture. As is pertinently said in the first opinion, 60 Nebr., 754, 762: "But can any one tell at what particular point in the state the common-law rule applicable to riparian owners would cease and the rule said to be better applicable to the less favored portions of the state would begin? Such a rule would merely tend to breed 'confusion worse confounded,' and would be an assumption of legislative powers by this court inhibited by the constitution." But it can not be said that the common-law rule of riparian ownership is inconsistent with the use of water for irrigation purposes, for, as we shall see later on, the right to the use of water for irrigation purposes is one of the elements of property belonging to the riparian owner along with that of its use for domestic and water-power purposes. If the common-law rule as to real property, when rights of riparian proprietors are involved, is to be abrogated, then why not say that the common-law doctrine as to other elements of real property or appurtenances belonging thereto, such as emblements, fixtures and easements, shall also be abrogated? The same reason for the rule exists in the one as well as the other, and can be denied in either only by the assumption of arbitrary power based on neither tenable grounds nor sound principles, and which should find no lodgment in the juridical branch of government.

On this same subject the supreme court of Washington—where climatic conditions are somewhat analogous to those prevailing here—in the case of *Benton v. Johncox,* 39 L. R. A., 107, 110, 61 Am. St. Rep., 912, 917, says: "But how it can be held that that which is an inseparable incident to the ownership of land in the Atlantic states and the Mississippi valley is not such an incident in this or any other of the Pacific states, we are unable clearly to comprehend. It certainly can not be true that a difference in climatic conditions or geographical position can operate to deprive one of a right of property vested in him by a well-settled rule of common law. The mere fact that the appellants will not be able to occupy or cultivate their lands as they heretofore have done unless they irrigate them with water taken from the Ahtanum river is no sufficient reason for depriving the respondents, who settled upon that stream in pursuance of the laws of the United States, of the natural rights incident to their more advantageous location. The necessities of one man, or of any number of men, can not justify the taking of another's property without his consent, and without compensation."

And says McKinstry, J., in *Lux v. Haggin,* 69 Cal., 255, 311: "Aridity of the soil and air being made the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow, that they would thereby become utterly unfit for cultivation or pasturage, while much of the water diverted must necessarily be dissipated."

We can not, for the reasons given, lead ourselves to believe that there is any justifiable ground upon which we can deny the common-law rule of riparian proprietors to be in force in all portions of the state, except as it may be modified or supplemented by legislation of the state or of the congress of the United States, of which we will speak hereafter.

It is quite apparent to those who have investigated that the lawmaking branch of the government of the state, for the purpose of advancing the material interests and welfare of the people, has sought to provide for the building up of a great system of irrigation in those portions of the state where the rainfall is regarded as insufficient to successfully engage in agricultural pursuits, and has authorized, so far as it is empowered so to do, the appropriation of the waters of the state and their diversion from natural channels, to be used by applying them artificially to the soil for beneficial purposes. To uphold and assist in carrying forward this avowed legislative policy is our duty in so far as the same may be done by having due regard for the property rights and interests of all, which is to be determined by those well-settled and recognized rules of general application found essential to the maintenance and protection of property rights and the adjustment of conflicting interests between all who are affected by the operation and enforcement of the law. The riparian proprietor, say all the books and the authorities, has a right to the flow of the water of the natural stream passing through or by his land; such right being inseparably annexed to the soil, and passing with it, not as an easement or appurtenance, but as a part and parcel of the land. This property right can be regarded only as a corporeal hereditament belonging to and incident to the soil, the same as though it were stones thereon, or grass or trees springing from the earth. Gould, Waters, section 204, and authorities there cited. The riparian right to the use of the water flowing in a natural watercourse is a property right, which should be regarded as such, and to protect which the owner may resort to any or all instrumentalities which may be employed for the protection of private property rights generally. *Gould v. Boston Duck Co.*, 13 Gray [Mass.], 442; *Ashley v. Pease*, 18 Pick. [Mass.], 268; *Blanchard v. Baker*, 8 Me., 253, 23 Am. Dec. 504; *Keeney & Wood Mfg. Co. v. Union Mfg. Co.*, 39 Conn., 576, 582; *Beissell v. Sholl*, 4 Dall. [U. S.],

211, 1 L. Ed., 804. The court could as properly say that in the prosecution of some important enterprise classed as works of internal improvement, such as the construction of irrigation canals, railroads, establishing public highways, or other similar undertakings, the property rights of the individual which are invaded or impaired must be ignored because of the necessity and advantage of the public enterprise as to say that the property right of a riparian proprietor may be sacrificed in order that the public welfare generally shall be advanced by promoting a system of irrigation where that method of moistening the soil is found necessary for successful agriculture. The question we are now dealing with has arisen in many of the states where resort to irrigation has been found beneficial and essential in some portions thereof to those engaging in agricultural pursuits, and in all such states, except those in the extreme arid portions of the country, it is held, as we have here held, that the common-law rule of the rights of riparian proprietors is not inapplicable because of the local conditions there prevailing, but is and has been in full force throughout all parts of such states. *Shamleffer v. Council Grove Peerless Mill Co.*, 18 Kan., 24; *Lone Tree Ditch Co. v. Cyclone Ditch Co.*, 91 N. W. Rep. [S. Dak.], 352; *Low v. Schaffer*, 24 Ore., 239; *Benton v. Johncox*, 39 L. R. A. [Wash.], 107; *Lux v. Haggin*, 69 Cal., 255. We can, therefore, for the reasons given, perceive of no tenable ground for adopting the view contended for, and hold the law of riparian rights, as determined by the principles of the common law, to be inapplicable to the conditions prevailing in the whole or in any part of this state.

It is also urged that by virtue of the legislation enacted the common-law rights belonging to riparian proprietors have been abolished. This position can not be, we think, successfully maintained. The legislature has not, as we construe the several acts of that body relating to the subject, attempted to abolish the common-law rule defining existing rights of riparian proprietors, or to deprive them

of such rights when once vested. On the contrary, such rights have been distinctly recognized. Nor is it believed that an attempt to abrogate such rights could be construed as other than an unconstitutional exercise of legislative power, and therefore invalid. In the irrigation act of 1889, the legislature sought to classify the streams in this state and restrict riparian rights to those owning lands bordering on streams not exceeding a certain width, but this attempted restriction proved abortive as an unwarranted act calculated to deprive riparian proprietors of vested property rights without due compensation, contrary to constitutional provisions in that regard. *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Nebr., 798. Otherwise, rights of riparian proprietors have in the different irrigation acts passed by the legislature been respected and recognized. What the legislature has done with a view of promoting irrigation, as we understand and construe the different laws enacted on the subject, is to provide for the appropriation of the unappropriated waters in the streams of the state and to authorize the condemnation of the property in and to the use of the waters belonging to riparian proprietors wherever required in order that the whole of the waters of a natural stream, when found necessary, may be used for irrigation purposes. The law when so construed violates no fundamental principle of property rights, nor interferes unlawfully with the property of another. Legislation of this character provides for the appropriation of the waters of the state by an orderly and legal method, and their diversion from the streams where flowing for the purpose of irrigation and for other purposes contemplated by law, and makes provisions for compensation to be made where private property rights are taken or damaged for a public use. This the legislature may lawfully do, and on account of which none may rightfully complain. That the common-law rule pertaining to the rights of riparian proprietors has been modified in many material respects under legislation by the United States congress and by

this state, will appear further on in this opinion. We are now speaking of the general rule pertaining to rights of riparian proprietors, and not of its exceptions and modifications, which we shall hereafter speak of. We conclude, therefore, that in this state, under any view we may take of the subject, the right of riparian proprietors to the use of the waters flowing in the streams to which their lands are adjacent, when once attached, is in its nature a vested right of property, a corporeal hereditament, being a part and parcel of the riparian land which is annexed to the soil, and the use of it is an incident thereto, of which the owners can not rightfully be deprived or divested except by grant, prescription or condemnation, with compensation by some of the means and methods recognized by law for the taking or damaging of private property for public use.

The development of a system of irrigation and the appropriation and application of the waters of the streams of the state for that purpose is obviously a work of internal improvement. It is so regarded and has been expressly declared by the legislature since its first enactment on the subject, and has been affirmed by this court in more than one of its decisions. By the act of the legislature approved February 19, 1877, the organization of corporations for the purpose of constructing and operating canals for irrigation was authorized, and such corporations were given power to acquire right of way, and to condemn property necessary to the construction of such canals, in the same manner as railroad corporations might acquire property and right of way for railroad purposes, and the law applicable to an exercise of the right of eminent domain by railroad companies was made to apply to such irrigation companies. It was also expressly declared that canals constructed for irrigation purposes were works of internal improvement, and all laws applicable to such enterprises should apply to such irrigating canals. Session Laws, 1877, p. 168. The irrigating act of 1877, with powers more amplified, was merged

in and became a part of the irrigation law passed by the legislature of 1889. Session Laws, 1889, ch. 68, p. 503. The law of 1889 was superseded by the more comprehensive act of 1895; the substance of the provisions of the two sections of the act of 1877 being embraced in sections 39 to 48, as found in article 2, chapter 93*a*, Compiled Statutes, 1901 (secs. 6793-6802, Annotated Statutes). Indeed, section 2 of the act of 1877 has been re-enacted in each succeeding law on the subject almost verbatim, while the substance of the other section of that act has been incorporated in several different sections of the act of 1895. It is manifest by a casual inspection of the different laws passed by the legislature that since the passage of the original act of 1877, above referred to, the construction of irrigation canals has been recognized and treated by the legislature as a work of internal improvement, to construct and operate these the right to take private property for a public use has been found necessary, and provisions, although at first somewhat obscure in their application, have been made by the legislature to accomplish that end. While sections 39 and 41 of the act of 1895 (art. 2, ch. 93*a*, Compiled Statutes, 1901 [secs. 6793 and 6795, Annotated Statutes]) are framed chiefly with a view to authorize the condemnation of rights of way for such enterprises, there appears to exist no substantial reason why they should not be construed as embracing within their scope and effect the same powers and privileges that are given to corporations organized under the district irrigation law which are expressly authorized to condemn the riparian proprietors' right to the use of the water, and divert it for irrigation purposes. Sec. 10, art. 3, ch. 93*a*, Compiled Statutes, 1901 (sec. 6831, Annotated Statutes). We are of the opinion the broad provisions of section 41 of article 2, when fairly construed, suffice for the purpose of authorizing condemnation for irrigation purposes, as contemplated by article 2, to the same extent as is authorized by section 10 when the irrigation business is conducted under the provisions of article 3. The con-

cluding words of section 41, article 2, which is a substantial reenactment of the provisions contained in the latter part of the first section of the act of 1877, are as follows: "Upon the filing of said petition [for condemnation] the same proceedings for condemnation of such right of way shall be had as is provided by law for the condemnation of rights of way for railroad corporations, and the same provisions of law providing for the condemnation of rights of way for railroad corporations, the payment of damages and the rights of appeal shall be applicable to irrigating ditches, canals, and to other works provided for in this act." If the construction and operation of a ditch or irrigating canal results in injury to the rights of riparian proprietors, or takes from them private property for a public use, the provisions of the law with respect to the recovery of damages where property is taken or injured by railroad companies in the exercise of the right of eminent domain become applicable, and may be resorted to by the riparian owners for the recovery of the compensation secured to them by the constitution. If the authority of section 41 seems insufficient, further authority is found in section 48 of the same chapter, wherein it is provided that canals and other works constructed for irrigation or water-power purposes are works of internal improvement, and all laws applicable to works of internal improvement are applicable to such canals and irrigation works. Under these comprehensive provisions the legislature could have intended nothing less than that in the construction and operation of irrigation enterprises private property reasonably necessary for the conduct of the business could be taken and appropriated on due compensation by the exercise of the power and right of eminent domain. Water for the irrigation canals contemplated by the act is absolutely indispensable for the successful prosecution of the enterprise. In fact, water to flow in the ditches to be constructed for the purpose of irrigating the soil for the production of crops was the overshadowing and all-controlling factor, without which the

law, so far as promoting the public welfare, would be but a hollow mockery, suggestive of a highly absurd situation—an anomalous condition of affairs. Water, and the necessity of diverting it from its natural channels and appropriating it for irrigation purposes as a public use, being of the very essence of the act authorizing the construction and operation of irrigation enterprises, can there exist any rational doubt that, under the provisions we have referred to, the right and authority to condemn property belonging to a riparian proprietor was given to those constructing such works of internal improvement for the purpose of putting the water to the public and beneficial uses contemplated and intended by the passage of the act? By section 81 of chapter 16, Compiled Statutes (sec. 9967, Annotated Statutes), entitled "Railroads," these corporations are authorized to take, hold and appropriate so much real property as may be necessary for the construction and convenient use of their roads. The power of eminent domain which may be exercised under the provisions of this section of the statute has by the legislature been referred to and become a part of the irrigation statute, as much so as though actually incorporated therein. There are other sections of the law with reference to internal improvements of other kinds than that of railroads which might also be resorted to, and which are fairly susceptible of a like construction, when considered in connection with the irrigation acts, which in terms refer to such laws as giving to irrigation canal companies power to condemn property necessary and essential to their use in the conduct of the business engaged in as contemplated by statute. The property in water belonging to a riparian proprietor and his right to the reasonable use thereof, as we have seen, is a part and parcel of the land, inseparably annexed to the soil, and is property within the meaning of that word, of which the owner can not be divested save and except by some lawful method, which would apply alike to all species

of real property and appurtenances belonging thereto.* This property right, like any other part of his realty, is subject to condemnation and appropriation for public uses in the manner provided by law. It may also be lost by grant or prescription.

In *McGee Irrigating Ditch Co. v. Hudson,* 22 S. W. Rep. [Tex.], 967, it is held that while in that state the irrigation act provides for the condemnation of a right of way only for an irrigation canal, still, under the Revised Statutes, article 628, section 6, authorizing canal companies to condemn any land necessary for their use, an irrigation company formed under the act of 1889 of the laws of Texas may divert water which a riparian proprietor had the right to have flow in a certain channel, and to the use thereof as such owner, since such diversion is, in effect, taking land, which may be done under the right to take private property for public uses. Says the court in the opinion by Stayton, C. J.: "The general law providing for the incorporation of canal companies contains the following, among the powers conferred on such corporations: 'To enter upon, and condemn and appropriate, any land of any person or corporation that may be necessary for the uses and purposes of said company; the damages for any property thus appropriated to be assessed and paid for in the same manner as provided by law in the case of railroads.' Revised Statutes, art. 628, sec. 6. The law first quoted evidently only provides for condemnation of ground over which an irrigation ditch might run, and, in the absence of a law providing for the condemnation of every property necessarily taken in such an enterprise, no right to condemn would exist. The act of March 19, 1889, in so far as it provides for condemnation, however, is not in conflict with article 628,

* It is to be hoped that this isolated sentence will never be quoted as a holding that there can be property in water. The doctrine that there can be no property in the corpus of water, but that the right to it is usufructuary—that is, the right to the use without impairing the substance—is horn-book law. See authorities quoted later in this opinion.—W. F. B.

Revised Statutes. The provisions of the latter are broader than the former, and under the power therein given to enter upon, condemn and appropriate lands, we are of opinion that any property belonging to plaintiffs, and necessary for the uses and purposes of defendant, in the business for which it was created, may be condemned, if it will pass, or may be included, under the term 'lands.' The word 'land' includes, not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fences."

In this state the court has repeatedly held that section 21, article 1, of the state constitution, is of itself a sufficient basis to justify an action for the recovery of all damages arising from an exercise of the right of eminent domain which causes a diminution in the value of the private property of another. *Chicago, K. & N. R. Co. v. Hazels,* 26 Nebr., 364; *Burlington & M. R. R. Co. v. Reinhackle,* 15 Nebr., 279, 48 Am. Rep., 342. In the cases cited the question of damages arose, not for the taking of property, but for damage to abutting property by railroad companies, resulting from obstruction of streets and highways and other incidents of their construction and operation of railways, causing a depreciation in the value of abutting property. The right of the property owner to the benefit and advantage of a street and highway adjacent to his land and the right of the riparian owner to the reasonable use and enjoyment of the water in a stream flowing over or adjoining his land, are not without features rendering them in a measure analogous. Speaking of the right to the use and enjoyment of the privilege and advantage attaching to abutting property on the public streets, it is said by the Michigan supreme court that such owner has "a peculiar interest in the adjacent street which neither the local nor the general public can pretend to claim; a private right in the nature of an incorporeal hereditament legally attached to his contiguous ground; an incidental title to certain facilities and fran-

chises, which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be owner." *Grand Rapids & I. R. Co. v. Heisel,* 38 Mich., 62, 71, 31 Am. Rep., 306. It is thus apparent that as to the property right of a riparian proprietor to the reasonable use of the water naturally flowing in the stream, provisions effective in character by virtue of the constitution and the statutes exist for the appropriation of such property and the diversion and use of the water for irrigation purposes, and that upon payment of adequate compensation for the property taken or damaged no substantial reason can be urged why the same may not be done without violating any principle governing property rights known to our system of jurisprudence. The right of a riparian proprietor to the reasonable use of water flowing in a natural channel is property, which is protected by the ægis of the constitution, and of which he can not be deprived against his will, except for public use, and upon due compensation for the injury sustained. If the legislature had undertaken to sweep away and abolish this right, we would not be warranted in giving the act judicial sanction. Where by any possible construction of a reasonable nature legislation can be upheld, it is our duty to give it such a construction as will uphold, rather than destroy it. The irrigation act of 1895 is valid when construed as not interfering with vested property rights which have been acquired by riparian proprietors. Such a construction, we are satisfied, is justified by a fair interpretation of the act in its entirety, considering its tenor, purport, and the object intended to be accomplished by its enactment.

The statute authorizes and regulates the appropriation of the waters of the state for irrigation and other purposes, and, in making such appropriations as contemplated by the act, the riparian owner whose property rights are appropriated or impaired, is entitled to compensation for the injuries actually sustained, to be recovered in a suitable action or proceeding instituted for that purpose. The

construction given renders the act effective as providing a method for the development of the semiarid portions of the state by means of a system of irrigation, including the appropriation and application of the waters flowing in the streams, to the more useful and beneficial purposes of fructifying the soil for the comfort and blessing of mankind.

Our discussion on the rights of riparian owners has extended only to those streams of water where the bed over which a stream flows is included within the survey of the public lands as made by the United States government, from whom the riparian owners obtain title. Such is the character of the stream the water of which is the subject of the present controversy. In the case at bar, the stream is a narrow one, ordinarily flowing but a small volume of water, the bed thereof belonging to the contiguous landowner. Whether the common-law rule fixing the rights of riparian proprietors applies to the larger streams of the state, such as may be classed as interstate rivers, and along the banks of which meander lines have been run by the government in its survey of the public lands, presents an entirely different question, and it would seem that riparian rights would not attach to the waters of such rivers. A final determination of the question, however, is not here made, as this should be left to be decided in a proper case, where the subject is fairly presented and considered after opportunity for thorough investigation, aided by the researches and arguments of counsel. As to those streams whose banks form the boundary lines of the estates adjoining, there are forcible reasons, well grounded on authority, for holding to the view that the rules of the common law applicable to navigable streams, as therein designated and classified, should be held applicable to all such rivers, even though in fact non-navigable. *Wood v. Fowler,* 26 Kan., 682, 40 Am. Rep., 330; *Lux v. Haggin,* 69 Cal., 255; *St. Louis, I. M. & S. R. Co. v. Ramsey,* 13 S. W. Rep. [Ark.], 931, 8 L. R. A., 559, 22 Am. St. Rep., 195; Gould, Waters, sec. 78. While this

subject received slight attention in the case of *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Nebr., 798, it was not determined, as a decision of the case turned on another point. As to navigable streams, the doctrine seems to be that the water and the soil thereunder belong to the state, and are under its sovereignty and domain, in trust for the people, and can not, therefore, be the subject of a claim of property therein, or the right to the use thereof by an adjoining landowner. When the government, in its survey, runs meander lines along the banks of a stream and parts with its title to the adjoining land, the boundary of which would be high-water mark, then it would seem permissible to classify the stream as navigable, in which case the waters thereof and the bed thereunder would belong to the state, and be held by it in trust for the people. The waters in such streams would be held to be *publici juris*, and not subject to riparian claims by the adjoining landowner, *Shively v. Bowlby*, 152 U. S., 1, 14 Sup. Ct. Rep., 548, 38 L. Ed., 331; *Illinois C. R. Co. v. State*, 146 U. S., 387, 13 Sup. Ct. Rep., 110, 36 L. Ed., 1018; *Packer v. Bird*, 137 U. S. 661, 11 Sup. Ct. Rep., 210, 34 L. Ed. 819; *Martin v. Waddell*, 16 Pet. [U. S.], 367, 10 L. Ed., 997; *Pollard v. Hagan*, 3 How. [U. S.], 212, 11 L. Ed., 565; *Richardson v. United States*, 100 Fed. Rep. [C. C.], 714.

The extent of the riparian proprietor's rights in and to the use of the waters of a natural channel is material to a satisfactory disposition of the subject we now have in hand. This right, stated in its broadest terms, is that "every proprietor of lands on the banks of a river, has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has the right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit*

et debet currere, is the language of the law. Though he may use water while it runs through his land, he can not unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate." 3 Kent, Commentaries, 439; *Smith v. City of Rochester,* 92 N. Y., 463, 473, 44 Am. Rep., 393. While, as an abstract rule of law, a riparian proprietor is entitled to the full flow of the stream as it is wont to flow by nature, yet the rule has so many exceptions and has been so modified as the law has progressed, that the nature and extent of a riparian proprietor's pecuniary interests or property in a stream can not be measured by such a rule, nor can the rule now be said to be a full and accurate statement of the law. The law does not recognize a riparian property right in the corpus of the water. *Vernon Irrigation Co. v. City of Los Angeles,* 39 Pac. Rep. [Cal.], 752. The riparian proprietor does not own the water. He has the right only to enjoy the advantage of a reasonable use of the stream as it flows by his land, subject to a like right belonging to all other riparian proprietors. Kinney, Irrigation, sec. 59; Gould, Waters, sec. 204; *Embrey v. Owen,* 6 Exch. [Eng.], 353. The property interest in the water is usufructuary and his right thereto is subject to many limitations and restrictions, and always depends upon its reasonableness when considered in connection with a like right as belonging to all other riparian proprietors. His use must be reasonable, whatever may be its purpose; and he may not, under any circumstances, by his use materially damage other proprietors, either above or below him. *Union Mill & Mining Co. v. Dangberg,* 81 Fed. Rep. 73; *Williamson v. Lock's Creek Canal Co.,* 78 N. Car., 156 The mere fact that the riparian proprietor is deprived of the full flow of the stream adjacent to his land would furnish no basis for compensatory damages; merely diminishing the volume of water in the stream would not deprive the owner of property for which he could lay claim to a pecuniary compensation. At most, the naked

right to the full flow of the stream, and its loss by diminishing the volume of water when appropriated for irrigation purposes, could result only in *damnum absque injuria*. In order to entitle the riparian owner to compensation, he must suffer an actual loss or injury to the use of the water which the law recognizes as belonging to him, and to deprive him of which is to take from him a substantial property right. It is for an interference with or injury to his usufructuary estate in the water for which compensation may rightfully be claimed where the water of the stream is diverted and appropriated for the use of irrigation; it is such a taking of or damage to property as materially and substantially depreciates the value of the real estate of which it forms a part. Ordinarily the riparian property right would be limited to the use of the water of the stream for domestic purposes, and, if applied to the irrigation of riparian lands, a reasonable use for such purposes in view of an equal right of use belonging to all other riparian proprietors, which would fix the basis for compensation where there has been a deprivation of such right by the appropriation of the water for a public use. *Low v. Schaffer*, 24 Ore., 239.

A riparian proprietor's right to the use of water for irrigation purposes must be understood as applying to riparian lands only. He would have no rights as a riparian owner which could extend to non-riparian lands. This raises the question as to the extent or area of lands bordering on a stream, or over which it flows, which may properly be classed as riparian lands. A riparian owner's right to the reasonable use of water exists solely by virtue of his ownership of the lands over or by which the stream flows. It is obvious that this right can not be enlarged or extended by acquisition of title to lands contiguous to the riparian land; nor can a riparian owner, as such, rightfully divert to non-riparian lands water which he has a right to use on riparian land, but which he does not so use. *Chauvet v. Hill*, 28 Pac. Rep. [Cal.], 1066; *Gould v. Eaton*, 49 Pac. Rep. [Cal.], 577, 38 L.

R. A., 181; *Bathgate v. Irvine,* 58 Pac. Rep. [Cal.], 442, 77 Am. St. Rep., 158. Land, to be riparian, must have the stream flowing over it or along its borders, and the vital question is how far away from the stream it may be considered to extend.

The subject is considered in the case of *Lux v. Haggin,* 69 Cal., 424, 425. It is there held that a riparian tract of land (in that case the title to which had been obtained from the state) would include all the sections or fractional sections mentioned in any one certificate of purchase bordering on a natural water channel, or through which it had its course; but says the court: "If, however, lands have been granted by patent, and the patent was issued on the cancelation of more than one certificate, the patent can operate, by relation (for the purpose of this suit), to the date of those certificates only, the lands described in which border on the stream."

In *Bochmer v. Big Rock Creek Irrigation District,* 48 Pac. Rep. [Cal.], 908, it is held that where quarter sections of land are granted by separate patents based on separate entries, and therefore constituting distinct tracts of land, mere contiguity can not extend a riparian right incident to only one quarter section, although both are owned by the same person.

The rule in California seems to be that where riparian lands are acquired by an entryman or purchaser by any one entry or purchase, the boundary of the riparian land would be restricted to the land the title of which was acquired by the one transaction; that each tract thus acquired would be treated as an independent tract, beyond which riparian rights could not extend. It is the policy of the government in the disposition of the public lands in this state, as it has been the policy of the state regarding her school lands, to have the land surveyed into townships, sections and subdivisions of sections, in order that it may be disposed of in limited quantities in legal subdivisions not less than one-sixteenth of a section, comprising a forty-acre tract, and usually not ex-

ceeding a quarter section of 160 acres. The forty-acre tract, or one-fourth of a quarter section,—or, if an irregular tract, it is designated as a certain numbered lot,—may be, and usually is, taken as the unit of measurement in the acquisition of title to the public lands within the state. As an illustration, the government authorizes the disposition of the public lands under the preemption, homestead or timber culture laws in tracts of not less than forty acres nor more than 160 acres. Where more than forty acres are taken it is not required that it be in any particular form or located within one particular section or quarter section, but if the forty-acre tracts adjoin each other and do not exceed the maximum acreage allowed in one entry, a party may thus acquire a good title to the land. Within the limits of railroad grants homestead entries were limited to tracts not exceeding eighty acres, while the railroad grants of land by the government are usually by sections of 640 acres each. Where a homestead of eighty acres has a watercourse through it, which also runs through a section of railroad land adjoining, there appears no sound reason for saying that the riparian land in one instance would include but eighty acres and in the other 640. If the riparian proprietor's right is incident to the soil, is a part and parcel of the real estate, like the trees and the grass, then it would seem that in this state, at least, in view of the policy of the government in the disposition of its public lands, riparian rights would attach only to those legal subdivisions of a section ordinarily described as forty-acre tracts, or, in lieu thereof, where the tracts are irregular, to a certain designated lot, which borders on a stream or through which it flows. There is neither reason nor logic for saying that when one acquires a forty-acre tract with the riparian rights belonging thereto, such is the limit of the riparian lands in that case, but where, on the same stream, an entire section is acquired by grant from the government, that the whole of the 640 acres, for that reason, becomes riparian land. It being

the policy of the government to dispose of its public domain in tracts of not less than forty acres each, why, then, may it not be said that riparian rights are limited to such tracts, even though several of them may be joined together in one certificate of purchase or instrument of conveyance? It is not decided that such should be the rule in this state, as it is deemed preferable to leave the question open for maturer investigation and consideration.

From what has been said, it must not be inferred that the rights of an appropriator for beneficial purposes contemplated by statute are not as sacred and as much entitled to the equal protection of the law as is the property right of riparian proprietors. Indeed, the property right of an appropriator in water diverted from natural channels and applied to irrigation uses is distinctly recognized in the case of *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Nebr., 798, where the doctrine of estoppel was applied to the acts of the riparian owner, and it was held that, because of his laches, he could not maintain an injunction suit to restrain the diversion of the water by an appropriator and its application to the soil by means of irrigation, and that he would be left to his ordinary remedy at law for compensation for the injury sustained. The two doctrines of water rights—one the rule of priority of appropriation and the other the common-law doctrine of riparian ownership, whose basis is equality between all those who own lands upon the stream—may, in our judgment, both exist at the same time, as both have existed in this state, as we shall endeavor hereafter to demonstrate. We have spoken of the common-law rule, made so by the legislative adoption of the principles of the common law when applicable and not inconsistent with the laws of the state. Valid vested rights have also been acquired by reason of the prior appropriation of the public waters of the state which have received sanction and recognition by the legislature and by the congress of the United States, which place the

title of the appropriator on an equality with riparian owners. The fundamental hypothesis of prior appropriation of water for the development of the arid or semiarid portions of the country, is the recognition of the right of the people or those desiring, to appropriate, and apply to beneficial uses any unemployed water of the natural streams, and that such rights, when so acquired, are to be determined according to the date of appropriation; priority of acquisition giving the better right. The two doctrines are not necessarily so in conflict with each other as that one must give way when the other comes into existence. The common-law rule of riparian rights is underlying and fundamental and takes precedence of appropriations of water if prior in time. The two doctrines stand side by side. They do not necessarily overthrow each other, but one supplements the other. The riparian owner acquires title to his usufructuary interest in the water when he appropriates the land to which it is an incident, and when the right is once vested it can not be divested except by some established rule of law. The appropriator acquires title by appropriation and application to some beneficial use, of which he can not be deprived except in some of the modes prescribed by law. The time when either right accrues must determine the superiority of title as between conflicting claimants.

The irrigation act of 1889 abrogated in this state the common-law rule of riparian ownership in water, and substituted in lieu thereof the doctrine of prior appropriation. This legislation could not and did not have the effect of abolishing riparian rights which had already accrued, but only of preventing the acquisition of such rights in the future. The law of 1895 but continued in force the act of 1889 in so far as that act abrogated the common-law rule as to the rights of riparian proprietors, and since the taking effect of the act of 1889 those acquired rights to the waters flowing in the natural channels of the state are to be tested and determined by the doctrine of prior appropriation. That it was competent

for the legislature to abrogate the rule of the common law as to riparian ownership in waters as to all rights which might be acquired in the future, and substitute a system of laws providing for the appropriation and application of all the unappropriated waters of the state to the beneficial uses as therein contemplated, there exists, it would seem, no reasonable doubt. In *United States v. Rio Grande Dam & Irrigation Co.*, 174 U. S., 690, 19 Sup. Ct. Rep. 770, 43 L. Ed., 1136, it is held that it is within the power of a state legislature to change the common-law rule of riparian proprietors and authorize the appropriation of the flowing waters within its dominion for such purposes as it deems wise and proper. The substitution of the law of prior appropriation, instead of the common-law rule of riparian ownership, is applicable only to those waters in the state which are unappropriated, or, in other words, which have not become the property of riparian proprietors. In our view of the subject, the right of the appropriators of water who have applied the same to the soil for agricultural purposes by means of irrigating canals antedates the passage of either of the irrigation acts of the legislature of which we have just made mention. This right has grown out of the necessities of the case, and has been sanctioned by the acts of congress and recognized by the laws of the state. It is a matter of common knowledge, historical in character, that in the development of the state in the higher altitudes in the western portions, because of the arid or semiarid climatic conditions which prevail, it has been found impossible to successfully engage in agricultural pursuits save by applying to the soil, by the process known as irrigation, waters diverted and drawn from natural streams, thereby rendering highly productive a land otherwise valuable only for grazing. It is a fact so common and notorious that we may properly take judicial notice of it that since the early settlement of the western portions of the state it has been the custom of the settlers to appropriate the waters of the

streams flowing therein by means of irrigating canals and apply them to the soil in prosecuting the business of agriculture in all its varied branches. We do not mean to say that there has grown up in the section of the state referred to a custom adopted by the people which has been perfected into a system or code of laws respecting the appropriation of water for agricultural purposes, nor do we find this necessary in the present case. What is said is that from the earliest settlement of the semiarid portions of the state, and before the enactment of any irrigation statute providing for the appropriation of water, there has existed a practice or usage of diverting water from the natural channels of the streams into irrigation canals constructed for that purpose, and the appropriation and application of such water for agricultural purposes. Whether or not under this practice or custom appropriators have acquired rights which are in their nature property, and which when once acquired become a superior title, and give the better right to the use of such water than that of a riparian owner whose title is acquired subsequently, must depend on facts and circumstances as disclosed in any particular case. When such a custom has been so generally recognized as to have the force of law, it can only be regarded as a substantial adoption of the doctrine of prior appropriation of water which obtains in the arid states immediately west of us.

Says Mr. Justice Miller, in speaking of the United States statute recognizing the right of those who have appropriated water for agricultural purposes: "The section* of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." *Broder v. Natoma Water & Mining Co.*, 101 U. S., 274, 276, 25 L. Ed., 790. The section just referred to is contained in an act of congress of July 26, 1866, and provides "that whenever, by priority of possession, rights to the use of water for mining, agri-

* 14 U. S. Statutes at Large, p. 253, sec. 9.

cultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however,* That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." 14 U. S. Statutes at Large, p. 253, sec. 9.

In a decision by the United States supreme court (*Basey v. Gallagher*, 87 U. S., 670, 22 L. Ed., 452), in which the opinion was prepared by Mr. Justice Field, the section we have just quoted was under consideration. It is there said by the author, after speaking of another case decided prior thereto (*Atchison v. Peterson*, 87 U. S., 507, 22 L. Ed., 414): "Ever since that decision it has been held generally throughout the Pacific states and territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour-mills and sawmills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual. The act of congress of 1866 recognizes the right to water by prior appropriation for agricultural and manufacturing pur-

poses, as well as for mining. * * * It is very evident that congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or the decisions of the courts. The union of the three conditions in any particular case, is not essential to the perfection of the right by priority; and in case of a conflict between a local custom and a statutory regulation the latter, as of superior authority, must necessarily control."

In *Lux v. Haggin,* 69 Cal., 255, 446, it is observed by the California supreme court: "From the foundation of the state, waters pertaining to the public lands of both the federal and state governments have been appropriated and used for mining, agriculture, and other useful purposes. Such appropriation and use was first sanctioned by custom, next by the decisions of the courts, and finally by legislative action on the part of the United States as well as the state. It thus became a part of the law of the land, of which every citizen was entitled to avail himself, and of which every purchaser from the United States, as well as the state, was bound to take notice. In protecting, therefore, the rights of the appropriators of water upon the public lands of the state and of the United States, no wrong is done to the purchasers from either government. That from the very beginning it has been the custom of the people of the state to divert from their natural channels the waters of the streams upon the public lands, and appropriate the same to the purposes of mining, agriculture, and other useful and beneficial uses, is a part of the history of the state."

See, also, *Isaacs v. Barber,* 30 L. R. A. [Wash.], 665, 45 Am. St. Rep., 772, where it is held that judicial notice will be taken of the fact that at least that portion of the state east of the Cascade Mountains was included within

the territory where the customary law of miners was in force and the right of appropriating water for agricultural and manufacturing purposes existed, although the common-law rule of riparian ownership was a part of the law of the state.

Recognizing the necessity for the appropriation of water and its application to the soil for agricultural purposes, the legislature of this state, in 1877, passed an act having for its object the formation of corporations for the construction and operation of canals for irrigation, and for that purpose gave them the right to acquire right of way for such canals, and declared the canals to be works of internal improvement. Session Laws, 1877, p. 168. It is manifest from a reading of the act, brief though it is, that the legislature, recognizing the conditions existing in the semiarid portions of the state where the tide of emigration was then beginning to flow, and the necessity of appropriating the public waters for agricultural purposes by means of irrigating canals, passed the act with the view of providing effective means for the appropriation of such waters and their application to the soil in order that agriculture might be successfully engaged in, and the resources of the state developed. Without irrigation the country was principally of use for grazing; with it, and a soil for fertility unsurpassed which it possessed, and a favorable climate, the country could be made to blossom as the rose, and to sustain a population of thousands, where but hundreds had previously found a means of livelihood. Who can doubt that by the passage of this act the legislature, composed as it was of intelligent men, intended to and did recognize the right of the inhabitants of the public domain—those settling there for the purpose of building permanent homes—to construct irrigation canals and appropriate the waters of the natural streams for the purpose of promoting agriculture and developing the country? It would be the height of absurdity to say that the construction of irrigation canals was authorized for any other purpose or with any other view

than the appropriation of the public waters flowing in the streams. Congress had authorized and sanctioned the appropriation of water for the purposes contemplated by the legislative act. It had declared by the act of 1866 that in the disposition of the public domain riparian proprietors took title to their lands subject to the rights of appropriators who had acquired title to the use of water by appropriation for agricultural purposes, where such rights were recognized by local customs, by the legislature or by the courts. Practically all the lands in the semiarid portions of the state at the time belonged to the government. It was the riparian proprietor, and it authorized the appropriation and diversion of the water for agriculture, mining and manufacturing purposes. The state recognized and encouraged the appropriation of water for agricultural purposes by the passage of the act of 1877. There were no riparian proprietors except the general government, or at most but a few, who were or could be affected by the act. It contemplated the appropriation of the waters of the streams and their use for irrigation to meet the necessities of the case in conformity with the customs and usages prevailing in arid portions of the western country, where irrigation was essential to agriculture. The congressional act of 1866 authorized this to be done, and land thereafter disposed of by the United States was subject to prior rights acquired by appropriation. The act of 1889 (Session Laws, 1889, ch. 68, p. 503), in which was merged the act of 1877, especially recognized the rights acquired by prior appropriators and treated them as it would any other vested property rights. Section 13, article 1 thereof, declares: "All ditches, canals and other works heretofore made, constructed or provided by means of which the waters of any stream have been diverted and applied to any beneficial use must be taken to have secured the right to the waters claimed to the extent of the quantity which said works are capable of conducting and not exceeding the quantity claimed without regard to, or compliance with, the re-

quirements of this chapter." And the act of 1895 preserved all rights acquired by appropriation prior to its passage. Session Laws, 1895, ch. 69, p. 244. By section 49 it is provided: "Nothing in this act contained shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the passage of this act."

In the light of the provisions of the act of congress as construed by the supreme court of the United States, the different acts of the legislature of this state relating to the appropriation of the waters flowing in the streams thereof, and taking notice of those historical facts connected with the development of which we have made mention, the conclusion appears to us irresistible that every appropriator of water who has applied it to the beneficial uses contemplated by these several acts has acquired a vested interest therein, which gives him a superior title to the use of the water over the riparian proprietor whose right has been acquired subsequent thereto, or who has lost his right, once acquired by either grant or prescription. Assuming, then, as we think should be done, that the right of acquiring an interest in the use of water by appropriation when applied to the beneficial purposes of agriculture has existed in this state since its early settlement in those portions where irrigation is found to be necessary, the decisive question in all cases as between riparian proprietors and those claiming as appropriators is who first secured the right to the use of the water in controversy. Has the riparian proprietor, who appropriates his riparian water right as an incident to and a part of the land obtained from the government, and whose right then attaches, a superior claim, or has the appropriator a better right because prior in time? The answer in each case must depend upon the facts and circumstances as developed therein. As to the law applicable to controversies between those claiming as riparian proprietors and those claiming by right of prior appropriation, see *Low v. Schaffer*, 24 Ore., 239; *Speake v. Hamilton*, 21 Ore.,

3; *Kaler v. Campbell,* 13 Ore., 596; *Ramelli v. Irish,* 96 Cal., 214; *Judkins v. Elliott,* 12 Pac. Rep. [Cal.], 116.

In support of its right to maintain an action of the character of the one at bar, it is argued by the plaintiff that those sections of the irrigation statute constituting the state board of irrigation with authority to ascertain and determine the priority and amount of past appropriations and allow further appropriations when it is determined there is unappropriated water in any natural stream from which it is sought to divert it, and with other powers as therein defined, are unconstitutional, because conferring judicial powers upon a tribunal not authorized by the constitution, and in contravention of its provisions. As we have heretofore made mention, the lower court in the trial of the case refused to entertain jurisdiction and try the merits of the controversy, holding that the state board of irrigation had exclusive original jurisdiction of the matters set out in the petition, and that as to all issues raised by the pleadings, save those pertaining to an injunction to hold matters *in statu quo* pending a determination of such rights, the respective parties should be remanded to the board for such remedies as they might be found entitled to. It is no doubt true, as pointed out by counsel, that the sections in question are borrowed from the statutes of Wyoming, in which state constitutional provisions authorize the creation of such a board, while our constitution is silent on the subject. But it is to be noted that the Wyoming constitution has not provided for a board of irrigation with judicial functions in the sense that it is a judicial tribunal. The duties of the board there, as here, are supervisory and administrative in character, and not judicial. While it may be true that they are given powers of a *quasi*-judicial character, this of itself does not constitute them a judicial body, nor does it have the effect of conferring upon administrative bodies the exercise of judicial functions in contravention of constitutional provisions. The Wyoming statute, from which ours is borrowed, has been subjected

to judicial construction, and is upheld by the supreme court of that state on the express ground that the powers authorized therein are not judicial, but administrative. *Farm Investment Co. v. Carpenter,* 50 L. R. A. [Wyo.], 747, 87 Am. St. Rep., 918. With this authoritative construction of the statute, and a decision of the very question raised in the case at bar upon reasoning quite convincing and satisfactory, it would seem that the question should be regarded as at rest. The primary object of the board is for the purpose of supervising the appropriation, distribution and diversion of water. This is obviously an administrative rather than a judicial function.

Says the Wyoming supreme court, in the case just cited (p. 757): "It is a matter of public concern that the various diversions shall occur with as little friction as possible, and that there shall be such a reasonable and just use and conservation of the waters as shall redound more greatly to the general welfare and advance material wealth and prosperity"; and, quoting from *White v. Farmers' Highline Canal & Reservoir Co.,* 43 Pac. Rep. [Colo.], 1028, 31 L. R. A., 828: "From the very nature of the business, controversies with reference to the use of water, naturally led to unseemly breaches of the peace; and, to avoid these, it was found expedient and necessary to provide complete rules of procedure governing the taking of water from the public streams of the state, and regulating its distribution to those entitled thereto"—as it were, a sort of policing of the waters capable of use for irrigation, as necessary and required, as well to preserve and procure proper use of the water as to prevent breaches of the peace. In order to accomplish this object it is necessary and expedient to provide for certain preliminary investigations. Again, quoting from *Farm Investment Co. v. Carpenter, supra* (p. 758): "Any effort to supervise and control the waters of the state, their appropriation and distribution, in the absence of an effective ascertainment of the several priorities of rights, must result in practical failure in times when official intervention is

most required. * * * In the development of the irrigation problem under the rule of prior appropriation, perplexing questions are continually arising, of a technical and practical character. * * * The board is not required to await the occurrence of controversies, but is to proceed, on its own motion, to ascertain the various rights, conflicting or not, and thereupon see that the water is properly divided."

Such functions, it would seem, are clearly administrative in character, and not judicial. It is a judicial function to administer justice between litigants in cases where disputes arise and to settle these disputes according to law as administered in courts of justice. The board of irrigation, however, in many cases acts in advance of any dispute, and whether there is or will be a controversy in no way affects its powers. The courts can act only as controversies arise between litigants, and then only by determining the questions presented by the litigation. While there are some questions affecting property rights which grow out of the administration of the law by the state board of irrigation, and in which are involved matters in dispute calling for action of a *quasi*-judicial character, yet as to all these ample provisions are made for recourse to the courts. Powers of the same general nature and character are conferred upon almost every administrative body known to the statute, and regarding which it has frequently been decided are of a *quasi*-judicial nature, and yet such bodies are invariably held to be administrative, and to in no way conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. The state board of transportation, as heretofore organized in this state, the constitutionality of which has been invariably upheld when attacked, in all respects, save as to the manner of passing the law providing for its creation, is a fair illustration of the validity of legislation of this character. Numerous other boards and offices created by statutes, of an administrative character, and yet possessing powers of a *quasi*-

judicial nature, might also be referred to if thought to serve any useful purpose. For the reasons given, we are of the opinion that the sections of the act in question are not obnoxious to the constitution on the objections raised by counsel, and that the authority of the board of irrigation to make the determinations contemplated by the act, and the requirement of its approval as a condition to the right of appropriation under the provisions of the act, is a valid exercise of legislative power.

It does not, however, necessarily follow from the conclusion just reached as to the powers and duties of the board that the courts are in any way ousted of their jurisdiction over actual controversies. The board is possessed of powers of an administrative character. The courts have judicial powers, and while the board may make all needful preliminary determinations to enable it to regulate the distribution of water, and may determine whether or not proposed appropriations shall be allowed, and in what order, in pursuance of the provision of the statute, subject to the right of appeal, whenever a controversy arises over the substance of the rights of various parties making use of a stream, such controversies are proper for the courts to take judicial cognizance of. The courts can not administer the statute nor regulate the use of the streams, but they can and should adjudicate disputes based on the rights of parties acquired under the statute. The statute does not create a mere license to the use of water appropriated; it creates a right in and to the use of the water, and expressly provides for its sale and disposal in the same manner as real property. Section 63, art. 2, ch. 93*a* Compiled Statutes (section 6817, Annotated Statutes). See, also, *Strickler v. City of Colorado Springs*, 26 Pac. Rep. [Colo.], 313, 25 Am. St. Rep., 245; *Frank v. Hicks*, 35 Pac. Rep. [Wyo.], 475. Whenever it becomes necessary to vindicate or support such a right by judicial proceedings, the courts should be open and available therefor as in the case of a controversy regarding any other property right; hence it is that all controversies over water rights

arising under the statute are not necessarily for the board of irrigation alone. If a controversy has been submitted to that board and by it adjudicated, and no appeal taken, an entirely different question is presented. But where the board has made no determination and a large number of persons are claiming the right to divert and use the water of a stream, some by appropriation under the statute, some under prior acts, some by prescription, and others as riparian owners whose rights have accrued prior to the statute and have not been divested, we know of no sound reason why a suit in equity to determine and adjust such rights and enjoin interference with those rights by others under a claim of right may not be maintained. Such suits are permitted everywhere where the system of appropriation adopted by our statute obtains. In some states they have been provided for by statute, but in the absence of statutes, they have been upheld under general principles of equity jurisdiction. *Frey v. Lowden,* 70 Cal., 550. In our opinion, it is altogether proper to permit such suits in this state where riparian rights exist and have long existed, but are subject to be divested or impaired by appropriations of water under the statute upon due compensation therefor. The litigation involved in the appropriation of water from a stream, the banks of which are thickly settled, would be endless if the jurisdiction of a court of equity to prevent multiplicity of suits could not be invoked. This principle has been appealed to frequently over litigation of water rights, and has been held to permit of a single suit by a plaintiff against all of a large number of persons having or claiming rights in the water of the stream which infringed on the rights of such plaintiff. Gould, Waters, sec. 564. The chief difficulty in such cases arises from the fact that the several defendants have several rights and interests, and are not so connected in interest that a determination as to one would include them all. There is to be found in the reported cases and in the text-books authority for a limitation of the jurisdiction to prevent a multiplicity of suits

in such cases, but the weight of authority, following the leading case of *Mayor v. Pilkington*, 1 Atk. [Eng.], 282, holds to a contrary doctrine. *Miller v. Highland Ditch Co.*, 87 Cal., 430, 22 Am. St. Rep., 254; *Hillman v. Newington*, 57 Cal., 56; *Woodruff v. North Bloomfield Gravel Mining Co.*, 8 Sawy. [U. S. C. C.], 628; *Meyer v. Phillips*, 97 N. Y., 485, 49 Am. Rep. 538. See, also, *New York & N. H. R. Co. v. Schuyler*, 17 N. Y., 592; *Thorpe v. Brumfitt*, 8 Ch. App. Cas., L. Rep. [Eng.], 650, 656; *Western Land & Emigration Co. v. Guinault*, 87 Fed. Rep., 523; *United States v. Flournoy Live-Stock & Real-Estate Co.*, 69 Fed. Rep., 886; *Hammontree v. Lott*, 40 Mich., 190; 1 Pomeroy, Equity Jurisprudence, secs. 252-260. For such reasons we are of the opinion the plaintiff might properly bring such an action as the one before us, so far as it comes within the scope of a bill of peace, to avoid a multiplicity of actions.

There is much in the petition to indicate that the action was intended as a general condemnation proceeding as well, and that some sort of administrative proceeding in parceling out and distributing the waters of the stream in controversy was contemplated, as well as the determination of the rights of the several parties. All this administrative work is for the board of irrigation, and, so far as relief of that nature is sought, the lower court acted correctly in remanding the parties to their remedies by a proper application to the board. It is also true that proceedings for condemnation in furtherance of an irrigation project can not be joined with a suit in equity of the kind just considered. A petition, however, must be judged and the nature and character of the action thereby begun determined, chiefly by the facts alleged and the legal results thereof, and remedies appropriate thereto. *Alter v. Bank of Stockham*, 53 *Nebr.*, 223, 230. Disregarding much surplusage and irrelevance, the prayer for an injunction against the several defendants, and the allegations upon which it is based, are sufficient to bring the petition within the jurisdiction of a court of equity. Nor do we

see any reason for not holding that the plaintiff in a suit in equity in the nature of a bill of peace to protect his water right and determine and define conflicting rights to or claims upon the waters of the same stream may offer to do equity by compensating riparian owners whose rights are affected by the construction and operation of a canal under his appropriation, and that in this way the amounts due the several parties claiming rights by way of damages may become a proper subject of inquiry and adjudication therein.

One other feature of the plaintiff's case, it seems proper to here give consideration. The plaintiff, it appears, was under contract to furnish water to the village of Crawford for general municipal purposes, including water for sprinkling streets and for power for a lighting plant, and was also under some obligation to the general government to furnish water for flushing the sewers at Fort Robinson, an occupied military post located near the village of Crawford. Furnishing water for the uses referred to it is claimed is a domestic use of the water, within the purview of section 43, article 2, chapter 93*a*, Compiled Statutes (section 6797, Annotated Statutes), and because thereof the plaintiff claims priority over several defendants as an appropriator of water for domestic and agricultural purposes under the statute. As far as the canal is intended for irrigation, the appropriation of water to flow therein is obviously an appropriation for an agricultural purpose. We do not, however, agree with counsel that the other purposes named are domestic, within the meaning of the statute. In our opinion, the term "domestic purposes," as used in the statute, has reference to the use of water for domestic purposes as known and recognized at common law by riparian proprietors. Gould, Water Rights, sec. 205. The common law distinguishes between those modes of use which ordinarily involve a taking of small quantities of water, and but little interference with the stream, and those which necessarily involve a taking or diversion of large quantities, and

a considerable interference with its ordinary flow. The use of a stream in the ordinary way by a riparian owner for drinking and cooking purposes and for watering his stock, is a domestic use. It involves no considerable diversion of water and no appreciable interference with the stream. This right of the riparian owner the statute intended to preserve to him, and to protect against appropriations of water for other uses by canals, ditches and pipe-lines, whereby large quantities would be abstracted. This is the only construction which will give any force to the statute. If all of the water of a stream may be diverted by a canal for so-called domestic purposes involving incidental use for power, the priority given agricultural uses is rendered nugatory. This is the construction given similar provisions elsewhere. *Montrose Canal Co. v. Loutsenhizer Ditch Co.*, 48 Pac. Rep. [Colo.], 532; *Broadmoor Dairy & Live-Stock Co. v. Brookside Water & Improvement Co.*, 52 Pac. Rep. [Colo.], 792.

In the first case cited the court says (p. 534): "While it is true that section 6 of article 16 of the constitution recognizes a preference in those using water for domestic purposes over those using it for any other purpose, it is not intended thereby to authorize a diversion of water for domestic use from the public streams of the state by means of large canals. * * * The use protected by the constitution is such as the riparian owner has at common law to take water for himself, his family, or his stock, and the like."

The principle upon which the decree on the cross-petition of the defendant Hall proceeds is in the main correct. Having been brought into court by the plaintiff, he sets up his previously-acquired riparian rights, the infringement thereof by plaintiff, and consequent damage, and prays an injunction. It is probably true he would not necessarily have been entitled to an injunction in an independent suit brought by him for that purpose, since there would be no question of repeated trespasses in case plaintiff had acquired a superior right by appropriation for irri-

gation purposes, and an action at law for damages would be an adequate remedy. But when the plaintiff sued him and prayed for an injunction against him, he could demand that plaintiff do equity and pay his damages before any relief be awarded. The court, we think, was justified in enjoining any interference with the riparian rights of the defendant Hall until this was done. It also appears that as to those uses to which the plaintiff was putting or seeking to put the water sought to be appropriated by it, not agricultural, defendant had a right to insist that he had priority by reason of his long-continued use for power and manufacturing purposes, and an injunction against any diversion beyond what was used by plaintiff for irrigation, so far as such diversion injured defendant Hall, was proper, in so far at least as he was able to make a beneficial use of the water for power purposes for which it was used. Section 20, art. 2, ch. 93*a*, Compiled Statutes (section 6774, Annotated Statutes). But the injunction granted goes much beyond either of these grounds. As has been seen, the common law does not give to a riparian owner an absolute and exclusive right to all the flow of the water from a stream in its natural state, but only the right to the benefit, advantage and use of the water flowing past his land in so far as it is consistent with a like right in all other riparian owners. Hall was entitled to an injunction restraining any unreasonable diversion of the water which produced a substantial injury to him. But he could not insist that the slightest sensible diminution in the volume of the water be stopped merely as such. He was entitled only to protection to the right which he had acquired as a riparian owner against any unlawful invasion thereof.

Connected with this same question is involved the right of the plaintiff, even as against a riparian owner, to divert the storm or flood waters passing down the stream in times of freshets. Hall at most, as a riparian owner, was entitled to only the ordinary and natural flow of the stream, or so much as was found necessary to propel his

mill machinery, and could not lawfully claim as against an appropriator, the flow of the flood waters of the stream.

In *Modoc Land & Live-Stock Co. v. Booth*, 102 Cal., 151, 156, it is said on this subject: "It seems clear, however, that in no case should a riparian owner be permitted to demand, as of right, the intervention of a court of equity to restrain all persons who are not riparian owners from diverting any water from the stream at points above him, simply because he wishes to see the stream flow by or through his land undiminished and unobstructed. In other words, a riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of water above him by a non-riparian owner, when the amount diverted would not be used by him, and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it."

And in *Fifield v. Spring Valley Water-Works*, 130 Cal., 552, it is held that a riparian proprietor is not entitled to an injunction to restrain a water company engaged in supplying water for public use from diverting the storm or flood waters of a creek which will not prevent the flowing over his land of the ordinary waters of the stream, nor in any way damage his land or interfere with the rights appurtenant thereto. See, also, *Edgar v. Stevenson*, 70 Cal., 286; *Heilbron v. '76 Land & Water Co.*, 80 Cal., 189; Black's Pomeroy, Water Rights, sec. 75.

On the arguments of the case at bar, it was suggested that defendant Hall had acquired a prescriptive right to the full flow of the stream by ten years' user. There can not be, in the very nature of things, any such thing as a prescriptive right of a lower riparian owner to receive water of a stream as against upper owners. The riparian owner is entitled to the reasonable use and enjoyment of the water of the stream and to insist that the water come to his land to be so used and enjoyed. He may, by prescription, acquire a right to use and divert the water beyond that which the common law would give him, but he gets

this right only by adverse user. If he diverts water which otherwise would flow down to a lower owner, that use is adverse. On the other hand, the water which comes to him would come in any case, and there is nothing adverse to any one, in merely receiving it, that could be said to give a prescriptive right enabling him to prevent reasonable use of it by the upper owner. *Hargrave v. Cook,* 41 Pac. Rep. [Cal.], 18, 30 L. R. A., 390; *Bathgate v. Irvine,* 58 Pac. Rep. [Cal.], 442, 77 Am. St. Rep., 158; *Mud Creek Irrigation, Agricultural & Mfg. Co. v. Vivian,* 11 S. W. Rep. [Tex.], 1078.

We have herein discussed some matters having an indirect bearing on the main issues involved in the case. The court, however, must not be understood as being committed to any proposition not expressly decided.

It follows from what has been said that the order of the trial court dismissing the plaintiff's action must be reversed, and the cause remanded, with directions to proceed in the further trial of the cause in accordance with the views herein expressed.

REVERSED AND REMANDED.

SEDGWICK, J.

I concur in the conclusions reached upon the following questions, which are necessarily involved in the determination of this case.

1. The common-law doctrine of riparian rights is the basis of our law upon that subject, and governs, so far as applicable to our conditions, matters not regulated by our irrigation statutes.

2. Those parts of the irrigation act of 1895 which provide for a board of irrigation, and the adoption of the rule of ownership of water by appropriation, are constitutional.

3. A suit in equity may be maintained against persons claiming rights to use or divert water of a stream to prevent infringement, under the color of such right, of the rights of plaintiff acquired under our irrigation act.

4. Damages accruing to such parties by reason of appropriations under the irrigation act become a subject of inquiry and adjudication in such an equity suit.

5. Lower riparian owners do not acquire a prescriptive right to receive water as against upper owners.

6. I think the scope and character of the riparian rights of the defendant Hall, under the facts disclosed in the cross-petition, are rightly determined.

I express no opinion on the discussion of the doctrine of appropriation as existing independently of and prior to our statutes. If irrigation enterprises are to be met with demands for damages claimed to accrue from interfering with the ownership of the body of the water in our streams, which ownership, it is claimed, is derived from some other source than the irrigation statutes, it seems to me that it will be a serious obstacle in the way of the growth and development of such enterprises, and such rules ought not to be announced until the occasion has arisen in actual litigation, and after full discussion. The doctrine of the private ownership of the body of the water of running streams is not to be found in the common law, nor in the civil law, but was originated in our mining states, and developed there under the influence of the necessities of our miners, and later of farmers in the arid and semi-arid districts. It is in the light of these facts that we must determine how far the common law has been modified by our constitution, and the legislation thereunder, and how far it is applicable to existing conditions. The question whether the law of riparian ownership applies to "the larger streams of the state" appears to depend upon whether the owner of the land is held to own to the thread of the stream or only to the banks, and the former was determined to be the law of this state in *McBride v. Whitaker,* 65 Nebr., 137. I am not satisfied with the discussion of the extent of lands that may be called riparian, and do not see how it is involved in this case.