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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1903.

VOLUME LXIX.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS.

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UNITED STATES STATUTES AT LARGE.

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AT

JANUARY TERM, 1903.

FRANCIS S. HOWELL, APPELLEE, V. JEREMIAH K. ROSS ET AL., APPELLANTS.

FILED MAY 6, 1903. No. 12,783.

Judgment: COLLATERAL ATTACK. The district court being vested with jurisdiction of actions to quiet title, a judgment rendered by it in such an action is exempt from collateral attack, even though the petition upon which it is based fails to show that the plaintiff is entitled to the relief demanded.

APPEAL from the district court for Washington county: JACOB FAWCETT, DISTRICT JUDGE. *Affirmed.*

Clark C. McNish and *John W. Graham,* for appellants.

Frank S. Howell and *Albert W. Jefferis, contra.*

SULLIVAN, C. J.

This action was brought by Howell against Ross and others to foreclose a real estate mortgage. From a decree in favor of the plaintiff, McManigal, who was made a defendant on the theory that he was in possession of the mortgaged premises as a tenant of the mortgagor, has removed the case to this court by appeal. The only question necessary to be decided is the effect of a former judgment rendered by the district court in a suit brought by Ross

against McManigal in 1896. The issues tried and determined in that suit were, it is conceded, precisely identical with the issues presented by the answer which McManigal filed in this case. It is conceded, too, that the judgment rendered was in favor of Ross, and that it has been reviewed by this court and affirmed. But it is contended that, the action having been brought to quiet title by one out of possession against one in possession, the court had no authority to entertain it or to pronounce a valid judgment. There is not the least merit in this contention. The question of jurisdiction having been raised and litigated in the district and in this court the decision would be binding upon the parties even if it were wrong. *Dryden v. Parrotte,* 61 Neb. 339.

Whether McManigal paid taxes upon the land from 1896 to 1900 is altogether immaterial. The fact is relevant to no issue presented by the pleadings.

The judgment is

AFFIRMED.

CHARLES F. SALISBURY, APPELLEE, V. EMORY W. MURPHY ET AL., APPELLANTS.

FILED MAY 6, 1903. No. 12,825.

Foreclosure: CANCELATION OF DEBT. A foreclosure sale of real property, whether the purchaser is the mortgagee or a stranger to the action, is not a cancelation or extinguishment of the mortgage debt, so long as the mortgagor, by resisting confirmation or prosecuting appellate proceedings, prevents the mortgagee from obtaining actual payment either in land or money.

APPEAL from the district court for Lincoln county: HANSON M. GRIMES, DISTRICT JUDGE. *Affirmed.*

Thomas C. Patterson and *Frank H. Woods,* for appellants.

Wilcox & Halligan, contra.

SULLIVAN, C. J.

This case comes here by appeal from an order of the district court for Lincoln county, confirming a foreclosure sale.

Some questions of practice discussed at length in the briefs and at the bar need not be considered, as they are raised by appellee, and the decision must, in any view of the case, be in his favor. The only question of substantive law presented by the record is: Whether a foreclosure sale of mortgaged property for a sum sufficient to satisfy the decree is to be regarded as payment, where the mortgagee is the purchaser and the order of confirmation is suspended by appeal. It is conceded that a mortgagee is in every case entitled to interest on the mortgage debt until it is paid; but it is asserted with apparent confidence that, when he is the purchaser, the amount of his bid is to be applied at once as a credit upon the decree, even where the mortgagor by instituting appellate proceedings continues to retain possession of the property. In other words, the contention of appellants is: That the sale to Salisbury operated as payment, although the mortgagor, by appealing from the order of confirmation, wrongfully withheld the title and possession of the property sold. This view of the matter is unsound both in law and morals, and the cases cited to sustain it (*Davis v. Dale,* 150 Ill. 239, and *Bogardus v. Moses,* 181 Ill. 554) are neither in point nor remotely analogous. They merely hold that the rights of the mortgagee as a purchaser are the same as they would have been if he were a stranger to the action. The question to be here determined is not with respect to the rights of the mortgagee as a purchaser, but whether the mortgage debt is to be regarded as paid and satisfied by a sale which devested neither the title nor possession of the mortgagor. This question in a somewhat different form arose and was decided adversely to the contention of the appellants in *Trompen v. Hammond,* 61 Neb. 446. That

case in effect holds that a foreclosure sale, whether the purchaser is the mortgagee or a stranger, is not a cancelation or extinguishment of the mortgage debt, so long as the mortgagor, by resisting confirmation or prosecuting appellate proceedings, prevents the mortgagee from obtaining actual payment either in land or money. Entertaining no doubt as to the correctness of this conclusion, we think the order under review should be affirmed.

AFFIRMED.

EDWARD JASTER, SR., V. F. M. CURRIE.

FILED MAY 6, 1903. No. 12,840.

1. **Foreign Judgment: FRAUD AS DEFENSE.** In an action on a judgment of a sister state, it is competent for the defendant to show that he was induced by the fraudulent conduct of the plaintiff to come within the jurisdiction of the court rendering the judgment.

2. ———: **JURISDICTION.** Full faith and credit is not denied the judgment of a sister state by permitting the defendant in an action on such judgment to show that jurisdiction of his person was fraudulently obtained.

3. ———: **DEFENSES.** The rule, requiring each state to give full faith and credit to the judicial proceedings of every other state, will not shield a judgment of a sister state from attacks that might have been made upon it in the state where it was rendered.

4. ———: ———. A party who has been induced by the fraud of his adversary to go into a jurisdiction other than that of his residence, for the purpose of being there served with process, need not appear specially and move to quash the service. He may entirely ignore the proceeding, without waiving his right to defend against the judgment.

5. **Service of Process: FRAUD.** If a party has been fraudulently brought within the jurisdiction of a court for the purpose of serving process upon him, the service is not lawful, even though he might, by exercising diligence, have gotten out of the jurisdiction after the fraud ceased to be operative and before the process was served.

6. **Indorser and Indorsee: PAROL EVIDENCE.** Where the rights of innocent third parties are not involved, it is permissible to show by

parol evidence that the contract between the indorser and indorsee of a promissory note was different from that which results by legal implication from a blank indorsement.

ERROR to the district court for Custer county: HOMER M. SULLIVAN, DISTRICT JUDGE. *Affirmed.*

O. A. Abbott and *Simon Cameron,* for plaintiff in error.

Elliott J. Clements, contra.

SULLIVAN, C. J.

This was an action on a judgment recovered by the plaintiff, Edward Jaster, Sr., against the defendant, Frank M. Currie, in the court of common pleas of Trumbull county, Ohio. The answer of the defendant, among other things, alleges that he was not indebted to the plaintiff; that he did not appear generally in the action; and that he was decoyed into the jurisdiction of the Ohio court, for the purpose of being there served with process. A general demurrer to the answer was overruled, and judgment on the merits given in favor of the defendant.

The contention of Jaster, based upon *Christmas v. Russell,* 5 Wall. (U. S.) 290, and other decisions of the supreme court of the United States, is that fraud in inducing the defendant to come within the jurisdiction of the Ohio court where an unjust judgment was recovered against him, is not available in an action brought upon that judgment in this state. This court is committed to a contrary doctrine. In *Eaton v. Hasty,* 6 Neb. 419, it was expressly held that fraud is a good defense to an action brought on a judgment of a sister state. The same conclusion was reached in *Keeler v. Elston,* 22 Neb. 310, and the doctrine was reaffirmed in *Snyder & Dull v. Critchfield,* 44 Neb. 66, although the question was not involved in that case. The plaintiff insists, however, that the doctrine of the foregoing cases is in conflict with article 4, section 1, of the federal constitution, and the act of congress made in pursuance thereof, which require each state to give full

faith and credit to the judgments of every other state. Many authorities may be cited which apparently sustain the plaintiff's position, but upon examination it will be found that they emanate from jurisdictions where the distinction between actions at law and suits in equity is strongly maintained and enforced, and where an equitable defense is not recognized nor allowed in an action at law. In this state the distinction between actions at law and suits in equity is abolished by statute, and to an action on a legal demand the defendant may interpose any defense he may have, whether the same be legal or equitable. The constitutional provision and act of congress, above referred to, require nothing more than that the judgment shall be given precisely the same effect in every other state that it has in the state where it was rendered. *Hanley v. Donoghue,* 116 U. S. 1; *French v. Pease,* 10 Kan. 51; *Simmons v. Clark,* 56 Ill. 96; *McLaren & Co. v. Kehler,* 23 La. Ann. 80, 8 Am. Rep. 591. In other words, in an action on a judgment of a sister state it has all the advantages and none other than it would have were it sought to be enforced in the state where it was rendered. Neither the constitution of the United States, nor the laws of congress, nor any rule of comity requires the courts of this state to shield a judgment from attacks that might have been successfully made upon it in the state where it was rendered. *Wood v. Watkinson,* 17 Conn. 500, 44 Am. Dec. 562; *Taylor v. Barron,* 30 N. H. 78, 64 Am. Dec. 281; *Bank of Chadron v. Anderson,* 6 Wyo. 518, 48 Pac. 197; *Warrington v. Ball,* 90 Fed. 465.

This being true, when the plaintiff sought to enforce his judgment in this state, the defendant had the same right to look for relief to the courts exercising equity jurisdiction in this state that he would have had to look to a court of equity of the state of Ohio, had the plaintiff sought to enforce it there. Under our system of pleading it was not necessary that he should institute an original action for relief. The code is designed to avoid circuity of action and to prevent multiplicity of suits. Any

grounds that he could have urged in an action instituted by him to obtain relief from the judgment are available as a defense to an action brought to enforce such judgment. The following cases, we think, fully sustain this conclusion: *Toof, McGovern & Co. v. Foley,* 87 Ia. 8; *Dunlap & Co. v. Cody,* 31 Ia. 260; *Pilcher v. Graham,* 18 Ohio C. C. 5; *Abercrombie v. Abercrombie,* 64 Kan. 29, 67 Pac. 539; *Wood v. Wood,* 78 Ky. 624, 629; *Marx v. Fore,* 51 Mo. 69. In most, if not all, of the cases just cited, the fraud consisted, as it does in this case, in decoying the defendant within the jurisdiction of the court rendering the judgment.

The plaintiff further contends that the answer fails to show a defense to the notes upon which the judgment is based. We need not stop to inquire whether in order to obtain relief from a judgment obtained by fraud, it is necessary to show a defense to the action in which such judgment was rendered. Whether necessary or unnecessary, the defendant has in his answer stated a valid defense to the action brought in the state of Ohio. It is true that such defense involves contradicting the contract which the law implies, over his indorsement of the notes upon which the action was based. But this court is thoroughly committed to the doctrine that that may be done, so long as the rights of innocent third parties are not involved. *Whitney v. Spearman,* 50 Neb. 617; *Holmes v. First Nat. Bank of Tobias,* 38 Neb. 326; *True v. Bullard,* 45 Neb. 409; *Corbett v. Fetzer,* 47 Neb. 269.

It is said that the question of the jurisdiction of the court of common pleas over the defendant was raised in that court by a motion to quash the service of summons and that the question was adjudged in favor of the plaintiff and can not be again litigated. The answer alleges that at the time the motion to quash was presented and determined, defendant did not know that plaintiff had been guilty of any fraudulent conduct, and it appears quite clearly from the petition in this case that the special appearance was made only for the purpose of challenging

the validity of the service of the summons on the ground that defendant was in Ohio for the purpose of attending the taking of depositions and therefore exempt from service of judicial process. That objection, if not interposed before judgment, would, of course, have been waived. But the objection that jurisdiction was fraudulently obtained was one which, according to the authorities, defendant was under no obligation to present to the Ohio court. He was not obliged to litigate any question in a court whose jurisdiction over him was obtained by deception and trickery. This is the doctrine implied in all the cases holding that fraud in obtaining jurisdiction is a good defense to an action on a judgment of a sister state.

To the suggestion that if the defendant had been diligent he might, after the depositions had been taken, have gotten out of Ohio without being served with summons, it is only necessary to say that want of diligence on the part of defendant could not change the quality of plaintiff's conduct nor entitle him to retain any advantage gained by fraud. *Townsend v. Smith*, 47 Wis. 623.

The judgment is right and is

AFFIRMED.

NOTE.—From this judgment error was prosecuted to the supreme court of the United States. April 24, 1905, judgment of this court reversed. *Jaster, Sr., v. Currie*, 25 Sup. Ct. Rep. 614. July 6, 1905, judgment of reversal entered in this court.—REPORTER.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. WILLIAM SPORER, ADMINISTRATOR OF THE ESTATE OF HENRY J. HENNINGS, DECEASED.

FILED MAY 6, 1903. No. 10,678.

1. **Directing Verdict.** The trial court is not required to submit a case to the jury unless the evidence supporting it is of such a character that it would warrant the jury in basing a verdict upon it.

2. ———: CONFLICTING EVIDENCE. Conflicting evidence is for the jury,

and when there is a conflict of evidence upon a material issue it is error to direct a verdict for either party.

3. ———: ———. Evidence may be said to be conflicting when there is substantial evidence upon either side of the controversy. A fact may be so conclusively established that slight evidence suspicious and uncertain will not be allowed to oerthrow it.

4. **Duty of Railway in Constructing Crossing.** It is the duty of a railway company in constructing its crossings over a highway to take all reasonable precautions to lessen the danger to the public in crossing its road.

5. **Negligence:** QUESTION FOR JURY. In this case it was for the jury to determine the rate of speed at which defendant's train was running at the time of the accident, and whether, under the conditions obtaining at the crossing, the company was negligent in running its train at such rate of speed.

6. **Instructions.** Conflicting instructions are erroneous, and one which misstates the law upon a vital issue is not cured by another which states the law correctly.

ERROR to the district court for Cass county: BASIL S. RAMSEY, DISTRICT JUDGE. *Reversed.*

W. F. Evans, Samuel M. Chapman, Lorenzo W. Billingsley, Robert J. Greene, Richard H. Hagelin, William V. Allen and *Willis E. Reed,* for plaintiff in error.

Harvey D. Travis and *Jesse L. Root, contra.*

SEDGWICK, J.

The plaintiff's intestate was killed by one of the defendant's trains, while he was driving across its track between the stations of Murdock and South Bend in Cass county. He recovered a judgment for damages in the district court for Cass county, which the company has brought here for review. Defendant's passenger train running from Lincoln to Omaha left Murdock about ten minutes behind its schedule time; and at the second section line crossing from Murdock the accident occurred. The petition alleged that the defendant was negligent in constructing its railway at the crossing of the highway and that it so negligently and carelessly operated its train that "no

whistle was sounded or bell rung before it approached said crossing," and was carelessly running its train at a high rate of speed, to wit, about sixty miles an hour. The defendant denied these allegations of negligence and alleged contributory negligence on the part of the deceased.

Just south of the highway on which the deceased was driving there is a rise of ground or hill from three hundred to four hundred feet in height. The railway runs in a northeasterly direction from Murdock and, as it passes along on the east side of this hill, bends toward the north and crosses the highway nearly at right angles, and extends therefrom eastward in a straight line for a distance of from one-half a mile to a mile. It has a downward grade continuously from Murdock until after the crossing in question is passed, and as it passes the crossing in question, runs through a deep cut along the brow of the hill which at a distance of about twelve hundred or fifteen hundred feet from the crossing is sixteen feet in depth. From this point to the crossing the depth of the cut gradually diminishes until when the track reaches the crossing it is not more than four feet in depth. In making this cut the earth was thrown up in embankments and the ground is cultivated in crops, so that in June, when this accident occurred, a train approaching through this cut can not be seen by a person approaching the crossing from the west when more than two hundred feet from the crossing. The deceased was driving with a team and single seated covered buggy with his little girl five or six years old, who was sleeping in the forward part of the box of the buggy, and approached this crossing from the west. The team was struck by the train and the horses and driver were instantly killed and the buggy destroyed. The child seems not to have been injured.

1. It is contended that there was negligence shown on the part of the company in running the train. The conductor, engineer and fireman, and other employees of the railroad company testified positively and clearly that the whistle was duly sounded at the proper distance from

the crossing and continuously until the train approached the crossing, and that the bell rang also continuously. The evidence of these witnesses should of course have been given its proper weight in determining that question.

We quote from the evidence of some of the other witnesses upon this point as follows: John Stroy, Sr., who was a farmer and had lived on an adjoining section for twenty-two years, was asked:

Q. Do you know where the crossing is?

A. Yes, sir.

Q. At the time of the accident how far were you from the crossing?

A. About eighty rods.

Q. Which way?

A. East of the track.

Q. What were you doing?

A. Going over, crossing there to my son's place.

Q. Go ahead in your own way and tell the court and jury just what you saw and what you heard in the way of sounding the whistle.

A. I went over across to see my son, I saw the train coming out of the cut, not this cut up to the crossing, a little cut a little further south, and when the train came out of that cut and before she got to the whistling post, I saw the steam pipe up and I heard the whistle and they did that four times, but the last time I couldn't see the steam because they got behind the grove; I am positive that they whistled four times before they got to the crossing.

Q. You know where the whistling post is do you?

A. Yes, sir.

Q. You had known the railroad at this point ever since it was constructed?

A. Oh, yes, I know every foot.

Q. You speak of the train coming out from in the cut, what cut do you mean?

A. The cut south of the whistling post.

Q. The one you speak of is south of the whistling post?

A. Yes, sir.

Q. The whistling post is between two cuts?

A. Yes, sir.

Q. State whether it was coming out of the south cut when you first saw it.

A. Yes, sir.

Q. State whether or not, Mr. Stroy, the train was coming out of the south cut when it first whistled and whether or not it was before it reached the whistling post.

A. It came out of the south cut and before it seemed to come to the whistling post, as I said before, I saw the steam pop up on the engine and then directly the sound came from the whistle.

Q. How far would you say that whistle could be heard, what distance?

A. I should judge about two or three miles.

Q. Was it plain and distinct?

A. Just as plain as could be.

Q. You had no difficulty in hearing it?

A. No, sir.

Q. How far were you from it?

A. Eighty rods.

In an able and searching cross-examination his evidence was strengthened rather than discredited.

Henry Baumgardner was plowing corn in a field just east of the crossing at the time of the accident, and testified as follows:

Q. Do you remember the time of the accident in question?

A. Yes, sir.

Q. Where were you at that time?

A. Plowing corn.

Q. Who for, at that time?

A. Mr. Stroy.

Q. And where were you plowing corn?

A. About twenty or thirty rods east of the railroad track.

Q. You know where the crossing is in question?

A. Yes, sir.

Q. You know where the whistling post south of that crossing is?

A. Yes, sir.

Q. Which way were you from the crossing?

A. East side of the railroad.

Q. How far from the railroad?

A. About twenty or thirty rods.

Q. Did you see the train that collided with the team?

A. No, sir.

Q. Did you hear it?

A. No, sir.

Q. I mean the train that was in the collision, did you see that train that day?

A. Yes, sir.

Q. Where did you first see it?

A. I saw the train coming through the cut.

Q. Which cut do you speak of?

A. The cut where the accident happened.

Q. Where did you first see the train, where was it when you first saw it?

A. North of that grove there when it passed the grove.

Q. Was it north or south of the whistling post?

A. A little bit north.

Q. When did you hear the train whistle if at all?

A. It was south of the whistling post.

Q. How many times did you hear the train whistle?

A. Several times.

Q. How long did it continue to whistle, where was the train when the whistling stopped?

A. It whistled all the way through the cut.

Q. Commenced whistling, you say, south of the whistling post?

A. Yes, sir.

Q. How far south of the whistling post was it when you heard it whistle?

A. I couldn't say how far it was south.

Q. Was it a loud whistle?

A. Oh, I couldn't say that, how loud it was.

Q. How far do you think a person could hear the whistle?

A. A couple of miles.

J. C. Stroy, Jr., who was also plowing corn in a field but a few rods from where the accident occurred testified as clearly and directly to the same effect. Also Mr. Lefler, who was buying grain at the time and was driving across the country with his team, and was about a mile east of the crossing where the accident happened, who testified that he saw the train when it was leaving Murdock, heard it whistle at the crossing a mile from Murdock, and heard it whistle at the crossing in question. He says that he heard it whistle several times while it was south of the crossing and that there were several blasts each time, he could hear it plainly.

Several others who were working in the fields near by the accident testified clearly and positively to the same facts.

Also some passengers upon the train gave clear and positive testimony to the same effect. The plaintiff produced but one witness who testified upon that point. This was Henry Hollenbeck, a pasenger on the train, who was asked:

Q. State whether or not they whistled or rang the bell before reaching the crossing.

A. No, sir, I don't think they did.

And upon cross-examination he was questioned, and answered as follows:

Q. How far was the train north of the crossing when you heard the whistling?

A. They had commenced slacking up.

Q. About how far north of the crossing?

A. Probably a quarter of a mile.

Q. When you heard the whistle the first time?

A. Yes, sir.

Q. Now prior to that time, all you know is, you didn't hear any bell or whistle?

A. No, sir, I didn't hear any whistle or bell.

Q. This is all you know about it that you didn't hear any whistle or bell?

A. I know I didn't hear it.

Q. This is all you do know about it, isn't it?

A. I don't think they whistled.

Q. You don't know?

A. I am willing to swear that they did not whistle.

On re-direct examination he was asked.

Q. With reference to the time you felt this jolt, when did the whistle sound?

A. Some time after.

Q. Right after?

A. Yes, sir.

The defendant then asked him:

Q. About a quarter of a mile from the crossing?

A. Yes, sir, I should think so.

He was then asked by the plaintiff:

Q. You wish the jury to understand that the train didn't commence whistling until about the time it stopped?

Defendant excepted as leading and suggestive, and the court said:

"State the facts." Whereupon he answered:

A. Yes, sir, they commenced whistling, well after they commenced to stop, the first I heard after I felt the jar, I heard the whistle.

This was all of the testimony given by this witness upon this point. It is to the effect that he heard the whistle after the train had passed the crossing about a quarter of a mile and that he did not hear the whistle before that time.

"Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." *Commissioners of Marion County v. Clark,* 4 Otto (U. S.), 278, 24 L. ed. 59.

"Conflicting evidence is for the jury to weigh, and when there is a conflict in evidence upon a material issue it is error to direct a verdict for either party." *Paxton v. State,* 60 Neb. 763.

The rule has been similarly stated in many decisions of this court, in some with language possibly not so accurate. To say that evidence is conflicting, is to imply that there is substantial evidence upon either side of the controversy. A fact may be so conclusively established by evidence that slight and suspicious evidence will not be allowed to overthrow it. We can not upon this record say that the jury must have found that the plaintiff had established the fact of negligence of the company in not sounding the whistle or ringing the bell. The verdict is a general one, and the jury may have reached its conclusion, under the instruction given by the court, as will be hereinafter shown, without finding this allegation in favor of the plaintiff. We will not assume that, against such overwhelming testimony, the jury has found a fact to be established by negative testimony of such character as this, where the finding and verdict may be accounted for on other grounds.

2. It is insisted that it follows that the court should have instructed the jury to return a verdict for the defendant. The evidence is meager and unsatisfactory as to the condition of the highway as it approached this crossing from the west. It appears that there is a descent in the grade immediately before the crossing is reached, but its extent or precipitancy is not shown. It also appears that the highway passes over a "hill" as it approaches the crossing, but the altitude or decline of this hill is not shown, nor does its distance from the crossing appear except that it was not more than forty rods distant. As before shown, the track as it approached the crossing is in the form of a curve around the base of a hill three hundred or four hundred feet in height and through a deep cut. As to the velocity of the wind, and possibly as to other facts that may have obscured the sound of the whistle, there is a conflict in the evidence.

The train was running at a high rate of speed. The conductor, engineer and fireman of the train unite in testifying that the speed was not greater than forty-five miles an hour. Notwithstanding the weight that is to be given to this testimony on account of the experience of these men in running passenger trains and their acquired ability to make close estimates of the rapidity of the motion of such trains, still it is more or less a matter of judgment or estimate, there being no evidence that any unusual attention was given to the matter by them at the time, or that they had any opportunities for special observation or comparison. The engineer testified that it is a continuous down grade from Murdock to the crossing; that he used some steam during the first mile from that station, but afterwards used no steam, the train apparently accelerating its rate of speed of its own momentum, it being, as he said, a heavy train carrying altogether about three hundred and fifty tons weight. There were other witnesses who saw the train and estimated that its speed was much greater than forty-five miles an hour.

Railway crossings are always places of danger. It is the duty of the company to take all reasonable precautions in constructing crossings to lessen the danger to the public in crossing its road. Whether under the circumstances the deceased can be charged with negligence in not observing the signals given by the engine was a question for the jury. Under these conditions it can not be said that the speed at which the train was running might not of itself render it impossible for one crossing the track at this point to avoid such an accident. The whole question as to whether under all the circumstances the speed of the train was such as to constitute negligence on the part of the defendant should have been submitted to the jury under proper instructions. The court therefore did not err in refusing to direct a verdict for the defendant.

3. The plaintiff presented fourteen requests for instructions to the jury and the defendant presented fifteen. It appears that the trial court made selections from these re-

quests in framing his charge to the jury, and the result was an irreconcilable conflict in the instructions upon several vital points.

In the second instruction given by the court the jury was told:

"The gist of this action is the alleged negligence and wrongful construction of defendant's alleged railroad over and across an alleged highway in Cass county. * * * The alleged negligence of the failure of the defendant to construct and maintain a suitable crossing over its road at such point and to keep such crossing in proper repair."

And this was repeated in the same instruction as follows:

"You are instructed therefore that the issues for you to decide are: Was the defendant negligent in the construction of said crossing; and by cutting of the excavation at said point and the construction of said crossing, did it negligently expose the deceased to unnecessary danger at such crossing."

But in the 7th and 10th instructions the court said:

"7. The jury are instructed, that there is no evidence in this case showing or tending to show that the defendant, the railway company, carelessly or negligently constructed its railway at the point where the collision occurred, or for about a mile to the southwest thereof, and the allegation in the plaintiff's petition in this regard, you should disregard and dismiss from your consideration.

"10. The jury are instructed that the plaintiff in this petition alleges that because of the configuration of the grounds at and about the crossing where the collision occurred and the manner in which the railway approached and crossed the highway, it was necessary, in order that said crossing might be safe, that it should have been constructed either beneath or above said track, or turned north along defendant's right of way twenty rods and parallel with said railway. In this connection you are instructed that no evidence has been offered by the plaintiff tending to prove this allegation in the petition and you will disregard the same in considering your verdict."

It was alleged in the petition and stated in the instructions that when the defendant constructed the railway across the highway it carelessly and negligently constructed the same at a point a half to a mile to the southwest of the crossing, and that the road approached the highway through a deep cut and a steep down grade, and on a heavy curve; that the said cut continued up to and beyond the highway crossing; that the defendant carelessly and negligently "caused the earth taken from said cut to be piled up on its right of way immediately west of said cut and parallel therewith for a long distance southwest, to wit, about five hundred feet, and thereby caused the track of said road to be buried deep from sight of the traveling public approaching the said railway along the said highway and to the west of said track," and that because of the negligent and careless construction of said railway it was impossible for the traveling public approaching said crossing from the west to see trains approaching said crossing from the southwest from any point along the highway within one mile west of said crossing and "that because of the configuration of the grounds at and about said crossing, and the manner in which the defendant's railway approached and crossed said highway it was necessary, in order that the said crossing might be safe and convenient for use, that the said highway where the said railway crossed the same should have been constructed either beneath or above said track, or that it should have been turned north along defendant's right of way, about twenty rods and parallel with the said railway, where it could have been constructed under said railway and then turned south till it would have intersected the said highway on the west side of said railway; that said highway could have been so changed and arranged without great expense, and the crossing thereof by the defendant's line of railway made safe and secure, yet the defendant, regardless of its duties to the public, negligently and carelessly omitted so to do, but negligently and carelessly permitted its said crossing to remain a dangerous and unsafe way for the traveling public."

There is no evidence that the location of the tracks or making the cuts and embankments were improper or unnecessary in the construction of the road. If therefore the defendant in the construction of the crossing neglected reasonable and proper precautions to guard the safety of the public in passing over this crossing, it should have been shown to the jury in support of the allegation of negligence on the part of the company. The plaintiff attempted to do this by showing that "it is practicable to construct either an underground or an overhead crossing for a highway at the point where the Rock Island road crosses the town line road."

The witness Hilton, who was a surveyor and civil engineer, testified it was not practicable to do either. He stated no reason for his conclusion, but being the plaintiff's witness and the only one on this point, the plaintiff is clearly bound by this testimony, so that the 7th and 10th instructions above quoted were applicable to the evidence. It was the duty of the jury to follow these instructions of the court, and the court erred in giving instruction numbered 2 in conflict with these instructions.

"An instruction which misstates the law is not cured by other instructions stating it correctly, because the jury would be left in doubt as to which paragraph was correct."

"In such case it is impossible to say which instruction the jury followed, and the correct instructions do not cure the error." *Richardson v. Halstead,* 44 Neb. 606.

There are 726 assignments of error largely relating to alleged errors in rulings upon the reception and exclusion of evidence. These questions are not liable to arise upon another trial of the case and their discussion at this time is unnecessary. Other assigned errors are disposed of in the foregoing discussion.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

FIRST NATIONAL BANK OF PLATTSMOUTH, NEBRASKA, V. FRANCIS N. GIBSON ET AL.

FILED MAY 6, 1903. No. 12,679.

1. **Fraudulent Transfer:** NECESSARY PARTY. To a petition in equity alleging fraudulent transfers of property and seeking to reach the fund conveyed, the debtor who transferred them is a necessary party.
2. **Venue.** Such action may be commenced where the debtor resides and the transferee served with summons at his residence in another county.

ERROR to the district court for Cass county: PAUL JESSEN, DISTRICT JUDGE. *Reversed.*

A. N. Sullivan, for plaintiff in error.

Stephen L. Geisthardt, contra.

HASTINGS, C.

The errors alleged in this action are:

First, That the court erred in sustaining the motion of defendant Francis N. Gibson to quash service of summons had upon him in Lancaster county;

Second, Error in dismissing the case as to the defendant Gibson;

Third, Error in sustaining the demurrer filed by the defendant Carter;

Fourth, Error in dismissing the action.

It is asked that the rulings be reversed and the case remanded as against both defendants.

The fundamental question in this case is: Whether or not John M. Carter was a *bona fide* defendant in this action; and that question is to be determined from an inspection of the petition. Of course, if Carter was not a *bona fide* defendant and there is no cause of action alleged against him, under the numerous holdings of this court, there would be no authority for serving summons upon

the defendant Gibson in Lancaster county, the action having been commenced in Cass county, and commenced there on the ground that John M. Carter, who resided there, was a proper party defendant.

Dunn v. Haines, 17 Neb. 560, and the several cases following it, and the latest one, *Barry v. Wachosky,* 57 Neb. 534, all hold that there must be a right of action against the resident defendant, in order to give any jurisdiction over defendants who reside and are served in other counties.

As above stated, the question is upon the petition, as a demurrer on Carter's behalf was sustained and the action thereupon dismissed. The defendant, Gibson, is the only one appearing in this court; and he claims that, as against him, there is no final order in the case; that he only appeared in Cass county to object to the jurisdiction and is not responsible for the fact that after such appearance, and the sustaining of the objections, the court dismissed the action as to him. It is alleged that this action of the court was taken in his absence and not at his request, and that, therefore, plaintiff can not complain, even after the final dismissal of the action against Carter, also. This is, apparently, on the ground that the entry of the dismissal must be construed as being taken at plaintiff's request and, therefore, was a waiver of any error there could be in sustaining Gibson's objections to the jurisdiction. It appears from the record, however, that plaintiff took exceptions to the dismissal and he can hardly be held responsible for it.

The authorities cited to the point that an order sustaining objections to the jurisdiction is not final, *Lewis v. Barker,* 46 Neb. 662, and the prior decisions in this state to the same effect, following *School District v. Cooper,* 29 Neb. 433, doubtless settle this point; but a judgment of dismissal is, of course, final. If the action of the court in sustaining the demurrer of Carter is upheld, then the judgment of dismissal is right. If that action of the court, however, was wrong and should be reversed, then it is clear that the action in sustaining Gibson's objections to the

jurisdiction is also wrong and should be reversed. It seems clear that it was entirely competent for plaintiff to bring the final judgment of dismissal, the dismissal as to Gibson and the sustaining of Gibson's objections to the jurisdiction, all three, before this court as he has sought to do by the petition in error. It seems clear, therefore, as above indicated, that if the petition in this action shows Carter to have been a proper party defendant, and a good cause of action against him, then Gibson, against whom the principal relief is asked, could be served with summons in Lancaster county and required to answer the action in Cass county.

The allegations of the petition, which is somewhat lengthy, are:

First, That plaintiff is a corporation.

Second, That in 1886 it recovered a judgment against John M. Carter for $778.70 and that execution was issued upon it and returned unsatisfied.

Third, That when the judgment was rendered Carter owned in fee 80 acres of land in Cass county which is described.

Fourth, That Carter in May, 1887, entered into a fraudulent and collusive agreement with Francis N. and B. A. Gibson, brothers, by which Benjamin A. took an assignment of a decree of the Cass county district court in favor of Beardsley, Clark & Davis against Carter rendered in 1883; that the decree had been fully paid off and discharged and the assignment was solely in order to defraud plaintiff and other creditors;

Fifth, That Benjamin A. Gibson, acting in concert with the other two as conspirators, procured an order of sale and caused this land, with others, to be sold under pretense of satisfying the said decree and Benjamin A. Gibson purchased the land and procured a confirmation of the sale and a sheriff's deed;

Sixth, That Benjamin A. Gibson in November, 1887, conveyed this 80 acres of land in question to Francis N. Gibson in pursuance of the fraudulent agreement and the

latter entered into possession and held it till March 1, 1901, and appropriated to his own use the rents and profits, amounting to not less than $300 a year; that none of these rents and profits have been paid to Carter and the latter is now, and has been ever since the rendition of plaintiff's judgment, insolvent;

Seventh, That in August, 1889, plaintiff commenced an action in the district court for Cass county to set aside the conveyance by sheriff's deed to Benjamin A. Gibson, and by Benjamin A. to his brother, for the reason that the conveyances were in fraud of plaintiff and Carter's other creditors, and Carter and both Gibsons were parties defendants and filed answers, and judgment was recovered against both Benjamin A. and Francis N. Gibson for the full amount of plaintiff's judgment; that appeals were prosecuted by both of said parties to this court and the personal judgment against Francis N. Gibson reversed because he had made no disposition of the land; that the said Benjamin A. Gibson has absconded and is insolvent;

Eighth, That afterward such proceedings were had in that action, that a decree was rendered in favor of plaintiff and against Francis N. Gibson, holding that plaintiff's judgment was a legal and valid lien upon the land, and from that decree Francis N. Gibson prosecuted an appeal to this court, where it was affirmed, and Francis N. Gibson's occupancy of the land was declared without color and tortious;

Ninth, That the land was in April, 1901, sold upon a decree of the circuit court of the United States for the district of Nebraska, upon a lien prior to plaintiff's, and plaintiff's decree against the land became wholly worthless, and plaintiff is entirely unable to collect its judgment except by compelling Francis N. Gibson to account for the rents and profits of the land during the time of his possession. The prayer of the petition is that an account may be taken of the amount due from Francis N. Gibson to the defendant Carter as rents, issues and profits of the land; that judgment be rendered against Gibson in favor

of Carter and that plaintiff be subrogated to the rights of said Carter to the extent of the amount due on said judgment and that plaintiff may be awarded execution therefor, and for general relief.

Counsel for defendant in error, Gibson, hardly seems to contend that Carter was not a proper party defendant but that his interest not being entirely adverse, and in fact he having an interest to get his judgment paid out of this fund, for the purpose of conferring jurisdiction, he should be held and considered as in fact a plaintiff, and that any action brought upon this claim should be brought in Lancaster county where Gibson resides.

German Nat. Bank of Hastings v. First Nat. Bank of Hastings, 59 Neb. 7, is cited as also the same case in 55 Neb. 86, to the proposition that this is merely a proceeding under section 532 of the code, and it is urged that there is no allegation of fraud as against the plaintiff on the part of Francis N. Gibson, and nothing to indicate that this is not simply a legal right on the part of Carter against Gibson, which the bank is seeking to enforce for its own benefit.

We do not think this position is tenable. The action seems to us to be much more in the nature of a creditor's bill. The allegation is that by an arrangement between the two Gibsons and Carter to which Francis N. Gibson is alleged to have been a party, and for the purpose of defrauding the plaintiff and other creditors of Carter, a paid off decree was assigned to Benjamin so as to get the title to this land, which was subject to the lien of plaintiff's judgment, out of Carter through Benjamin A. to Francis N. Gibson.

It seems clear that Carter if he was, as alleged, a party to the fraud, would himself have no right to assert a claim to the land, or to the income from it. Under the holding in the case of *German Nat. Bank v. First Nat. Bank, supra,* only a legal right of action on Carter's part would support a direct suit, under section 532 of the code, on the plaintiff's part against Francis N. Gibson. It seems clear that

equity must be resorted to in order to render these facts available, and it has been held that section 532 does not abrogate or supersede the remedy in equity. *Monroe v. Reid, Murdock & Co.*, 46 Neb. 316, 328; *Benedict v. T. L. V. Land & Cattle Co.*, 66 Neb. 236.

"The judgment debtor is a necessary party in all actions brought by creditors to subject property which it is claimed was fraudulently transferred, and without him the action can not proceed to judgment. The person to whom the property has been transferred is also a necessary party." Maxwell, Code Pleading, page 167; citing *Logan v. Hale*, 42 Cal. 645; *Lawrence v. Bank of the Republic*, 35 N. Y. 320; *Miller v. Hall*, 70 N. Y. 250, 252.

This doctrine seems to have the sanction of Chief Justice Marshall in *United States v. Howland & Allen*, 4 Wheat. (U. S.) 108. This last and other cases may be found collected in 14 Century Digest, col. 508.

As above suggested, the necessity of making the judgment debtor, who has transferred property fraudulently, a party to an equitable action is hardly disputed by Gibson's counsel in this case. As we have concluded that the petition is one in equity, there seems no doubt that Carter was a proper party and that jurisdiction attached in Cass county. No defect in the petition itself has been pointed out. As above suggested, Carter makes no appearance, and Gibson and his counsel are evidently afraid of submitting themselves to the jurisdiction of the court.

We have observed no fatal defect in the petition. Of course, if these proceedings are collusive as between plaintiff and Carter, as Gibson's counsel suggests, that fact can be shown.

It is recommended that the judgment of dismissal, the order sustaining the demurrer and also that sustaining the objections of defendant, Gibson, to the jurisdiction of the Cass county district court, be reversed and the cause remanded for further proceedings.

KIRKPATRICK, C., concurs.

By the Court: For the reasons stated in the foregoing opinion the judgment of dismissal, the order sustaining the demurrer, and also that sustaining the objections of defendant, Gibson, to the jurisdiction of the Cass county district court, are reversed, and the cause remanded for further proceedings.

REVERSED.

ELLA M. ROSE V. DEMPSTER MILL MANUFACTURING COMPANY.

FILED MAY 6, 1903. No. 12,834.

Appeal and Error: FINAL ORDER. An order setting aside a judgment or decree, fixing the time for filing pleadings and setting the cause down for a new trial, under section 602 of the code, is not a final order from which appeal or error will lie before trial and a final judgment.

ERROR to the district court for Gage county: CHARLES B. LETTON, DISTRICT JUDGE. *Proceeding in error dismissed.*

G. M. Johnston, for plaintiff in error.

Frank N. Prout, William B. Rose, Alfred Hazlett and *Fulton Jack, contra.*

BARNES, C.

Plaintiff in error, Ella M. Rose, obtained a decree in the district court for the foreclosure of a certain real estate mortgage against Dempster Mill Manufacturing Company, defendant in error, together with certain others who were the mortgagors. The premises were sold for much less than the amount due on the decree; the sale was confirmed, and afterwards a deficiency judgment was rendered, by default, against the defendant for the remainder due on the decree, on the alleged ground that it had assumed and agreed to pay the mortgage debt. Afterwards

defendant filed a petition under section 602 of the code, to set aside the judgment and allow it to file an answer and defend against the alleged liability. On the hearing the court found for the petitioner, opened up the judgment, fixed the time for pleading and set the cause down for trial. From that order the plaintiff prosecuted error to this court, and the defendant now moves to dismiss for the reason that the order was not a final one and that no appeal or proceeding in error can be predicated thereon. This presents the single question as to whether an order opening up or setting aside a judgment or decree and granting a new trial in the case, under section 602 of the code, is a final order or judgment from which appeal or error will lie.

In the case of *Morse & Co. v. Engle,* 26 Neb. 247, it was held that such an application to open up a decree was not a new action but a proceeding in the original one. A final order or judgment in such a proceeding, to be appealable, must at once put an end to the action by declaring that the plaintiff has or has not entitled himself to recover the remedy for which he sues.

Tried by this test the order in question is not a final one, but merely vacates the decree or deficiency judgment and allows the defendant to file an answer and make its defense. It leaves the original action to recover a deficiency judgment undetermined in the trial court. *Cockle Separator Mfg. Co. v. Clark,* 23 Neb. 702; *Merle & Heaney Mfg. Co. v. Wallace,* 48 Neb. 886.

This question was again before the court in *Browne v. Croft,* 3 Neb. (Unof.) 133. The opinion on rehearing will be found in 3 Neb. (Unof.) 134. Following the cases above cited it was again held that an order vacating a judgment and permitting an answer to be filed, thus leaving the case for trial on its merits in the district court, is not a final judgment in the case from which appeal or error will lie. Before such an order can be reviewed, there must be a final judgment in the case which disposes of it on its merits.

It follows that the motion to dismiss is well taken, and we recommend that it be sustained and the proceeding in error dismissed.

ALBERT and GLANVILLE, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the motion be sustained and the proceeding in error dismissed.

PROCEEDING IN ERROR DISMISSED.

CITY OF OMAHA ET AL. V. STATE OF NEBRASKA, EX REL. ALPHONSE METZGER.

FILED MAY 6, 1903. No. 13,096.

1. **Eminent Domain: DAMAGES.** The provision of section 158, chapter 12*a*, Compiled Statutes, 1901, relative to the assessment of damages against abutting and adjacent lands, for lands appropriated by a city in the exercise of the right of eminent domain, does not contemplate the creation of a fund thereby to pay the owners of lands appropriated, but provides a means whereby the city may reimburse itself, in whole or in part, for payment made to such owners.
2. **Tortious Appropriation: REMEDY OF OWNER.** Where a city tortiously appropriates private land to the public use, the owner of the land thus appropriated is not bound to look to the fund contemplated by said section 158 for the payment of a judgment, rendered in an action brought by him to recover damages for such appropriation of his property.
3. **Construction of Statute.** The "special fund" referred to in section 7 of said chapter has no reference to the assessment levied in pursuance of said section 158, but refers to a levy made for the payment of a specific judgment in pursuance of section 2, article VI, chapter 77, Compiled Statutes.
4. **Levy of Assessment: NO PERSONAL LIABILITY.** The levy of the assessment contemplated by said section 158 imposes no personal liability upon the owner of the land against which it is assessed.

ERROR to the district court for Douglas county: GUY R. C. READ, DISTRICT JUDGE. *Affirmed.*

Carl C. Wright and *W. J. Connell,* for plaintiffs in error.

Joel W. West, contra.

ALBERT, C.

In 1894 Fannie Croft, as trustee, held the legal title to a tract of land within the corporate limits of the city of Omaha. In that year, the city took tortious possession of a strip of such tract, for the purpose of widening one of its streets, without any proceedings to condemn the same as required by law for the exercise of the right of eminent domain.

Afterward, said trustee brought an action, in the district court for Douglas county, against the city to recover damages for the wrongful appropriation of her property, in which she recovered a judgment for $874.66, and costs of suit. The judgment of the district court was affirmed by this court March 21, 1900. *City of Omaha v. Croft,* 60 Neb. 57. Afterward, and before the proceedings had for the levy of the special assessment hereinafter mentioned, the ownership of the judgment, and the title to the tract of land, less the strip appropriated by the city, passed to a third party, who in turn assigned the judgment to the relator in this case.

On the 11th day of April, 1901, the city council, by resolution, directed the city engineer to prepare a plan of assessment to pay the judgment, and submit the same to the city board of equalization. The city engineer prepared and submitted a plan, which contemplated a levy of a special assessment against the tract of land from which the strip was taken, of $874.66, the full amount of the damages recovered in the action hereinbefore mentioned. The plan was adopted by the city council, and, on the 13th day of June, 1901, a special assessment in the sum of $874.66 was accordingly equalized and levied against the tract of land in question. The assessment was never paid.

Afterward, the city paid into court the costs and in-

terest accrued on the judgment, and tendered the assignee of the judgment a warrant drawn against the special fund sought to be created by the levy above mentioned. The assignee of the judgment refused to accept such warrant, and made demand of payment of the remainder due on the judgment. The city refused to comply with such demand, and the assignee of the judgment instituted proceedings in the district court against the city and its proper officers, asking a writ of mandamus requiring the issuance of a warrant drawn against the general fund, or general judgment fund, of the city for the payment of the remainder due on his judgment. The issues were made up, and the cause submitted to the court, where the foregoing facts were conclusively established by the pleadings and the evidence.

The trial court found all the issues in favor of the relator, "except upon the issue raised pertaining to the validity of the special assessment and levy," hereinbefore mentioned, and granted the writ as prayed. The respondents bring the case here on error.

The only question presented in this case is, whether the relator is required to look to the fund sought to be raised by the special assessment, above referred to, for the payment of the remainder due on his judgment. The respondents contend that he is, and, in support of that contention we are cited to the following provisions of chapter 12*a*, Compiled Statutes (Annotated Statutes, 7456-7626):

"Sec. 7. Lands, houses, moneys, debts due the city, and property and assets of every description belonging to any city governed by this act, shall be exempt from taxation, execution and sale; judgments against said city shall be paid out of the judgment fund or when a special fund is created for such purpose, out of such special fund."

"Sec. 158. The council shall have power, and is hereby authorized, to assess the damages awarded or recovered for grading, change of grade, or for the appropriation of private property, upon the lots and lands benefited, which shall abut or be adjacent to the street, avenue or alley graded,

or for the opening, extending or widening of which, private property shall be appropriated, or on which the grade shall be changed, and in case of the appropriation of land for the widening of a street, avenue or alley, the council may consider for the purpose of determining benefits and equalizing such assessment, whether any portion of the street, avenue or alley had been previously donated from any lot or piece of land abutting or adjacent thereto."

It is insisted that the "special fund" referred to in section 7, includes the assessments levied in pursuance of section 158 for damages for the appropriation of private property. We find ourselves unable to accept that construction. Section 158 does not provide for a special assessment to pay the owners of property appropriated the amount awarded or recovered by them therefor, but merely authorizes the city council to assess the amount, so awarded or recovered, against the abutting or adjacent property. In other words, instead of authorizing a special assessment for the payment of damages awarded the owners of the property appropriated, it simply provides a means whereby the city may reimburse itself, in whole or in part, for the amount it may expend in payment of such damages.

That this is the true construction is clear, we think, from other provisions of the city charter. Section 29 prescribes the manner in which the city may exercise the right of eminent domain, and for an award of damages to the owners of the property sought to be appropriated. It also makes the payment of the amount awarded, or a deposit thereof with the city treasurer, a condition precedent to the appropriation of the property. Section 30 provides for an appeal by the owner of the property from the award, and that such appeal shall not delay the taking of the property by the city. If it be true, that the fund created by the levy, authorized by section 158, is a special fund for the payment to the owners of property of the damages awarded or recovered by them therefor, then such assessment and levy, of necessity, must precede an appropria-

tion of the property, because, as we have seen, the payment of the award, or the deposit of the amount thereof with the city treasurer, is a condition precedent to the taking of the property. It is also true, that, if the fund is intended for such purpose, before the assessment is levied, the damages awarded or recovered must be definitely fixed and ascertained, because, until they are, there is no competent basis for the levy for their payment. That the statute does not contemplate that the damages shall be definitely fixed and ascertained before the appropriation of the property, is clear from the fact that section 30 expressly provides that the appeal shall not delay the taking of the property, because, until such appeal is determined, the amount of damages involved are largely a matter of conjecture. We think it inevitably follows, that, as before indicated, the purpose of section 158 is not to provide a fund for the payment of the owner of property appropriated, but that the provisions relating to the subject contemplate the payment of such damages by the city, in the first instance, and that it may reimburse itself for such payments by an assessment levied in pursuance of section 158. That being true, the "special fund" referred to in section 7 has no reference to that for which provision is made by section 158, but refers we think to a levy made for the payment of a specific judgment in pursuance of section 2, article VI, chapter 77, Compiled Statutes (Annotated Statutes, 10699), which requires a municipality to make a levy, in sufficient amount to pay a judgment obtained against it, when the general levy is insufficient.

The respondents insist that the present owner of the land in question who assigned the judgment to the relator is bound, in equity and good conscience, to pay the special assessment, and, inferentially, that the relator stands in no better position than would such assignor had this proceeding been brought on his relation; consequently, that he is in no position to complain because, upon the payment of the special assessment, the fund thereby sought to be created would be sufficient to pay the warrant drawn

against it for the remainder due on the judgment. We can not concur in this view. A special assessment against real estate creates no personal liability. Whether the owner of the property shall pay such assessment, or allow the property to be sold for it, is purely optional. *Grant v. Bartholomew,* 57 Neb. 673. Had the city proceeded lawfully to condemn the land, the owner would have been entitled to compensation from the city, regardless of any unpaid assessments levied against her real estate. Neither she nor her assigns can be held to occupy a worse position because the land was taken tortiously.

The judgment of the district court was right, and we recommend that it be affirmed.

BARNES and GLANVILLE, CC., concur.

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

AFFIRMED.

MELVIN L. RAWLINGS V. ANHEUSER-BUSCH BREWING ASSOCIATION.

FILED MAY 6, 1903. No. 12,655.

1. **Interest on Judgment.** Where a plaintiff has obtained a verdict on which judgment has been entered, and on appeal the supreme court holds that the verdict is excessive and orders a new trial unless plaintiff remit the amount deemed excessive, and plaintiff does enter a remittitur for such excess, he is entitled to interest on the amount of the judgment allowed to stand from the date of the original entry.

2. ———. Where payment is made upon a judgment in excess of the amount of the interest then due thereon, the entire unpaid remainder due on the judgment, including interest, bears interest as provided by law from the date of such payment.

ERROR to the district court for Gage county: CHARLES B. LETTON, DISTRICT JUDGE. *Affirmed.*

L. M. Pemberton, for plaintiff in error.

Alfred Hazlett and *Fulton Jack, contra.*

GLANVILLE, C.

The plaintiff in error has brought this action to this court to have reviewed the ruling of the district court upon his motion to suspend an execution issued out of that court and quash and set aside said execution, claiming that the judgment upon which the execution was issued had been paid in full prior to the issuing of the execution. There is no dispute whatever as to the facts in the case.

It appears that this cause was before this court on a petition in error filed by the same plaintiff in error, wherein the action of the district court upon the trial of the original action was complained of, and it was ordered by this court that in case the defendant in error within forty days remit all damages adjudged to it in excess of the amount prayed in its petition, the judgment be affirmed, otherwise the judgment to be reversed and the cause remanded. It seems that plaintiff below omitted to pray in its petition for certain interest that was included in the verdict and judgment, and that the excess of damages referred to in the order of this court was such interest. The defendant in error entered the proper remittitur in this court and a mandate was issued to the district court wherein the following order was made:

"Now, therefore, you are commanded without delay to cause execution to issue, carrying into effect your said judgment as modified by said remission in the manner provided by law."

The execution in question is dated February 19, 1902, and was issued for the collection of $286.44, together with interest thereon at the rate of 7 per cent. per annum from the 12th day of September, 1901, until paid, also $23.70 costs of suit, with the accruing costs. By the recitals contained in the execution it is shown that Rawlings paid on

the judgment and costs $1,203.40, on the 12th day of September, 1901. This sum, it appears, is the amount of the original judgment, less the sum remitted, with interest only from the date of the mandate, and the sum for which execution is issued is the interest on the amount of the original judgment, less the sum remitted, from the date of the judgment to the date of the mandate; and the only questions to be determined are: (1) Should the remainder of the judgment, after deducting the amount remitted, bear interest from the date of its original entry? (2) If it should, then it was right to require the collection of interest upon the unpaid remainder of the judgment from the date of the payment made thereon?

By the rule announced in this court in *Davis v. Neligh,* 7 Neb. 78, holding that "interest on a judgment or debt due, is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterwards, if there be a surplus, it is applied upon the principal and so *toties quoties,* taking care that the principal thus reduced shall not at any time be suffered to accumulate by the accruing interest," the second question above is answered in the affirmative. If the amount for which execution was issued is the remainder due upon the judgment after crediting the payment made, it bears interest from the date of such payment.

We think the first question must also be answered in the affirmative, upon reason and justice as well as authority. By section 3 of the chapter on interest in the statutes of this state, it is provided:

"Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof, at the rate of $7 upon each $100, until the same shall be paid."

The judgment in question was rendered on the 2d day of April, 1898. It has never been reversed, though by the order of this court it was modified by the remittitur which effected the deduction of a certain amount therefrom. The remittitur relates back to the date of the judgment, and

the amount thereof was correctly deducted from the original amount and interest computed from that date upon the unremitted remainder only. The mandate properly directed the carrying into effect of the judgment as modified by the remission, and no principle, or rule of justice or law, has been suggested by the plaintiff in error which would justify the holding that defendant in error is not entitled to interest as provided by law upon the judgment, modified only by the deduction of the amount remitted. In *McLimans v. City of Lancaster*, 65 Wis. 240, the supreme court of Wisconsin held:

"Where a plaintiff has obtained a verdict on which judgment has been entered, and on appeal the supreme court holds that the verdict is excessive, and orders a new trial unless plaintiff remit the amount deemed excessive, and plaintiff does enter a remittitur for such excess, he is entitled to interest on the amount of the judgment allowed to stand from the date of original entry."

The case before us, considering the language used in the ruling of this court, and the order contained in the mandate therefrom, is much stronger in favor of the allowance of such interest and gives less plausibility to the contention that it should not be allowed, than does the language in the ruling and order involved in the Wisconsin case. In that case it is said:

"There may be some reason for the construction given to this direction by the learned counsel for the appellant, but we think in consideration of the fact that this court held that if the verdict had originally been for the sum of $5,000 this court would have approved the same, and affirmed the judgment rendered thereon, which would have included or given the respondent the benefit of the interest on that sum from the date of such verdict, she ought not now to be debarred from having such interest allowed to her, unless the language of the court clearly excludes her from having the same. The language of the order is that the judgment shall be entered in her favor on the verdict and such remission for the sum of $5,000 and costs. The

verdict here referred to must be the verdict rendered March 12, 1884, and the remission is from the verdict of that date. The direction to enter judgment upon that verdict for the sum of $5,000 and costs should therefore be construed to mean to enter judgment upon the verdict for $5,000 rendered on the twelfth of March, 1884."

We think the Wisconsin case is correctly reasoned and decided, and that the order of the district court in the case before us, overruling the motion to suspend and quash or set aside the execution against plaintiff in error, is right and should be sustained.

We therefore recommend that the order of the district court overruling the motion of plaintiff in error be approved, and the decision of that court affirmed.

BARNES and ALBERT, CC., concur.

By the Court: For the reasons set forth in the foregoing opinion, the order of the district court overruling the motion of the plaintiff in error, is approved, and the decision of that court is

AFFIRMED.

CURTIS W. RIBBLE, ADMINISTRATOR OF THE ESTATE OF JAMES M. BULLION, DECEASED, V. NETTIE FURMIN.

FILED MAY 6, 1903. No. 13,175.

Appeal and Error: FINAL ORDER. A judgment of the district court on appeal from an inferior tribunal, which is a complete adjudication so far as the district court is concerned, so as to leave nothing further to be done in that court, is a final order within the purview of section 582 of the code, although the cause is remanded for further proceedings below.

ERROR to the district court for Saline county: GEORGE W. STUBBS, DISTRICT JUDGE. Motion to dismiss proceeding in error. *Motion denied.*

Leonard W. Colby and *A. S. Sands,* for plaintiff in error.

George H. Hastings and *Robert Ryan, contra.*

POUND, C.

Nettie Furmin applied to the county court of Saline county for leave to file a claim against the estate of James M. Bullion, deceased, after an order barring claims. The application appears to have been made under sections 218, 219, chapter 23, Compiled Statutes (Annotated Statutes, 5083, 5084), and to have been filed in due time. It was denied, and the petitioner appealed to the district court. Issues were joined in that court by pleadings, and the administrator requested a trial by jury. But the court, evidently believing that a question of law, whether the claimant should be permitted to file her claim, was all that was before him, denied this request and confined the hearing in substance to this one point. In consequence, the judgment of the district court does not dispose of the merits, but goes only to the right to have a hearing on the claim. It is in these words:

"It is therefore considered and ordered by the court that the order of the county court be reversed, and the county court ordered to permit the filing of the claim and to set a day for hearing, and to proceed to hear and pass upon the claim."

Error is prosecuted from this judgment. The defendant in error contends that it is not a judgment or final order within the meaning of section 582 of the code, and moves to dismiss on that ground.

Appeals to the district court in matters of probate and administration are governed by sections 42-48, chapter 20, Compiled Statutes (Annotated Statutes, 4823-4829). *Malick v. McDermot,* 25 Neb. 267. Section 47 provides that when the transcript on appeal is filed in the district court "that court shall be possessed of the action, and shall proceed to hear, try and determine the same, in like manner as upon appeals, brought upon the judgments of the same court in civil actions." Appeals from judgments in ordinary civil actions in the county court are covered by section 26, chapter 20, Compiled Statutes (Annotated

Statutes, 4809), which prescribes the same procedure as upon appeals from justices of the peace. We are thus referred to section 1010 of the code, which governs such cases, and provides that upon appeal the cause shall proceed, "in all respects, in the same manner as though the action had been originally instituted in the said court." It will be seen therefore that the district court clearly had the power to render a final judgment upon the merits of the claim. The order denying leave to file the claim was a final order since it in effect prevented a judgment and determined the proceeding within the purview of section 581 of the code. When this order was appealed from and the transcript filed, the district court acquired jurisdiction of the whole matter and power to deal with it as though the application had been filed in that court originally. *Jacobs v. Morrow,* 21 Neb. 233. Even if the cause had been taken to the district court upon error, the same course would have been proper. *Maryott & McHurron v. Gardner,* 50 Neb. 320. The legislature evidently intended that causes should be settled finally in the district court when taken there by appeal or error and that parties should not be compelled to go back and forth from the lower to the higher tribunal in matters involving small sums as is so often the case in the more important causes brought in the district court and reviewed in the supreme court. Hence, it is doubtful whether any warrant is to be found for the course taken in the case at bar so far as the judgment remands the cause for further proceedings in the county court. But, as the district court has refused to pass upon the merits and make a final disposition of the claim, and the judgment actually rendered, not a judgment of the sort which might and, we think, ought to have been rendered, is before us, the question arises whether such judgment is within the purview of section 582 of the code, so as to be reviewable on petition in error.

Said section 582 provides that "a judgment rendered or final order made by the district court, may be reversed, vacated or modified by the supreme court, for errors ap-

pearing on the record." Construing this section and the one preceding, this court has established the general rule that a judgment or order, to be final and subject to review by petition in error or appeal, must dispose of the case fully and leave nothing for further determination. *Smith v. Sahler,* 1 Neb. 310; *Hall v. Vanier,* 7 Neb. 397; *Grimes v. Chamberlain,* 27 Neb. 605; *Edgar v. Keller,* 43 Neb. 263; *Parmele v. Schroeder,* 59 Neb. 553. In *Smith v. Sahler* it was said that the judgment must "dispose of the merits of the case, and leave nothing for the further determination of the court." In *Hall v. Vanier* the court said the judgment must be one "that disposes of the merits of the case" and that "no judgment or order which does not determine the rights of the parties in the cause, and preclude further inquiry into their rights in the premises, is final." Finally, in *Parmele v. Schroeder,* the court said: "A decree is not final, if anything remains to be done by the court before it can be executed."

We are of opinion that the statement in *Hall v. Vanier,* standing apart from the facts of that case, and as applicable to all cases, is too broad, and that the test proposed in *Parmele v. Schroeder* is much to be preferred. A judgment may completely dispose of the cause, as far as the court in which it is rendered is concerned, and yet may not completely determine the rights of the parties and preclude all further inquiry with respect thereto. In view of subsequent decisions to be noticed presently, we are satisfied that the statement of the rule in *Hall v. Vanier* should be modified and that a better statement would be: No judgment or order, which does not preclude further inquiry into the rights of the parties in the court in which it is rendered, is final. Even so stated, however, it requires some explanation with respect to proceedings in error from inferior tribunals and proceedings in the district court for vacation or modification of its own judgments.

A petition in error in the district court to review a judgment or order of an inferior tribunal is an independent proceeding, having for its immediate object a reversal

of the judgment or order complained of. Hence, a judgment of reversal in such a case may be reviewed in this court, notwithstanding the cause stands for trial on its merits in the district court, under section 601 of the code, after such judgment. *Dane County Bank v. Garrett,* 48 Neb. 916; *Tootle, Hosea & Co. v. Jones,* 19 Neb. 588; *Banks v. Uhl,* 5 Neb. 240. As the immediate object of the proceeding is to reverse the judgment or order of the inferior tribunal, the proceeding is regarded as fully terminated when that judgment is reversed, and the original cause remains for trial in the district court after reversal, not the independent error proceeding. Such, we take it, is the meaning of what was said in *Banks v. Uhl.* For the same reasons, an order setting aside a judgment after the term at which it was rendered, under section 318 of the code, is a final order and may be reviewed on error. *Johnson v. Parrotte,* 34 Neb. 26. Such orders can be made only in special proceedings, instituted for that purpose by petition and summons, and the order vacating the judgment fully terminates such proceedings and leaves nothing more to be done therein. The original cause still remains for hearing and disposition. But it is a distinct case, having no relation to the proceeding to vacate the judgment, which has wholly terminated and for that reason its pendency can not preclude review of the order. On the other hand orders made in the cause itself, without any new, special and distinct proceedings, are not final and in consequence are not reviewable so long as the cause remains undisposed of. *Edgar v. Keller,* 43 Neb. 263; *Grimes v. Chamberlain,* 27 Neb. 605; *Artman v. West Point Mfg. Co.,* 16 Neb. 572. In the one class of cases, nothing further remains for the court to do in the proceeding in hand. In the other, notwithstanding the order, before such order can have any substantial effect on the rights of the parties, there must be further action in the same court and in the same proceeding. Such, we think, is the distinction which the court had in mind in *Parmele v. Schroeder.*

For the reasons stated, we are of opinion that a judg-

ment of the district court on appeal from an inferior tribunal, which is a complete adjudication so far as the district court is concerned, so as to leave nothing further to be done in that court, is a final order within the purview of section 582 of the code. Counsel make an ingenious distinction between a judgment of reversal in error proceedings and the anomalous reversal and remand upon appeal in the case at bar. As they point out, the error proceeding is distinct and independent, while the appeal is a mere continuation of the same cause in another court. When judgment of reversal is entered in the error proceeding, that proceeding is at an end. When rendered on appeal, the same cause is still pending and undisposed of. But when, on appeal, the judgment of reversal also remands the cause for further proceedings in the inferior tribunal, it is manifest that the cause is fully disposed of so far as the district court is concerned. It has nothing more to do. Its judgment may be executed fully without any further action. All further inquiry into the rights of the parties in that court is precluded. The judgment of the district court is final because it terminates the proceedings in that court and leaves nothing pending therein.

We therefore recommend that the motion be denied.

DUFFIE and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the motion to dismiss be denied.

MOTION DENIED.

LORENZO BURROWS, ADMINISTRATOR OF THE ESTATE OF WILLIAM R. BURROWS, DECEASED, v. A. H. VANDERBERGH ET AL.

FILED MAY 20, 1903. No. 12,738.

1. **Constitutional Law**: CONSTRUCTION OF STATUTE. The validity of the so-called deficiency judgment law of 1897 can be upheld only by construing it, in connection with section 2, chapter 88 of the

Compiled Statutes, in such manner as to bring it into harmony with the supreme law of the land as interpreted by the supreme court of the United States. So construed, it does not impair or affect any remedy upon any contract entered into before its enactment.

2. **Deficiency Judgment.** The act of 1897, above mentioned, does not take away or impair the right of the holder of a mortgage executed before its enactment, to apply for and obtain, in an action for the foreclosure of the instrument, a personal judgment for a residue of the mortgage debt remaining after the application of the proceeds of the foreclosure sale.

3. **Impairing the Obligation of a Contract.** An act of a state legislature which is designed, and if enforced would be effectual, to deprive the obligees of existing contracts of an important and efficient remedy for the enforcement of the same, is an act impairing the obligations of such contracts and is in contravention of section 10, article 1 of the constitution of the United States.

ERROR to the district court for Webster county: ED L. ADAMS, DISTRICT JUDGE. *Reversed.*

E. A. Overman and *L. H. Blackledge,* for plaintiff in error.

Bernard McNeny, contra.

SULLIVAN, C. J.

This action was brought by Lorenzo Burrows as administrator of the estate of William R. Burrows, deceased, to foreclose a mortgage given by A. H. and Anna Vanderbergh upon real estate in Webster county. The mortgage was given in 1892 to secure a note which by its terms became due and payable in August, 1897. The defendants were personally served with summons, but made no defense and judgment went against them by default. The mortgaged property was afterwards sold under the decree, but, the amount realized from the sale being insufficient to pay the debt and costs of foreclosure, the plaintiff applied to the court by motion for a deficiency judgment. The application was refused and the order refusing it is by this proceeding brought here for review.

The precise question raised by the record and discussed

in the briefs is whether chapter 95 of the laws of 1897 is effective in a case of this kind, that is, where the action is founded upon a mortgage which was in existence with conditions unbroken at the time the statute was adopted.

Without accepting the theory advanced by counsel for plaintiff that this law is unconstitutional, we have reached the conclusion that the motion for a personal judgment against the defendants should have been sustained. When the mortgage in suit was given the statutory law on the subject of the foreclosure of mortgages among other things provided:

(Code, section 847.) "When a petition shall be filed for the satisfaction of a mortgage, the court shall not only have the power to decree and compel the delivery of the possession of the premises to the purchaser thereof, but on the coming in of the report of sale, the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law; and for that purpose may issue the necessary execution, as in other cases, against other property of the mortgagor.

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

"Sec. 849. If the mortgage debt be secured by the obligation or other evidence of debt of any other person besides the mortgagor, the complainant may make such person a party to the petition, and the court may decree payment of the balance of such debt remaining unsatisfied after a sale of the mortgaged premises, as well against such other person as the mortgagor, and may enforce such decree as in other cases."

By the act of 1897 the right of a mortgagee to recover a deficiency judgment, whether given by these sections or

existing independently of them, would, in the absence of a saving statute, be wholly abrogated. Sections 847 and 849 were repealed and section 848 was amended by striking out the words "unless authorized by the court." This legislation, it must be conceded, does not take away or impair the right of a mortgagee to a deficiency judgment in any case where his mortgage was, or might have been, in process of foreclosure at the time of its enactment. *Thompson v. West,* 59 Neb. 677; *Patrick v. Nat. Bank of Commerce,* 63 Neb. 200; *Merrill v. Miller,* 2 Neb. (Unof.) 630; *Brayton v. Oaks,* 2 Neb. (Unof.) 593.

When the act of 1897 was adopted there was in force, as there still is, an act concerning the enacting and repealing of statutes (Compiled Statutes, chapter 88; Annotated Statutes, 6966), the second section of which declares:

"Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of actions not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

It is to be presumed that the legislature had this statute in mind when it adopted the act of 1897, and it is to be presumed also that the enactment of a constitutional law was intended. Although a mortgagee may still sue at law in the first instance, it can not, we think, be said that such an action will in every case furnish so efficient and satisfactory a remedy as to prevent the deprivation of the right to a deficiency judgment as it formerly existed from being an impairment of contract obligations within the meaning of the federal constitution. *Barnitz v. Beverly,* 163 U. S. 118, and cases there cited.

In this case we must either hold that the legislature exceeded its authority in adopting the act of 1897 or else that the right to a deficiency judgment in an action based upon a mortgage which was executed before, but matured after, that act took effect is saved and preserved by section 2 of chapter 88, aforesaid. The latter view seems to us the more just and reasonable. No doubt a precise and

accurate conception of a cause of action is a right to sue resulting from the violation of an obligation or duty, but certainly this is not the only sense in which the term is used. It has been held with respect to contracts that the contract itself and not merely the breach of the obligation which it creates is the cause of action. *Wurtele v. Lenghan,* 1 Quebec, 61; *Alderton v. Archer,* 14 Q. B. Div. 1; *Jackson v. Coxworthy,* 12 L. C. R. 416. In *Emerson v. Steamboat, Shawano City,* 10 Wis. 377, 379, Dixon, C. J., speaking for the court said:

"Although a cause of action may not, in general, be said to have *accrued* until the time of credit, if any, has expired, yet in giving a construction to the particular words of a statute, we are to look to the whole act, and from it determine the sense in which they are used, so as to give effect to the legislative intent. The verb 'to accrue' is often and properly used to convey the same idea as the verb 'to arise.' Such is evidently the sense in which it is here used. A cause of action may be said to arise, when the contract out of which it grows is entered into or made."

The supreme court of California, discussing a question of procedure in a case founded on contract, said:

"The action, therefore, springs from the obligation, and hence the 'cause of action' is simply the obligation." *Frost v. Witter,* 132 Cal. 421, 426.

There is, so far as we can discover, no reason at all why the legislature, in enacting the general saving statute, should make a distinction between contracts upon which an action may be maintained at once and those not yet due. Each class of contracts seems entitled to exactly the same consideration and in our opinion both are within the meaning of the clause, "Causes of action not in suit." The qualifying clause, "that acrued prior to any such repeal," has reference, not to the time when the right to institute an action accrued, but to the time when the obligation out of which the action arose came into existence. This construction of the general saving law is consonant with reason and brings the act of 1897 into entire harmony with

the provision of the federal constitution inhibiting the enactment of any law impairing the obligation of contracts.

It results from what has been said that the decision of the district court denying the plaintiff's motion for a deficiency judgment should be reversed and the cause remanded for further proceedings.

REVERSED.

UNION PACIFIC RAILROAD COMPANY, APPELLANT, V. F. K. SPRAGUE, TREASURER OF MERRICK COUNTY, NEBRASKA, ET AL., APPELLEES.

FILED MAY 20, 1903. No. 13,131.

1. **Constitutional Law:** TITLE OF ACT. An immaterial change in the title of a legislative bill, whenever made, is without legal effect.
2. ———: ———. The constitution regards substance rather than form; it requires that the subject of legislation shall be clearly expressed in the title of a bill, but beyond this it does not go; the form of expression is at all times a matter of legislative choice.
3. ———: ———. The title of a bill for an amendatory act is not materially changed by omitting a clause providing for a repeal, in general terms, of all repugnant or inconsistent statutes and substituting therefor a clause providing specifically for the repeal of the amended law.
4. ———: ———. An intention to repeal all laws inconsistent with a proposed measure of legislation is necessarily implied and need not be expressed in the title of a legislative bill.
5. ———: ———. Any provision in a legislative bill which is not clearly expressed in the title can not be enacted into law.
6. ———: ———. The title of chapter 70, laws 1897, was too restrictive to cover a provision enlarging the authority of school boards with respect to the levy of taxes for general revenue.
7. **Statute in Conflict with Constitution.** A statute in conflict with the constitution yields only to the extent of the repugnancy.
8. **Valid and Invalid Portions of Statute.** If the valid and invalid parts of a statute are severable and it is apparent that the latter was not an inducement to the adoption of the former, the law will be upheld and enforced to the extent that it is in harmony with the constitution.

9. **Act Valid in Part.** Chapter 70, laws 1897, is valid to the extent that the subject of legislation is expressed in the title.

10. **Act Valid.** Chapter 69, laws 1901, was constitutionally adopted and is valid.

APPEAL from the district court for Merrick county: CONRAD HOLLENBECK, DISTRICT JUDGE. *Reversed.*

John N. Baldwin and *Edson Rich,* for appellant.

John C. Martin, contra.

SULLIVAN, C. J.

This action was brought by the Union Pacific Railroad Company against the treasurer of Merrick county and the school district of Central City to enjoin the collection of school taxes and for other purposes. The trial court found the issues in favor of the defendants and rendered judgment dismissing the petition. The plaintiff appeals.

The principal question discussed by counsel is: Whether chapter 70, laws of 1897, was adopted in accordance with constitutional procedure and became a valid law. The contention on behalf of the company is that the legislative journals impeach the enrolled bill by showing that it passed the house and senate under a title different from the one which it bore when it was presented to the governor for approval. Without conceding this point, we dispose of it on the assumption that there is in the journals conclusive evidence that the title was altered as alleged. The title of the act as shown by the enrolled bill is: "An act to amend section twenty-four (24), chapter seventy-nine (79), subdivision fourteen (14) of the Compiled Statutes of 1895, to provide for the exclusion of school bond taxes in the computation of the aggregate school taxes under the provisions of this act, and to repeal section twenty-four (24), chapter seventy-nine (79), subdivision fourteen (14) of the Compiled Statutes of 1895." According to plaintiff's theory, which is provisionally ac-

cepted, the title of the bill when introduced in the senate, and at the time it passed both branches of the legislature, and at all times prior to its enrollment was: "A Bill for an act to amend section twenty-four, chapter seventy-nine, subdivision fourteen, of the Compiled Statutes of 1895, to provide for the exclusion of school bond taxes in the computation of the aggregate school taxes under the provisions of this act, and to repeal all acts and parts of acts inconsistent herewith."

The first section of the act of 1897 declares:

"That the aggregate school tax, exclusive of school bond taxes, shall in no one year exceed twenty-five mills."

The provision in the original section limiting the taxing power of school boards was:

"That the aggregate school tax shall in no one year exceed two per cent."

Clearly the only purpose of the legislature was to enlarge the taxing power of school boards, and this purpose was as distinctly evidenced by one title as the other. Each was well calculated to apprise the members of the legislature and the public generally that section twenty-four was to be amended in a certain way and that the original section was to be repealed. Whether this thought was conveyed by one form of expression or another is, of course, immaterial. The constitution regards substance rather than form; it requires that the subject of legislation shall be clearly expressed in the title of every bill, but beyond this it does not go; the form of the expression is at all times a matter of legislative choice. We believe it has never been held that the subject of legislation must be expressed in the title of a bill in exactly the same language when the bill receives final legislative assent and executive approval. It may be further remarked that the expression in the title of an intention on the part of the legislature to repeal the amended section, or all acts and parts of acts inconsistent with the new law, was altogether unnecessary. That part of the title served no useful purpose; it had no function to perform; it was a mere redundancy and might

have been stricken out of both titles without changing their meaning or legal effect. An amendatory act can not become effective without expressly repealing the amended statute and repealing by implication all repugnant or inconsistent laws, hence an intention to repeal is always necessarily implied and need not be expressed in order to apprise the members of the legislature and the public that the new law, if adopted, will take the place of the old one.

Another ground upon which it is claimed the act of 1897 was unconstitutional is that the provision authorizing a levy of twenty-five mills was not embraced within its title. The title is restrictive and was evidently not designed to cover legislation increasing the power of school boards to levy taxes for general purposes. The title was made to fit the original bill, which did not contemplate any change in the law with respect to taxes other than school bond taxes. The provision increasing the authorized annual levy from twenty mills to twenty-five mills was a senate amendment, and we are entirely satisfied that the matter which it contained was not clearly or even obscurely expressed in either the original or substituted title. The amendment of section 24, so as to provide for the exclusion of school bond taxes from the authorized levy for general purposes, was the only contemplated change in the law which the title of the bill would indicate or suggest. This being so the conclusion is inevitable that the act as a whole was not constitutionally adopted. The senate amendment must be rejected, but the remainder of the law is valid and will be sustained. A statute in conflict with a higher law yields only to the extent of the repugnancy. If it is apparent that the valid part, considered by itself and standing upon its own merits, would have been adopted by the legislature the courts will uphold and enforce it. *State v. Stuht,* 52 Neb. 209; *Scott v. Flowers,* 61 Neb. 620. The will of the legislature when unrestricted by constitutional limitations and expressed in the manner prescribed by the constitution is the law of the state. The act of 1897 was in the nature of a grant of power. The intention to

grant authority to make a twenty-five mill levy for general revenue is clear. And it is, we think, equally certain that the legislature would have given its assent to the bill if it had been known that the five mill increase provided for by the senate amendment was invalid. The grant of the greater power affords in this case almost conclusive evidence of an intention to grant the less, and satisfies us that the matter contained in the senate amendment was not an inducement to the adoption of the act. We therefore hold that the act of 1897 to the extent that the subject of legislation was expressed in its title was, until repealed, a valid and effective law. *City of Tecumseh v. Phillips,* 5 Neb. 305; *White v. City of Lincoln,* 5 Neb. 505; *Messenger v. State,* 25 Neb. 674; *State v. Moore,* 37 Neb. 13; *Scott v. Flowers, supra; Carothers v. Philadelphia Co.,* 118 Pa. St. 468; *Ex parte Moore,* 62 Ala. 471; *State v. Bankers' and Merchants' Mutual Benefit Ass'n,* 23 Kan. 499; *In re Sackett, Douglass and De Graw Streets, Brooklyn,* 74 N. Y. 95.

Chapter 69, laws of 1901, which amends and repeals the act of 1897, is also involved in this litigation and is assailed as unconstitutional, but the conclusion we have reached with respect to the earlier act removes all doubt as to the validity of the later one. But we may add that if the act of 1897 were held to be unconstitutional we would find no difficulty at all in sustaining the act of 1901. The judgment of the district court is reversed and the cause remanded with direction to render a decree in accordance with the views expressed in this opinion.

REVERSED.

EMMA F. WALKER ET AL., APPELLEES, V. MARY FITZGERALD ET AL., APPELLANTS.

FILED MAY 20, 1903. No. 12,750.

1. **Motion for New Trial: SUPERSEDEAS.** The pendency of a motion for a new trial, in an action where a decree has been rendered directing the sale of real estate in foreclosure proceedings, will

not of itself operate as a supersedeas or stay the issuance of an order of sale in pursuance of the terms of the decree.

2. **Supersedeas.** In an error proceeding from a decree of the district court foreclosing a real estate mortgage, an undertaking which does not provide for the payment of "the value of the use and occupation of the property" is not effective as a supersedeas. *Collins v. Brown*, 64 Neb. 173.

3. **Objections Not Considered.** An objection to an order of confirmation not presented to the trial court entering the order can not be considered by this court on appeal.

4. **Receiver.** DECREE FOR TAXES. The statute does not authorize the appointment of a receiver at the instance of a holder of a certificate of tax sale of real estate sold for delinquent taxes, who has obtained a decree directing the sale of the property to satisfy his lien on the ground that the property is insufficient in value to satisfy the lien for delinquent taxes on which such decree is based.

APPEAL from the district court for Cass county: PAUL JESSEN, DISTRICT JUDGE. *Affirmed in part.*

James Manahan and *D. O. Dwyer*, for appellants.

Jesse L. Root, *J. H. Haldeman* and *Allen J. Beeson*, *contra.*

HOLCOMB, J.

This cause, an action equitable in its nature, is here by appeal and is presented in a dual aspect. The appeal is taken from an order of confirmation of sale of real estate made under a decree in foreclosure proceedings, and also from an order entered by the trial court appointing a receiver of the real estate in controversy pending the further litigation.

The order of confirmation was resisted on several grounds set forth in objections by appellants, but two of which are relied on and argued in brief of counsel. These will be considered by us in the disposition of the cause.

It is first argued that, because a motion for a new trial was pending and undisposed of when the order of sale was issued and the property sold thereunder, the sale as made

was thereby invalidated and confirmation should not have been ordered. A motion for a new trial will not in itself operate as a supersedeas or stay the issuance of an order of sale in pursuance of the decree rendered in the action and this objection is, therefore, wholly untenable.

It is next contended that, because a bond was filed for the purpose of securing a review by proceeding in error at the time the sale was made, the order of confirmation ought not to have been entered. The bond set out in the record is clearly defective and insufficient for the purpose of staying proceedings, and for that reason the proceedings had in the execution of the decree, notwithstanding the purported supersedeas bond, were regular and the execution of the defective undertaking afforded no sufficient reason for withholding an order of confirmation of the sale made in pursuance of the decree. The question here presented is identical with the one decided by the court in the case of *Collins v. Brown*, 64 Neb. 173, and on the authority of that case, the action of the trial court must be held to be regular and proper. Something is said in brief of counsel regarding one of the appellants being an administratrix and, for that reason, no bond being required to stay proceedings in order to secure a review either by appeal or proceeding in error. In the first place, the record fails to show any appeal by the administratrix in her representative capacity. Secondly, it does not appear that she offered any objections in the trial court to the order of confirmation, nor that there was in that court any objection made to confirmation on the ground that one of the appellants as administratrix was prosecuting either error or appeal proceedings from the decree of foreclosure and order of sale. We can here consider only those objections which were presented to the trial court and the objection here urged not being one of them, it is not properly before us for consideration as an objection made in the trial court to the order of confirmation.

In the action begun in the trial court, at the instance of cross-petitioners who were the holders of tax-sale certifi-

cates issued by the proper county authorities for the sale of the land involved in the controversy for delinquent taxes, and who had obtained a decree in the action establishing their claims as a lien on the land and ordering the sale of it for the satisfaction thereof, a receiver was appointed for the real estate against which the decree operated. This was on the ground that the land was not of sufficient value to satisfy such lien. The trial court was not, in our opinion, warranted in appointing a receiver at the instance of those holding a tax lien on the property, and this solely on the ground that a receiver under such circumstances is unauthorized by the statute providing for the appointment of receivers in certain cases. Section 266 of the code. The provisions of the statute, section 179, article 1, chapter 77 of the revenue act, authorizing the holder of a tax-sale certificate to proceed to foreclose his lien in all respects as far as practicable in the same manner and with like effect as though the same were a mortgage executed to the owner of such certificate or certificates for the amount named therein, applies to the procedure relative to the foreclosure of real estate mortgages and does not extend to the statutory provisions concerning the appointment of receivers. The holder of a tax-sale certificate or one in whose favor a decree has been rendered on such certificate is not a creditor within the meaning of section 266, regulating the appointment of receivers. Neither the holder of such a claim nor the public from whom he acquired it, has any claim of a personal nature against the owner of the land assessed. The lien extends to the real property only, and it alone can be looked to for the satisfaction of the demand. If a receiver may be appointed and the rents and profits sequestered and applied to the payment of the sum due for taxes assessed against the property, then to that extent, at least, would the owner of the property be held as personally liable for the indebtedness. On principle, and in harmony with the legislative policy prevailing in this state with respect to the levying and collection of revenues on real property assessed for

that purpose, we are satisfied that the appointment of a receiver to take charge and collect the rents and profits of the property sold because of delinquent taxes, pending a final decree in foreclosure proceedings, on the ground of its alleged insufficiency to satisfy the tax lien, is unauthorized and does not come within the purview of our statute relating to the appointment of receivers. From what has been said, our conclusions are that the order of confirmation appealed from should be affirmed; and the order appointing a receiver should be vacated and set aside and the petition for the appointment of a receiver dismissed; and judgment will be entered in this court accordingly.

JUDGMENT ACCORDINGLY.

FRANK DONNER V. STATE OF NEBRASKA.

FILED MAY 20, 1903. No. 12,990.

1. **Evidence**: HEARSAY. Ordinarily hearsay testimony is inadmissible.
2. ———: SECONDARY. What the law requires is the production of original evidence, the best evidence obtainable; secondary evidence being admissible only when for some reason primary evidence can not be secured.
3. ———: ———. A witness is not permitted to state what appears from books or records where it is shown that the books were not kept by the witness nor the entries made by him nor in his presence, such statements being merely hearsay testimony.
4. **Error**: HEARSAY TESTIMONY. Testimony of a witness for the prosecution in the case at bar, admitted over the objections of the defendant, which is set out in the opinion, examined and *held* to be hearsay testimony and its admission prejudicially erroneous.

ERROR to the district court for Antelope county: JAMES F. BOYD, DISTRICT JUDGE. *Reversed.*

Norman D. Jackson, H. C. Brome, O. A. Williams and *A. H. Burnett,* for plaintiff in error.

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

HOLCOMB, J.

The defendant in the trial court who comes here by proceeding in error was informed against and, by a jury, found guilty of the larceny of two head of cattle of the value of $45. After overruling a motion for a new trial, the trial court pronounced sentence of imprisonment in the penitentiary for a period of four years; to secure a reversal of which is the object of the present proceedings.

The errors assigned which are relied on and argued by counsel for the accused relate to the rulings of the trial court in the admission of certain testimony over objections of the defendant, which it is contended was hearsay testimony and, therefore, incompetent. The cattle alleged to have been stolen by the accused were found to be missing from a pasture containing a large number kept there during the grazing season. The prosecution by the state was conducted on the theory that the accused took those mentioned in the information with others from the pasture and with his own cattle drove them to Oakdale, a railway station near by, where he shipped the bunch, being a car-load, to the South Omaha market and there disposed of them through a firm of commission merchants operating at that place. The evidence is conclusive to the effect that the defendant, at about the time of the alleged larceny, shipped in the name of the Antelope County Bank, doing business at Oakdale, a car-load of cattle to Shelley, Rogers & Co. at South Omaha. Whether the stolen cattle were, in fact, included in the shipment thus made by the accused, depended upon the evidence of witnesses who were qualified to testify to the receipt of the cattle at the stock yards and to identify the car-load coming from Oakdale as the consignment made by the bank at the instance of the accused to Shelley, Rogers & Co. There appears to have been no evidence obtainable by which the stolen cattle could be identified as being in the possession of the accused at the time or prior to the shipment of the car-load from Oakdale. On this point, it is the contention of counsel for the accused

that the only evidence, tending to prove that the cattle alleged to have been stolen were a part of the car-load consigned by the bank at Oakdale to the commission merchants at South Omaha, was hearsay and, for that reason, incompetent, and because thereof the verdict of guilty can not be sustained. The testimony of this character admitted over objection by the defendant, which is especially urged as being erroneous, is found in the testimony of a certain witness named Jones who was assistant weighmaster of the stock yards of South Omaha. After testifying that he was receiving and weighing stock on the 17th of July, at South Omaha, this being the day after the accused shipped the car of cattle from Oakdale, the witness was asked:

"You may state if on that date you received and weighed a consignment of stock from the Antelope County Bank to Shelley, Rogers & Co."

Before the answer of the question was allowed, the witness was cross-examined as to his competency to testify as to the facts inquired about, in which it was disclosed that his only knowledge, regarding the cattle he was testifying about being shipped by the Antelope County Bank or having come in a car from that place, was from information received from other employees of the stock yards; that the first knowledge he had of the cattle was when he found them in a particular inclosure after being unloaded and, from the records kept by the stock yards company and by other employees, he learned where they came from, who the consignor of the load was, and to whom they were consigned. Objection was made to the witness's answering the question put by the state because it appeared that his testimony was hearsay and incompetent. The objection was overruled and exception taken, and the witness's answer to the question was: "I did." He was then permitted to testify what he did with the particular bunch of cattle purporting to have been consigned by the Antelope County Bank to Shelley, Rogers & Co., into what yard or pen he turned them and in whose charge they were placed. The

bunch of cattle thus identified as coming from the accused was then traced into the hands of the consignee Shelley, Rogers & Co. and from them to others, where they were afterwards found and identified by the owner and others as the cattle which had been stolen from the pasture in Antelope county where they had been kept. On cross-examination the witness Jones was asked:

Q. Where did you get your information from, when you say you received a consignment of cattle?

A. From the car number and consignee and consignor, then it is turned over to me. I take the bunch out and count it.

Q. That is the one source of your information?

A. That is the one way I know of by.

Q. That is the only source of the information of the fact you have testified to?

A. I took the car number from the books furnished me, then I counted them out of the chutes and turned them over to an employee of the company.

Q. And your information comes from the books kept by some one?

A. Yes, sir.

The defendant thereupon moved the court to strike out the testimony of the witness because hearsay and based upon certain books that have not been received in evidence and incompetent and immaterial. The objection was overruled and exceptions taken. There is no other evidence in the record connecting the bunch of stock received at South Omaha, in which the stolen cattle were found with the shipment made by the bank for the accused, except that which we have just quoted. The testimony of other witnesses identifying the stolen stock found in South Omaha must, necessarily, so far as its connection with the accused is concerned, rest on the testimony of the witness Jones, to the effect that the cattle afterwards identified as being stolen were a part of the car-load shipped by the defendant's order at the time stated. Whether the assistant weighmaster should be permitted to testify, that the bunch

of cattle he identified were those included in the consignment made by the Antelope County Bank to Shelley, Rogers & Co., was of the most vital importance in determining the question of the guilt or innocence of the defendant. The state's case rested almost entirely on its ability to identify the stolen cattle after they reached South Omaha as being those included in the car-load shipped from Oakdale by the bank at the request of the accused. The testimony was manifestly hearsay and regarding a matter that vitally affected the most essential fact to be established, viz., the possession by the defendant of the stolen property. The state having proved that the defendant had shipped, through the Antelope County Bank as his own and asserting ownership over them, a car-load of cattle to Shelley, Rogers & Co., competent proof that the stolen cattle were a part of the shipment would be, under the circumstances, such strong evidence of guilt as to warrant the jury in finding the accused committed the larceny. The witness Jones, although he had no personal knowledge of the fact, was permitted to testify that the bunch of cattle which he found in a certain chute in the stock yards was the car-load of cattle consigned by the bank to Shelley, Rogers & Co. Then by other witnesses it was proved to the satisfaction of the jury that in the bunch were the two stolen cattle and thus possession of the stolen property was traced to the accused. The only knowledge the witness had as to where the cattle came from, in what car they were shipped, by whom consigned and to whom consigned, was derived from the records and books of the stock yards company. He did not see or have personal knowledge of what car these particular cattle were taken from, when they were unloaded. His testimony in that regard was not original. It was not the best evidence. It was, in legal contemplation, the same as though some third party had told the witness that the bunch of cattle he was testifying about came in a certain numbered car and was the shipment made by the bank at Oakdale to the consignees in South Omaha. The person unloading the car,

which was used by the accused in shipping the cattle from Oakdale to South Omaha, was not offered as a witness. There was nothing to show who made the entries in the book from which the witness obtained his information, when they were made or under what circumstances, nor was the absence of the person who made the entries attempted to be accounted for in any way. It is elementary that as a general rule hearsay evidence is inadmissible. It is true there are certain well recognized exceptions to the rule, but we are aware of none which would authorize the admission of testimony of the kind given by Mr. Jones as coming within any of the recognized exceptions. What the law requires is the production of original evidence, the best evidence obtainable, secondary evidence being admissible only when for some reason primary evidence can not be secured. Wharton, Criminal Evidence (8th ed.), sec. 220; *Village of Ponca v. Crawford,* 23 Neb. 662; *Bennett v. McDonald,* 59 Neb. 234. In *Traber v. Hicks,* 131 Mo. 180, it is said that while a witness may refresh his memory from memoranda made by himself at or near the time of the transaction, he may not do so from those made by others and as to facts of which he has no personal knowledge. Statements by a witness as to what appears from books or records, where it is shown that the books were not kept by the witness, nor the entries made by him or in his presence, are nothing more than hearsay testimony. *Young v. Miles,* 20 Wis. 646. To the same effect are *Thomas v. Woodruff,* 53 N. Y. Super. 327; *Gulf, C. & S. F. R. Co. v. Frost,* 34 S. W. (Texas Civ. App.) 167; *McCornick v. Sadler,* 10 Utah, 210; *Hibbard v. Mills,* 46 Vt. 243.

Although loth to interfere with the judgment of the trial court in this case, we can not escape the conclusion that the verdict of guilty as found by the jury can not be sustained, without ignoring and violating fundamental principles of the law of evidence. The record disclosing, as it indubitably does, prejudicial error in the admission of the testimony referred to over the objections of the defendant,

the verdict and sentence must be set aside and a new trial awarded. The judgment of the trial court is reversed and the cause remanded for further proceedings in conformity with law.

REVERSED.

UNION PACIFIC RAILROAD COMPANY V. OSCAR ROESER, ADMINISTRATOR OF THE ESTATE OF NIELS RASMUSSEN, DECEASED.

FILED MAY 20, 1903. No. 12,235.

1. **Lord Campbell's Act: PLEADING.** In an action by an administrator for damages for causing the death of his intestate, it is proper to allege such facts as will show a pecuniary loss to the next of kin.
2. **Demurrer.** In such action the petition is not demurrable because it alleges a contract to support the next of kin made by the deceased in his lifetime, without alleging that the estate of the deceased is insufficient for that purpose.
3. **Contributory Negligence.** If a passenger on a steam railroad extends his person through the window of the car of a rapidly moving train in which he is riding, he is chargeable with such gross negligence as will prevent a recovery of damages for an injury to which such act on his part contributes.

ERROR to the district court for Hall county: JOHN R. THOMPSON, DISTRICT JUDGE. *Reversed.*

W. R. Kelly, John N. Baldwin, Edson Rich and *W. H. Platt,* for plaintiff in error.

R. R. Horth, contra.

SEDGWICK, J.

The plaintiff, as administrator of the estate of Niels Rasmussen, deceased, brought this action against the railroad company to recover damages for the death of Niels Rasmussen, suffered by injuries received while a passenger from Grand Island to Omaha on one of the defendant's trains. It was at Chapman that the accident occurred.

The train did not stop at this station but maintained its speed of about forty or forty-five miles an hour. In passing this station, deceased raised a window and saluted an acquaintance on the station platform. He extended his head and right shoulder outside of the window and was waving his hand toward his acquaintance, until the train passed the station about two hundred feet, when he was struck just above the left ear by an iron ring, about fifteen inches in diameter, which was suspended from a crane and holding a mail sack. His skull was broken by the blow, from which he died the following day.

The plaintiff recovered a judgment in the court below, which the company has brought to this court for review.

1. The first contention is that the petition does not state a cause of action, because it does not contain the necessary allegation under our statute allowing pecuniary damages to the next of kin. The ground of this contention appears to be, that the petition alleges that prior to his death the deceased had entered into a contract with his parents by which he was bound to support them, and since this contract would be enforceable against his estate, and there is nothing in the petition to show that the estate is not ample for that purpose, the plaintiff can not recover in this action. The petition contains an allegation that the deceased promised his parents to support them, and that this promise induced them to come to America to live, and that the parents were depending upon the deceased for the support so promised. It may be that some of the allegations of the petition in this connection were irrelevant and might have been striken out upon motion. It is proper in such a case to allege such facts in the petition as will show a pecuniary loss to the next of kin, and some of the allegations complained of were necessary and proper for that purpose. The petition shows that the father is the next of kin of the deceased and contains the necessary allegation to enable the administrator to maintain this action in his behalf.

2. It is complained that the court erred in admitting evi-

dence that the parents came to this country at the request of the deceased and relying upon his promise to assist them. It is urged that if the action is based upon our statute such evidence was immaterial and might have a prejudicial influence upon the jury in estimating the amount of damages, and that if the action is based upon the contract of the deceased with his parents then no recovery is allowable.

No recovery can be had under our statute except for pecuniary damage. The value in money of the life of one person to another person can not be determined by mathematical calculations from fixed rules. It is a matter to be estimated from all the conditions existing and surrounding circumstances, and is peculiarly within the province of the jury. The evidence in question tended to show that the parents were likely to have received substantial assistance from the deceased had he lived, and were proper for the jury to consider in arriving at a reasonable estimate of the pecuniary loss. The father was the next of kin under the law and the duty of supporting the mother devolved upon the father. Contributions to support the mother would be a pecuniary benefit to the father, which the jury might also consider in determining the father's damage by the death of his son.

3. The principal question in the case is, whether the act of the deceased was, under the circumstances, such negligence on his part as will prevent recovery. It appears to be conceded that the company was guilty of negligence which directly contributed to the accident. The injury was caused by a heavy iron ring suspended from a crane which was used to enable trains when passing at full speed to receive or deposit sacks of mail. The post from which it was suspended was set a distance of about three feet from the side of a passing car and when not in use the iron ring was about eight feet from the car, but when placed in position so that the mail sack could be taken from the passing train this ring was about eight and one-half inches from the car. The train in which the deceased was riding was not a mail train, but the company's agent

in charge of the apparatus, from some mistake not explained, turned the crane and prepared the mail sack so that it might be taken by this train. But for this mistake of the company's agent the accident could not have occurred, so that, the negligence of the company being established, the question, as above suggested, is, whether the act of the deceased was of such a nature as to prevent the recovery.

4. It is generally held to be negligence *per se* and to be so declared as a matter of law, for a passenger on a steam railway to voluntarily protrude his person through the window of a car while in motion and beyond the line outside of the car. The law requires railway carriers of passengers to exercise extraordinary diligence to accomplish the safe carriage of passengers so far as human skill and foresight can secure that result. But railways must construct and arrange their tracks, stations, grounds and equipment, and operate their trains to attain practical purposes in the transaction of their business. They have not been restrained from constructing tracks with switches in close proximity with each other when necessary. These and other conditions of a similar character justify the general conviction that the only place of reasonable safety for passengers is within the cars.

In *Georgia P. R. Co. v. Underwood,* 90 Ala. 49, 8 So. 116, the supreme court of Alabama, by Judge McClellan, after citing a large number of cases which adhere to the above principle, say:

"Against this array of adjudged cases, and to the converse of the proposition stated, there is believed to be in reality but one authority. That is the case of *Spencer v. Milwaukee & P. du C. R. Co.,* 17 Wis. *487, which takes the position, and supports it with vigor, that it is not negligence *per se* for a passenger to project his arm out of the window of the car in which he is riding. Another case frequently cited and relied on to support this view is that of *Chicago & A. R. Co. v. Pondrom,* 51 Ill. 333. The conclusion in that case, however, was rested on the doctrine of

comparative negligence—a doctrine which, if not peculiar to Illinois, certainly is not recognized in our jurisprudence; and while the protrusion of the passenger's arm from the window of a moving car was admitted to be negligence, the judgment was allowed to stand because plaintiff's negligence was held to be *less* than that of the defendant." He then reviews the authorities and says:

"We are, however, satisfied with the rule as formulated and supported by the great number of adjudged cases, and the texts to which we have referred. The reasons upon which they base the doctrine appear to be eminently sound. Windows are not provided in cars that passengers may project themselves through or out of them, but for the admission of light and air. They are not intended for occupation, but for use and enjoyment without occupation. No possible necessity of the passenger can be subserved by the protrusion of his person through them. Neither his convenience nor comfort requires that he should do so. It may be, doubtless is true, that men of ordinary prudence and care habitually lean upon, or rest their arms upon the sills of windows by which they ride. But this is a very different thing from *protrusion beyond* the outer edge of the sills, and beyond the surface of the car. We can not concur in the assumption of the Wisconsin court that prudent men are habitually given to thus projecting themselves from the windows of moving trains."

The plaintiff does not contend that this is not a correct statement of the law. In his brief he says:

"We have not to deal with the question, was Rasmussen guilty of a want of ordinary care? But rather does the petition disclose such conduct on his part as amounted to a reckless disregard of his own safety and the wilful indifference to the consequences liable to follow?"

This presents the real question with which we have to deal. Admitting that the act of the deceased was negligent and that his negligence contributed to the accident so that it could not have occurred without this contributory negligence, was this negligence on his part of such character

as would prevent a recovery in this case? Our statute provides (Compiled Statutes, chapter 72, article 1, section 3; Annotated Statutes, 10039):

"Every railroad company, as aforesaid, shall be liable for all damages inflicted upon the person of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road actually brought to his or her notice."

The purpose and meaning of this statute has long been settled in this state. In *Omaha & R. V. R. Co. v. Chollette,* 33 Neb. 143, the court, speaking by Judge MAXWELL, approved an instruction in the following language:

"The term criminal negligence, as it is used in the statute above quoted, is defined to be gross negligence. It is such negligence as would amount to a flagrant and reckless disregard of her own safety and amount to a wilful indifference to the injury liable to follow."

This instruction was approved and followed in *Missouri P. R. Co. v. Baier,* 37 Neb. 235, where it was said:

"The purpose of the statute was not to fasten upon a common carrier of passengers a liability as insurer against any and all injuries while being transported upon the trains of such carriers, but it was rather intended to establish a presumption from the passenger receiving injury under the circumstances contemplated."

And in *Clark v. Zarniko,* 106 Fed. 607, the United States circuit court of appeals adopted and applied this as the proper construction of the statute. The court said:

"The supreme court of Nebraska has defined the term 'criminal negligence' in this statute to be gross negligence; such negligence as would amount to a flagrant and reckless disregard of one's safety, or to a wilful indifference to the injury liable to follow. It has also declared that the purpose of the statute was not to fasten upon a common carrier of passengers a liability as insurer, but that it was rather intended to establish a presumption from an

injury to a passenger that the damages inflicted by such injury were entirely attributable to the negligence of the railroad company, and that to avoid liability it devolves upon the company to show that the injury was imputable to the criminal negligence of the party injured, or to his violation of some express rule or regulation of the road actually brought to his notice."

Other decisions of this court have recognized this as the true meaning of the statute. It is difficult to see what other force can be given to the word "criminal." It has no well defined legal meaning in such connection. It occurs, so far as the writer is aware, in no other similar statute in this state or elsewhere.

Such recklessness as is incompatible with a proper regard for human life is negligence which will render unintentional homicide criminal. 1 McClain, Criminal Law, sec. 350. Gross negligence is criminal negligence as the word is used in the statute. A reckless, that is, without thought or care, disregarded of one's own safety or a wilful indifference or intentional disregard of the consequences liable to follow is criminal negligence when accompanying the intentional doing of an act incompatible with a proper regard for one's own life. The act of the deceased was in no way related to the duty of the carrier to its passengers; it was not necessary to his convenience or comfort as a passenger. He was provided with a place to ride in safety within the car. It is known to every passenger of ordinary intelligence that, on account of passing trains on adjacent tracks, and other causes continually existing in the operation of the road, a slight extension of the human body beyond the side of a moving car is done with danger to life and limb.

"These conditions have always existed. They are customary and to a large extent indispensable. * * * The customary methods of constructing tracks, building bridges and running trains in railroad yards renders any exposure of a person beyond the car line imminently hazardous." *Benedict v. Minneapolis & St. L. R. Co.*, 86 Minn. 224, 57 L. R. A. 639.

The deceased being an ordinarily intelligent young man knew this, and without any necessity whatever for so doing he elected to take the risk. The act, conceded to be negligent, it is clear was done knowingly and intentionally without heeding the consequences, and constitutes such gross negligence as will defeat a recovery.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

SULLIVAN, C. J., dissenting.

I am not prepared to agree to the proposition that Rasmussen's act in protruding his head from the car window was so clearly an act of criminal negligence that reasonable men might not differ with respect to it. What he did was, I think, nothing more than people generally do under like circumstances. His conduct was the product of a sudden impulse—the spontaneous expression of an emotional nature. It was not, of course, prudent conduct; calculation and provident foresight were wanting, but it did not amount to a flagrant or reckless disregard of the consequences which were certain or likely to ensue. Risk was incurred, but from the standpoint of a person who knew nothing about the appliance that caused the accident, it was a slight and not a serious risk. It was hardly sufficient, taking human nature as it is, to impose restraint upon the social instinct which prompts one to give greeting to a friend. In dealing with cases of negligence, judges are, I am disposed to think, too much inclined to take themselves as standards by which to measure the conduct of all classes and conditions of men. Commensurate care in a given case is apt to be what they would have done. They are accustomed to travel and understand the dangers of the road; they are unaffected by novel situations; their native enthusiasm has been chilled by contact with the world; they hold themselves in leash and wave no improvident salutations to acquaintances or friends. They are well-poised, circumspect and deliberate; they

are exemplars of correct conduct, but, however much it is to be regretted, their ways are not the ways of exultant youth nor of "the man with the hoe." In my opinion *Chicago, B. & Q. R. Co. v. Martelle,* 65 Neb. 540, went too far, but this case goes still farther. Carriers of passengers, as was observed in *Chicago, R. I. & P. R. Co. v. Zernecke,* 59 Neb. 689, are insurers; they charge for the risk they assume and there is consequently no reason why the law imposing liability upon them should be enforced with reluctance. In actions brought to recover indemnity courts have, it seems to me, no call to put a harsh construction upon the plaintiff's conduct in order to temper the statute with natural justice. Criminal negligence, as the term is used in section 3, article 1, chapter 72, Compiled Statutes (Annotated Statutes, 10039), means such negligence as amounts to "a flagrant and reckless disregard of one's own safety, and the wilful indifference to the injury liable to follow." *Chicago, B. & Q. R. Co. v. Hague,* 48 Neb. 97. It is true that in the case cited it was held that the act of a passenger, who, after he had been expressly warned that the freight caboose, in which he was riding, was standing on a high bridge, and that he must not attempt to leave the car, stepped off at the rear and fell, receiving injuries from which death resulted, was "criminal negligence." In the next case, *Chicago, B. & Q. R. Co. v. Hyatt,* 48 Neb. 161, criminal negligence is defined as "gross negligence such as amounts to a reckless disregard of one's own safety and a wilful indifference to the consequence liable to follow," and in that case the action of the plaintiff, in jumping from a moving train, was held not to be such negligence, and the case was distinguished from *Chicago, B. & Q. R. Co. v. Landauer,* 36 Neb. 642, because in the latter case the train was moving rapidly and the act of jumping off was obviously and necessarily perilous and showed a wilful disregard of the injury which was liable to follow. In the *Chollette* case it was held that the question of negligence in stepping off a moving train was properly left to the jury, and the judgment against the company was

affirmed. A great many cases, including the foregoing, are cited by plaintiff in error in its elaborate brief, but it is conceded that the definition of "criminal negligence" in *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143, 147, has been followed ever since. Some of the cases cited from other jurisdictions hold that the placing of the passenger's person outside the window of a moving train is evidence of negligence; some that it is conclusive evidence of negligence; and some that under the particular circumstances indicated, it is gross negligence; but none of them have any relation to the interpretation of that Nebraska statute which makes the carrier an insurer of its passenger against injuries inflicted upon him while he is such, unless such injury arises from his own "criminal negligence" or from "violation of some express rule or regulation of the road," brought expressly to his attention. It is not thought that any of these cases furnish any precedent for the determination of this one. None of the circumstances, under which the courts have held that the mere fact of placing a part of the person out of the window of a moving train is gross negligence, appear here. The injury was caused by a heavy iron ring suspended on a crane for the delivery of a mail-sack to and the reception of one from another corresponding crane on a moving train. The appliance, which seems to be no longer in use, was called "The Fleming Mail Catcher and Deliverer Crane." It is not necessary to describe it further than to say that by means of a post set at a distance of about three feet from the side of a passing car, and a swinging arm attached to the post, an iron ring could be let down to come within eight inches of a passing car to be there caught by a like arm extending from the mail car, and the ring and mail bag drawn on board the car without stopping the latter. The machine was not of a kind to attract the notice of a traveler, as when not in use the swinging arms were drawn up and when properly in use and the arms drawn down, they would be caught and thrown up by the crane on the mail-car before the passenger coaches came by.

The train on which the plaintiff's intestate was riding carried no mail and, if his attention had been called to the matter, he would have naturally supposed that the crane was drawn up properly and no ring in dangerous proximity to the train window, but there is nothing to indicate any knowledge on his part of the presence of the ring or of anything to warn him that his conduct was more dangerous than it would be on the open prairie. It would seem, therefore, that his conduct was not the "criminal negligence" necessary to relieve defendant from its statutory liability for the safety of its passengers.

Plaintiff in error cites Anderson's definition for gross negligence: "The omission of that care which even inattentive and thoughtless men never fail to take of their own property or interests." It is defined in Black's Law Dictionary as: "The want of that care which every man of common sense, how inattentive soever, takes of his own property. The omission of that care which even inattentive and thoughtless men never fail to take of their own property." The last sentence is also Bouvier's definition, citing Jones, Bailments.

Beyond doubt, the question here, as in the case of *Chicago, B. & Q. R. Co. v. Hague, supra,* is not whether this act of Rasmussen in putting his head out of the window seems to this court to be gross negligence, but whether it was so manifestly of that character that reasonable men can not deem it anything else. I am entirely unable to say so, and am unable to say on this ground either that there is no cause of action in the petition, or that none is proved by the evidence.

FRANK J. SHARP V. DELMAR W. CALL ET AL.*

FILED MAY 20, 1903. No. 11,750.

Contribution. Where trustees of an insolvent corporation have, with knowledge of the pendency of an action against it, divided among

* Rehearing of case reported in 3 Neb. (Unof.) 64.

shareholders nearly all its available assets; one of the trustees, who is also treasurer and who paid out the money divided, can not recover contribution from another director, because of payment of a judgment against him, as trustee, for so converting the company's assets.

ERROR to the district court for Hamilton county: SAMUEL H. SORNBORGER, DISTRICT JUDGE. *Affirmed.*

Eugene J. Hainer and *J. H. Smith,* for plaintiff in error.

David A. Scoville, contra.

HASTINGS, C.

At the former hearing the judgment in this case was affirmed, because there was no complaint of error in overruling a motion for new trial. A rehearing having been obtained, this defect in the petition in error has been remedied, and the case is before us for determination upon its merits.

It is a claim on behalf of the plaintiff Sharp of the right of contribution against the defendant Call upon a judgment, amounting to $616, paid by Sharp, recovered by one Wandell against Sharp, Evans and Stockham, on account of property of the Stockham Creamery Association, which had been distributed by its directors, of whom were both Sharp and Call, among certain of the stockholders who had paid assessments. Sharp claims to have expended $65 in the defending of Wandell's action against the directors, and thereby to have reduced the recovery by $200. He brought this action against Call, Evans, Stockham and Buss for contribution; alleged that he himself and the defendant Call are the only solvent ones among the five directors and sues to recover $510.75. The defendants, Evans, Stockham and Buss made no answer. Call answered admitting the incorporation of the Stockham Creamery Association in February, 1889; its continuing in business until December 12, 1889; the conveying by its directors, as trustees, in January, 1890, of the real estate of the association in exchange for live stock; a sale a month

later of the live stock for $728, and the dividing among themselves and other shareholders of $403 in money; admitted that Wandell recovered judgment against the company; issued an execution; levied upon its personal property and applied the proceeds; that, in 1894, he brought suit against Sharp and some seventeen others for the misappropriation of the property of the association and recovered a judgment against Evans, Sharp and Stockham, as alleged; denied plaintiff's other allegations; alleged that up to December 12, 1889, Evans, Sharp, Stockham and two others acted as directors; that about December 12, 1889, the association became embarrassed and ceased to transact business; that Evans, Sharp and Stockham became its trustees, and continued as such from that time; that September 27, 1889, Wandell had sued the association on his claim and Evans, Sharp and Stockham, being then trustees of the corporation, fraudulently interposed a defense and caused the trial of Wandell's action to be delayed and while it was so delayed, in February, 1890, the plaintiff, Sharp, who was treasurer of the association, received $726 belonging to it, and with Evans and Stockham, fraudulently and to prevent Wandell from collecting any judgment, and to prevent the other creditors of the corporation from collecting their claims, divided the $728, then in his hands as treasurer, among the stockholders of the corporation; that this fund was all of the property of the corporation excepting about $55 in personal property; that the corporation was then indebted to various persons besides the indebtedness to Wandell; that the judgment which Sharp claims to have paid was based upon this previous judgment of Wandell against the corporation, and upon the action of Sharp in dividing up and paying the stockholders the $728, and that the judgment paid by Sharp was one obtained against him for his appropriation of the $728. The defendant also alleged that Sharp was estopped from recovering any part of this judgment, because it was recovered upon an express claim of fraud, wrong doing and misappropriation of funds on Sharp's

part as treasurer of the corporation, and because the court in Wandell's action adjudged that the money of the association had been wrongfully distributed. The defendant also claims that the corporation was not indebted to any of the stockholders who received portions of the money, and that the money was not divided among all of the stockholders of the corporation but only a portion of them. This answer was denied by the plaintiff. On a trial to the court, a jury being waived, a general finding and judgment for the defendants was entered. Motion for new trial was overruled, and the action dismissed.

The error complained of is simply that upon the pleadings and evidence the judgment of dismissal is wrong and that it should have been in favor of the plaintiff. The questions arising are at most three. *First:* Is a trustee of a corporation, who has been compelled to satisfy a judgment against him for misappropriation of assets of that corporation, entitled to contribution against a co-director who was not recovered against in that action? *Second:* Is the plaintiff Sharp in any way concluded as against defendant Call by the allegations, findings and judgment in the Wandell action; those allegations and findings being to the effect that the money was wrongfully and fraudulently misappropriated? *Third:* Does the fact that Sharp, as treasurer of the corporation, had custody of the funds which were misappropriated, in any way estop him from recovering contribution? Of course, if the first question is answered in the negative, the finding of the trial court must be sustained. If the action of taking practically the whole of the corporation's assets and dividing them among the stockholders, or a portion of the stockholders, at the time when claims against the corporation were unsatisfied and Wandell's claim against the corporation was actually pending in court, is tortious, and plaintiff must be presumed to have known that it was a wrong doing, then it would seem that there can be no recovery in this case. On the other hand, if the action was taken in good faith and with defendant's participation, and plain-

tiff need not be presumed to have known it was wrong, there would be a right to contribution. *Johnson v. Torpy,* 35 Neb. 604, 37 Am. St. Rep. 447; *Torpy v. Johnson,* 43 Neb. 882; Cooley, Torts (2d ed.), 170, 171.

An examination of the evidence discloses that the division of the assets was with full knowledge of the pendency of Wandell's action. It does not appear that the defendant participated in the arrangements for dividing the assets, except by taking and keeping his part, $39, of the money divided. The capital stock of the company is claimed to have been paid up at the commencement of its business in the spring of 1889. The expenses of running the business were met by assessments which were not paid by all of the stockholders and which the trustees were advised were irregular and illegal. The amount paid on these assessments was over $1,800. Plaintiff testifies that he received legal advice that the proceeds of the company's property could be used to pay back these assessments. The money derived from the company's real estate to the amount of $403 was thereupon divided among the stockholders who had paid these assessments according to the sum which each had paid. Defendant testifies that the impossibility of Wandell's obtaining anything in case he did get judgment was discussed. The distribution of the $403 was ordered, as appears from the directors' minutes, on February 10, 1890. Wandell's action against the company was begun in September, 1889, and judgment was rendered on it April, 1890. The personal property consisting of creamery machinery and cans for carrying cream, sold under this judgment for $55.

It is clear that the corporation was insolvent and was no longer prosecuting its business. It follows that the money divided was a trust fund for creditors and the action taken in dividing it, not only wrong, but expressly forbidden in section 141, chapter 16, Compiled Statutes (Annotated Statutes, 4133). *Stough v. Ponca Mill Co.,* 54 Neb. 500; *Ingwersen v. Edgecombe,* 42 Neb. 740; *Tillson v. Downing,* 45 Neb. 549; *Wyman v. Williams,* 53 Neb. 676.

It would seem that the directors must be presumed to have known that their action was wrong and that the treasurer, who paid out the money and who also, as one of the directors and trustees, assisted in preparing the order for its division, can have no relief by way of contribution for the repayment of this judgment brought upon him by his own act.

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

KIRKPATRICK, C., concurs. LOBINGIER, C., not sitting.

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

AFFIRMED.

The following dissenting opinion, by SEDGWICK, J., was filed October 7, 1903:

SEDGWICK, J.

Upon further examination, I feel that I ought to say that I have never been satisfied with the decision of this case, and think that the plaintiff ought to be allowed to recover. That he has acted in good faith throughout the various phases of the transactions which led up to this litigation, and has at all times taken such action as an honorable and intelligent business man would ordinarily be expected to take, I believe, is unquestioned. I do not believe that there is any principle of law that requires us, under the facts as disclosed by this record, to imply such wrong-doing on his part as to prevent a recovery.

I should have reviewed these facts in a dissenting opinion at the conclusion upon the former hearing, but this would have involved the expenditure of considerable time without any apparent beneficial practical results; and as the case has now been twice considered, and a majority

of the court are satisfied that the result would be the same if the case were heard again, another hearing does not seem to be advisable; but I feel that it is my duty, to the parties interested, to make this brief statement.

NOBLE W. BIXBY V. WALLACE BRUCE.

FILED MAY 20, 1903. No. 12,854.

Trade Usage. One not shown to have knowledge of a trade usage confined to a particular business, which is not shown to be of such a general and notorious character that he must have been presumed to have contracted with reference to it, is not bound by such usage.

ERROR to the district court for Nuckolls county: GEORGE W. STUBBS, DISTRICT JUDGE. *Reversed.*

F. H. Stubbs, for plaintiff in error.

W. F. Buck, contra.

HASTINGS, C.

This was an action to recover from the plaintiff in error, Bixby, an alleged balance of $267.08 for material and labor furnished in the construction of a brick building at Hardy, Nebraska. The parties will be designated plaintiff and defendant, as they were at the beginning of the litigation. Plaintiff's account, as stated in his petition, amounted to $1,758.47. On this he admitted having received $1,517.37, and he brought suit for the remainder, with interest.

The defendant answered admitting four items of plaintiff's account; admitted the furnishing of brick for the building but says that instead of 167,237 brick only 138,491 were furnished. Some other items were disputed and defects in the building were alleged causing damage in the sum of $500, and judgment was asked against the plaintiff in the sum of $527. There was a general as well as special denials in the answer, which was itself denied. On trial to

a jury the plaintiff recovered a verdict for $88.20. Motion for new trial was overruled, and from judgment on this verdict the defendant brings error.

The sole error complained of is the giving of the following instruction:

"You are further instructed that if you shall find from the evidence that the plaintiff erected for the defendant under a verbal agreement a brick building, the walls of which were to be and were 14 inch hollow walls, and that no agreement was made between the plaintiff and the defendant as to the rule of measurement of the brickwork in such building, under the evidence in this case the plaintiff would be entitled to measure and receive pay for such building as a 14 inch solid wall. And if after the completion of the building a settlement was had, and through inadvertence or mistake the building was improperly figured to the injury of the plaintiff, such fact would not preclude his recovery in this action."

The plaintiff simply alleges that he "furnished 167,237 brick laid in the wall" at $8 a thousand. The defendant says that it was agreed that the wall should be 14 inches in thickness and with a two inch air space and that the plaintiff agreed it should be figured as a 12 inch, and not as a 14 inch wall; that the plaintiff's computation is for a 14 inch solid wall and that one-seventh must be deducted because of the two inch air space.

Plaintiff at the trial introduced, without objection from defendant, some evidence to prove a custom among masons to charge for the empty space in hollow walls in computing the number of the bricks laid; he says that it was computed so in this instance.

As above indicated, the sole error complained of is the instruction to the jury by the trial court, that under the evidence plaintiff would be entitled to measure and receive pay for a 14 inch solid wall if no agreement as to the manner of ascertaining the number of brick was found. The evidence hardly seems to warrant so emphatic an instruction. It is certainly not a matter of judicial knowl-

edge that masons in ascertaining the number of brick in a wall always count the air space as if it was filled solidly with brick. The evidence in this case entirely fails to establish any such immemorial general custom. It shows, at most, only what is designated by Mr. Greenleaf, "a usage of trade" as to which he says "it is sufficient if it be established, known, certain, uniform, reasonable and not contrary to law. These usages, many judges are of opinion, should be sparingly adopted by the courts as rules of law, as they are often founded in mere mistake, or in the want of enlarged and comprehensive views of the full bearing of principles. Their true office is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulation, but from mere implications and presumptions, and acts of doubtful and equivocal character; and to fix and explain the meaning of words and expressions of doubtful and various senses. On this principle, the usage or habit of trade or conduct of an individual, which is known to the person who deals with him, may be given in evidence to prove what was the contract between them." 2 Greenleaf, Evidence (16th ed.), sec. 251.

In the present case the real question between the plaintiff and defendant is, what was intended by the phrase "$8 a thousand for brick in the wall"?

It is not claimed on behalf of the defendant in error that any evidence tended to show knowledge of this usage on the part of the defendant, or that the contract was made with such a usage in view; such a custom among masons is testified to by the plaintiff and by two other witnesses. While there are some cases holding that no such usage can be shown in connection with an express contract for brick at a certain price (*Sweeney v. Thomason,* 9 Lea (Tenn.), 359, 42 Am. Rep. 676), the better doctrine seems to be that such a custom or trade usage may be shown as a means of ascertaining the intention of the parties to a contract but never to thwart or control such intention. *Kendall v. Russell,* 5 Dana (Ky), 501, 30 Am. Dec. 696.

It is urged that defendant is not in a position to complain of this instruction, because he did not at the trial below in fact raise the issue as to the existence of this usage or his own knowledge of it, but attempted to establish an agreement that it should be disregarded and a different rule of measurement adopted. It should be remembered that, as before stated, the plaintiff's petition is simply for the price of 167,000 brick. No allegation of any custom or measurement is made. Defendant is alleging that only 138,000, and no more, were laid. There is also a general denial attached to the answer. It hardly seems that plaintiff ought to derive any advantage by reason of the fact that he has failed to allege such a usage in his petition.

In *First Nat. Bank of Hastings v. Farmers & Merchants Bank,* 56 Neb. 149, it is held that such a usage of a particular trade to be available must be pleaded, and if denied must be proved. It seems clear that the court in undertaking to say that in the absence of a special agreement as to the manner of measurement, the wall and the air spaces should be counted as a solid one, is not warranted by the evidence. It was a question of the intention of the parties, an attempt to vary and control the ordinary meaning of the contract terms by means of a trade usage. In order to have the proposed effect, either knowledge of such usage on the part of the defendant, or such a general knowledge of it as to lead to a conclusive presumption that he knew of and contracted with reference to it, must have been shown. 15 Century Digest, col. 1244; *Irwin v. Williar,* 110 U. S. 499. Neither of these appear in this case. It does not affirmatively appear that defendant was aware of such usage, nor does it appear to have been so general and so well known, that he must be presumed to have contracted with reference to it, and the utmost which plaintiff would be entitled to have under the evidence shown here would be a submission of this question to the jury, and the taking of the jury's finding as to whether or not the contract was made with reference to such a usage.

We conclude that the court was in error in deciding, and so telling the jury, that in the absence of a special contract this wall must be measured as if it were a 14 inch solid one; that whether or not such a rule of measurement was the one really agreed upon, and to be applied in this case, was a question for the jury under all the facts.

For this error, it is recommended that the judgment of the trial court be reversed and the cause remanded for further proceedings.

AMES and OLDHAM, CC., concur.

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

REVERSED.

JOHN RILEY V. MISSOURI PACIFIC RAILWAY CO.

FILED MAY 20, 1903. No. 12,735.

1. **Reception of Evidence After Demurrer.** The reception of evidence tendered by the defendant, after a decision against him on a demurrer to plaintiff's evidence, is not error. *Dunn v. Bozarth*, 59 Neb. 244, followed and approved.
2. **Rulings on Evidence.** Rulings of the trial court on the admission of evidence, *held*, not prejudicial.
3. **Exceptions to the Exclusion of Testimony.** Exceptions to the exclusion of testimony are unavailing, unless there be tender made of the proof which it was sought to elicit. *Hambleton v. Fort*, 58 Neb. 282, followed and approved.
4. **Instruction: OBJECTION.** Where no request is made for a more explicit instruction, an objection can not be entertained because the one given is vague and indefinite.
5. **Negligence: QUESTION FOR JURY.** The existence of negligence should be proven to and passed upon by the jury as any other fact.
6. **Comparative Negligence.** The doctrine of comparative negligence is not recognized in this state.
7. **Instructions.** Instructions given, examined and approved.

8. New Trial: DISCRETION. A sound discretion is reposed in the trial court in refusing a new trial on the ground of newly discovered evidence which is cumulative in its character.

ERROR to the district court for Lancaster county: LINCOLN FROST, DISTRICT JUDGE. *Affirmed.*

Jesse B. Strode, Edmund C. Strode and *D. J. Flaherty*, for plaintiff in error.

Bailey P. Waggoner, James W. Orr and *Adolphus R. Talbot, contra.*

OLDHAM, C.

This was an action for personal injuries which plaintiff sustained while driving a team hitched to a lumber wagon across the railroad track of defendant on a public crossing on North 14th street, in the city of Lincoln, Nebraska. It appears from the testimony that the plaintiff had purchased some coal which was in his wagon box, at a coal yard some distance north of the railroad crossing; that his son, a man of the age of 35 years, and his grandson, a youth of about 17 years, were also in the wagon and that they were driving south toward plaintiff's home, at the time the accident occurred; the plaintiff's evidence shows that from the wagon there was a clear view of defendant's track for about 100 feet before the crossing was reached; that when plaintiff was from 30 to 60 feet from the railroad crossing, he noticed an engine attached to two coal cars and a box car, which he says was standing still, about a block east of the crossing; that he then looked westward along defendant's tracks and saw no trains coming from that direction, and that he then proceeded to drive across the track; that when he reached the track he discovered, for the first time, that the engine, which was on the east side of the crossing, was in motion and had backed its cars to within about 10 feet of the crossing; that he was on the track before he made this discovery and was forced to attempt to drive across to avoid a collision. The son and

grandson jumped from the wagon, and do not appear to have been seriously injured; the wagon, however, was run into by the cars and plaintiff was thrown under the hind car and seriously and permanently injured. Plaintiff's evidence tended to show that the accident was occasioned by the negligence of defendant in backing its train over a much used public crossing without blowing the whistle, ringing the bell, keeping a flagman at the crossing, or placing a brakeman or other employee on the rear car of the train to give warning of its approach. There was no contention that the train was running at an unusual rate of speed, but there was proof of an ordinance of the city which required the ringing of the bell, and blowing of the whistle, and the keeping of a flagman or other employee, to warn of danger at the crossing.

The defendant on its part contended that it had complied with all these requirements by ringing the bell, blowing the whistle and having a switchman standing on the rear car hallooing and warning the plaintiff and others against attempting to cross the track while the train was approaching; and that the injury was occasioned by plaintiff's negligence in attempting to cross in front of a moving train after having been properly warned of its approach. On issues thus joined, there was a trial to a jury, verdict for defendant, and plaintiff brings error to this court.

We shall consider the allegations of error in the proceeding, in the order in which they are presented in plaintiff's brief. At the close of plaintiff's testimony, defendant filed a motion for a non-suit, and to direct a verdict for defendant. Plaintiff thereupon filed a motion to instruct the jury to return a verdict for plaintiff. Each of these motions was overruled by the trial court, and defendant, over the objection of plaintiff, was permitted to introduce his testimony. Plaintiff's contention is that, as defendant's motion amounted to a demurrer to plaintiff's testimony, it was error for the trial court to permit the defendant to proceed with its testimony after overruling its motion. Some authorities are cited from other states

which seem to support this contention, but, however it may be elsewhere, the rule in this state seems to be firmly established that when at the close of plaintiff's testimony, in a civil action, the defendant desires to test the sufficiency of plaintiff's evidence to sustain a verdict, he may file a request for an instruction for that purpose, and if his request be denied, he may proceed then to introduce his own evidence. This rule was favorably commended and adhered to in *Dunn v. Bozarth,* 59 Neb. 244, in which it was said:

"The reception of evidence tendered by the defendant, after a decision against him on a demurrer to plaintiff's evidence, is not error."

Complaint is next lodged against the action of the trial court in the admission of evidence. On the cross-examination of one of plaintiff's witnesses, defendant's counsel were permitted, over plaintiff's objection, to ask the witness if he had not made a statement in writing shortly after the injury, containing certain declarations differing from the statements to which he had just testified. It was objected that it was improper to ask this question without first showing the witness a copy of the written statement. Whatever technical merit may have attached to this objection at the time it was made, it was all cured by the subsequent action of plaintiff's counsel in consenting that the entire written statement might be offered in evidence, which was accordingly done.

Complaint is also made of the action of the trial court in sustaining defendant's objection to two questions propounded by plaintiff's counsel to one of his witnesses on re-examination. As the plaintiff did not follow his question by an offer to prove the answer sought to be elicited, we can not examine this contention, if it were otherwise meritorious. *Hambleton v. Fort,* 58 Neb. 282.

At the close of the testimony, numerous instructions were requested by counsel for the contending parties. The requests were all denied, and all the instructions submitted to the jury were given on the court's own motion;

so that to determine whether or not the court erred either in the giving or refusing of instructions, it is necessary to examine the instructions given and ascertain whether or not they have fairly presented to the jury each material issue arising on the pleadings and proofs contained in the record.

Paragraphs 1, 2, 3 and 4 of the instructions given by the court are confined to a statement of the issues and directions as to the burden of proof. None of these are complained of. Paragraph 5 defines actionable negligence. This instruction is complained of by plaintiff as being couched in language that an ordinary juryman could not understand and as being vague and indefinite. It is not contended, however, that there is anything inherently wrong in the definition given. While we agree with counsel that "instructions to a jury should be clear, explicit and definite, and couched in plain, simple language," and while we do not commend the instruction given either for clearness or precision, yet plaintiff made no request for an instruction defining actionable negligence, and, consequently, under the well established rule of this court, he is not entitled to complain of the vagueness and uncertainty of the one given. *Republican V. R. Co. v. Fink,* 18 Neb. 89.

Paragraphs 6, 7 and 8 of the instructions given define contributory negligence and tell the jury that if the plaintiff has proved his case without disclosing negligence on his part, the burden is upon the defendant to prove contributory negligence. These instructions are each couched in concise terms and no complaint is lodged against any of them. Paragraph 9 defines ordinary care. Paragraph 10 defines the proximate cause of injury. Paragraph 11 tells the jury that they have been permitted to view the premises and may consider what they saw there as any other evidence in the case. Paragraph 12 is as follows:

"In determining whether the defendant's employees have been guilty of actionable negligence as hereinbefore defined, you should take into consideration the fact that the

defendant was pushing its train backward, and also the fact that the defendant had no flagman at its crossing at 14th street; you should also consider whether the bell was rung and the whistle sounded; whether there was a brakeman on the rear end of defendant's train; you should also take into consideration the amount of travel across defendant's track at 14th street, and all the other facts and circumstances shown in the evidence bearing upon this question. And you are instructed that while it was the duty of the defendant's employees to comply with the ordinances of the city relating to the ringing of the bell of the engine, and to the stationing of a flagman at the 14th street crossing, yet a failure on the part of the defendant's employees to comply with said ordinances in either or both of these respects, while that may be considered by you as evidence tending to prove the actionable negligence of the defendant's employees, does not necessarily demand an inference of negligence."

This instruction we have set out at length for the purpose of determining whether or not it fairly presented the question of defendant's alleged negligence, in approaching this public crossing, to the jury. Plaintiff had made numerous requests for instructions on this question which were all refused, and this one given in their stead.

The first principle contended for in the requests which were refused, is that if defendant backed its train over the public crossing without giving the required signals, then as a matter of law it was guilty of actionable negligence. This court has decided many times that the existence of negligence should be proved to and passed upon by the jury as any other fact, and that it is improper to state to the jury a circumstance or group of circumstances as to which evidence has been introduced on the trial and instruct that such fact or group of facts amount to negligence in law. The approved practice is to instruct the jury that such facts or circumstances, if established by the weight of the evidence, are proper to be considered in determining the existence of negligence. *Missouri P. R. Co. v. Geist,* 49 Neb. 489.

Another principle contended for in the instructions refused, is founded on the doctrine of comparative negligence which is not recognized in this state. *Missouri P. R. Co. v. Fox*, 56 Neb. 746, 749.

The other proposition contended for and refused was that, if no signals were given, plaintiff, as a matter of law, would not be guilty of contributory negligence in driving across the railroad track at the public crossing. Instead of declaring this fact as a matter of law, the court submitted the question of plaintiff's contributory negligence to the jury, under all the facts and circumstances proved in the case, in the instruction immediately following the one just discussed. It follows, from what has been said, that, in our view, the jury were properly instructed both on the question of actionable negligence of defendant and contributory negligence of the plaintiff.

Paragraph 14 of instructions given told the jury that the rights of the public and of a railroad company at a public crossing are mutual and reciprocal, and that both must use the highway with due regard for the safety of others; that the train of the railway company has the right of priority in the use of a crossing, provided due and timely warning of its approach is given. Paragraph 15 says that a railroad crossing is a place of danger and that all persons situated as the parties to this suit, are bound to take notice of that fact; that plaintiff, upon approaching the crossing of defendant's track, was bound to use care commensurate with the perils involved and that the law did not require the plaintiff to exercise extraordinary care. Paragraph 16 told the jury that if they believed that on account of the want of ordinary care on the part of defendant, he, plaintiff, found himself suddenly in a condition of imminent peril or danger, the law would not hold him guilty of contributory negligence merely because in that emergency he did not act in the best way to avoid injury.

These instructions seem to state the law as favorably as possible to plaintiff's contention.

The 17th paragraph of the instructions is assailed in

plaintiff's brief. This instruction tells the jury, in substance, that if they believe from the evidence that defendant gave proper signals of the approach of its train and stationed a man on the rear car to warn plaintiff of his approaching danger, and that plaintiff was so warned while in a place of safety, then the defendant would not be liable for the injury received. We see no reason why this instruction should not have been given. It simply submitted to the jury defendant's theory of the accident as outlined in its proof.

The next alleged error called to our attention is the action of the trial court in overruling plaintiff's motion and supplemental motion for a new trial, the supplemental motion being based on newly discovered evidence.

In determining the merits of this contention it is well to keep in mind the conflicting theories of plaintiff and defendant as to the facts and circumstances surrounding the accident. Plaintiff contended that when he first saw the train, some distance from the track, it was standing still. He also contended that there was no employee of defendant on the hind car of the train to warn of the approach of the train, and that no signals were given on its approach to the crossing. The defendant on the contrary contended that the train was not standing still, but was slowly backing and that the bell was being continuously rung, that the whistle was sounded on nearing the crossing and that there was a switchman on the back end of the car hallooing as loud as he could and particularly warning the plaintiff against attempting to cross the track. The newly discovered evidence relied upon in support of the supplemental motion consists of an affidavit of a witness who states that within a day or two after the accident, he had a conversation with defendant's engineer on his engine and he told him that the engine and train of cars which collided with plaintiff were standing on a track a short distance from the crossing and that he, the engineer, started the train backing toward the crossing and forgot to give any signal and that there was no brakeman on the

train. This affidavit is contradicted by counter-affidavits of the engineer and fireman, who positively deny any such conversation, and affirm the former testimony given by them that the train was in motion all the time. Another affidavit was filed of a conductor of the Burlington & M. R. R. Co. who stated that he was in a coal office about 100 feet from the crossing at the time of the accident and was looking out of a window when the accident occurred; that he heard no signals sounded and saw no one on the hind car of the train at the time the accident occurred. Two affidavits were also filed stating that after the trial two of defendant's witnesses had told affiants that they had received money, for the testimony which they gave on the trial, from the defendant. Affidavits of diligence in procuring this testimony were also filed by plaintiff and his attorneys. Numerous counter-affidavits were filed denying each of the allegations of this newly discovered evidence. It is plain from an examination of this evidence that it is all either cumulative or impeaching in its character. There is no strong probability that this testimony would change the result, if a new trial were granted. A sound discretion is reposed in the trial court in refusing or granting a new trial on account of newly discovered evidence which is cumulative in its character, and this court has said in *Davis v. State*, 51 Neb. 301:

"The denial of a motion for a new trial upon the ground of newly discovered evidence, will not be held erroneous when it appears that the newly discovered evidence is cumulative and would not probably change the result already reached."

Finding no reversible error in the trial of this cause, we recommend that the judgment of the district court be affirmed.

AMES and HASTINGS, CC., concur.

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

AFFIRMED.

WILLIAM J. JONES ET AL. V. DUFF GRAIN COMPANY.

FILED MAY 20, 1903. No. 13,065.

1. **Attorney's Lien**: FRAUD. Where a judgment to which an attorney's lien has attached has been compromised between plaintiff and defendant in fraud of the attorney's rights, such settlement and compromise may be set aside at the suit of the attorney defrauded.
2. ———: INTERVENTION. The proper method of procedure in such case is for the attorney to file an intervening petition and have the amount and extent of his lien judicially determined before any other steps are taken for its enforcement.
3. ———: EXECUTION. *Held*, not error for the trial court to overrule a motion for an execution to enforce the collection of an attorney's lien before the nature and extent of such lien had been judicially determined.

ERROR to the district court for Cass county: PAUL JESSEN, DISTRICT JUDGE. *Affirmed.*

James L. Caldwell and *Benjamin F. Johnson*, for plaintiffs in error.

Samuel M. Chapman, Robert Ryan and *John C. Watson, contra.*

OLDHAM, C.

Plaintiffs in error in this cause of action procured a judgment for $750 as attorneys at law for William J. Jones, against the Duff Grain Company, defendant in error, in the district court for Cass county. Subsequently, a supersedeas bond was filed and error proceedings were instituted in the supreme court to reverse said judgment by the defendant company. At the time of the institution of the original suit plaintiffs served the following notice of attorneys' lien on the company:

"You are hereby notified that we have and claim an attorneys' lien, for services rendered plaintiff by us as attorneys in above case to the extent and amount of one-half of the amount recovered by plaintiff against you on the cause of action set forth in his petition filed in above en-

titled case and in above entitled court, or for one-half of any amount paid by you in settlement of plaintiff's claim against you in his cause of action set forth in his petition filed against you as aforesaid, and you are hereby cautioned and warned to make no settlement with plaintiff herein to the prejudice of our said attorneys' lien."

This notice was served by the sheriff and filed with the papers in the case. During the pendency of the error proceedings, defendant's attorney notified one of plaintiffs that Jones and the defendant were willing to compromise the claim on payment of $350 and costs of suit by defendant. This offer was refused by plaintiffs, who stated that they were unwilling to settle their claim for less than one-half of the judgment. Counsel for defendant, notwithstanding this refusal, proceeded to enter into a stipulation with Jones, the plaintiff in the former proceeding, for settlement of the claim on the payment of $175 to Jones and $175 to plaintiffs as their attorneys' fees and payment of costs. This stipulation was entered into by Jones and defendant, and the petition in error was accordingly dismissed in the supreme court. After the stipulation was entered into the defendant through its attorneys tendered plaintiffs the sum of $175, which they refused to accept and thereupon they procured a certificate from the clerk of the supreme court and filed a motion asking that an execution be issued on the judgment in the name of Jones, the plaintiff, for the benefit of plaintiffs for the amount of $375. Affidavits setting up the facts above recited were filed in support of this motion, and the motion was overruled and proceedings in error were accordingly instituted for the purpose of reversing this judgment.

The question which we are to determine in this case is, whether or not the district court erred in overruling plaintiffs' motion for an execution on the judgment formerly rendered by the district court in favor of plaintiffs' client and against the company. Conceding for the purpose of determining this question that the settlement between the defendant and Jones was made without the consent or

knowledge of plaintiff's attorneys and that defendant was in possession of the notice of attorneys' lien, above set forth, was it the duty of the trial court on motion to issue an execution on the judgment for the amount claimed by plaintiff's attorneys as their lien?

While there is much conflict as to the proper method of procedure to enforce the collection of a special or charging attorneys' lien where a cause has been compromised by plaintiff and defendant, after judgment, yet much of this apparent conflict arises from a construction of the various statutes providing for the lien. So that we are necessarily compelled to favor such method of procedure as would be best calculated to afford the protection provided by our own statute. In the first place the question, as to whether the execution when awarded should issue in the name of the original plaintiff for the benefit of the attorneys, or whether it should issue in the name of the attorneys, is a question on which there is a conflict of authority, but one on which the conflict is merely as to the form and not to the substance of the right sought to be enforced. If plaintiffs were entitled to collect the lien by summary process, we do not see how it would materially affect the defendant, whether the execution was issued in the name of the original plaintiff in the cause of action for the benefit of the attorneys, or whether it was issued directly in the name of the attorneys themselves for their own benefit. A controversy as to this matter is as to shadows and not to substances.

The object of special or charging liens is to protect the claim of the attorney by equitable interference of the court and to secure to him payment of just charges out of the fruits of his own labor. In order to reach this end it seems to us that the first thing necessary is to establish judicially the amount, nature and extent of the lien to the end that the attorney may be protected for what is justly due him and that the client and the judgment debtor may also be protected from extortionate and unconscionable charges which might be exacted, if liens of this nature

could in the first instance be collected by summary process. In *Ackerman v. Ackerman,* 14 Abb. Pr. 229, it is held that unless the proceeds have come into the attorney's hands, he must invoke the equitable aid of the court to ascertain the existence and amount of the lien before any steps can be taken to enforce it. In *Fox v. Fox,* 24 How. Pr. 409, the method prescribed as a proper course to be adopted (when there is a controversy as to what the contract is or in regard to the amount payable under it) is for the attorney to proceed by an action to determine the amount or extent of the lien, and have a decree declaring the judgment subject to the lien and awarding execution on the judgment for the amount due. It is said in this decision that under this proceeding "issue may be framed" and a trial had in a way to secure the rights of all parties.

That the settlement and discharge of a judgment, when made in bad faith between plaintiff and defendant and for the purpose of defrauding the attorney in the collection of his lien, may be set aside on application of such attorney, is uniformly established. But it seems to stand on sound principles that when such fraudulent settlement is set aside the attorney claiming the lien should file an intervening petition and establish the amount of his lien, before asking an execution either in his own name or in the name of the judgment plaintiff for its satisfaction. In *Reynolds v. Reynolds,* 10 Neb. 574, 580, this court said:

"When it appears that the attorney, to secure the payment of fees due him for services performed in the preparation and prosecution of the case, has taken the statutory steps necessary to perfect his lien upon money due from the defendant, and which is the subject of the litigation, he has such an interest therein as entitles him to have the case go forward to a final determination; and to the end of protecting that interest and enforcing payment may, if necessary, be admitted as a party plaintiff. In such a proceeding it would be proper practice for the attorney, on being admitted as a party, to file a petition in his own name against both plaintiff and defendant, setting forth the par-

ticulars of his claim and lien so that, if disputed by them, answers could be filed, and the issues made up, as in other cases."

This case has been cited with approval in *Oliver v. Sheeley*, 11 Neb. 521, and *Elliott v. Atkins*, 26 Neb. 408, and it prescribes a proper procedure for the enforcement of a lien when the judgment has been satisfied or is attempted to be satisfied by a collusive agreement between plaintiff and defendant in fraud of an attorney's rights. If we are correct as to the proper method of procedure it follows that the lower court did not err in overruling the motion to have the execution issued before the amount and extent of the lien had been judicially determined.

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

AMES and HASTINGS, CC., concur.

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

AFFIRMED.

RICHARD S. HORTON V. HENRY ROHLFF ET AL.

FILED MAY 20, 1903. No. 12,762.

1. **Contract:** CONSTRUCTION. If a contract admits of more than one construction, one of which will render it inefficacious or nullify it, that construction should be adopted which will carry it into effect.
2. ———: PRESUMPTION. It will not be presumed that the parties to a contract intended to provide for the doing of an illegal act, or one which would render their agreement void.
3. **Demurrer Ore Tenus.** When it does not clearly appear on the face of the petition that the contract declared on is void because of illegality, it is error to sustain an objection to the introduction of plaintiff's evidence on that ground.
4. **Contract:** DEFENSE OF ILLEGALITY. In such a case where the defense relied on is the illegality of the contract, it is necessary to plead and prove such defense.

ERROR to the district court for Douglas county: JACOB FAWCETT, DISTRICT JUDGE. *Reversed.*

Richard S. Horton and *T. W. Blackburn,* for plaintiff in error.

George W. Shields and *A. W. Gross, contra.*

BARNES, C.

The Greater America Exposition was incorporated under the laws of this state for the avowed purpose of conducting an exposition in the city of Omaha during the season of 1899, for the purpose of exhibiting to the public the products and resources of the transmississippi country; the manners, customs and modes of life of its inhabitants and various other features of interest pertaining to the manners, customs, habits of life and amusements of other nations and people; all to be conducted for the instruction and amusement of the people of this and other countries generally, and for gain on the part of the corporation. On the 24th day of May, 1899, said corporation entered into a contract with one Henry Rohlff, from which we quote as follows:

"This contract made and entered into this 24th day of May, A. D. 1899, by and between the Greater America Exposition, a corporation of Omaha, Nebraska, party of the first part, and Henry Rohlff, of Omaha, party of the second part, Witnesseth:

"That said party of the first part for and in consideration of the sum of eight hundred ($800) dollars and the covenants and agreements hereinafter enumerated to be kept and performed, subject to the rules and regulations of the Greater America Exposition, by said party of the second part, agrees with said party of the second part, as follows, to wit: * * *

"That it will and it does hereby grant to the said party of the second part the concession, privilege or right to in-

stall, maintain and operate upon the said above designated tract or parcel of land a German village, to be thoroughly representative of the buildings, life, manners and customs of villages in Germany, and to exhibit and sell therein articles of merchandise of German manufacture or origin; also the right to operate therein a restaurant and therein to sell and serve beer and light table wines (to be served at tables only), cigars, tobacco and cigarettes; also the right to operate a bowling alley; also the right to entertain his patrons with instrumental music furnished by a band or orchestra to consist of not more than ten pieces. * * *

"Said party of the second part, for and in consideration of the promise and agreements hereinbefore set forth, does hereby accept the aforesaid concession, privilege or right and agrees that he will operate the same in a thoroughly first-class manner, to the best advantage, free from all objectionable features, continuously from the day said exposition opens until the close thereof and during such hours of each day as said exposition is open to the public.

"That immediately upon the execution of this contract he will proceed to place the buildings now standing upon said above designated tract or parcel of land in a condition of thoroughly first-class repair, refitting, repainting and refurnishing same subject to the approval of the party of the first part, and that same will be completed and everything herein provided for installed and ready for operation as soon as possible, with the exercise of reasonable dispatch.

"That he will install, maintain and operate within said German village a typical German restaurant or cafe and sell and serve therein beer and light table wines (to be served at tables only), cigars, tobacco and cigarettes. That all waiters and waitresses shall be neatly attired in typical German costumes. * * *

"That he will procure from the proper authorities, at his own expense, a license for the sale of malt, spirituous and vinous liquors upon the aforesaid premises.

"That said consideration of eight hundred ($800) dollars shall be paid upon the execution and delivery of the con-

tract, and that, as further compensation for the rights and privileges herein conferred, he will pay to said party of the first part fifteen (15) *per centum* of his daily gross receipts from all sources arising from the operation of this concession during the continuance of said exposition."

In order to secure the faithful performance of the contract, Rohlff gave a bond to the corporation in the sum of $2,000, signed by himself and George E. Ring, James Schneiderwind and P. C. Schroeder as sureties. Rohlff conducted a German village, as provided by the terms of the contract, but failed to pay the corporation fifteen *per centum* of all of the gross receipts of the business, and it is claimed that there was a balance due from him of $647.56 on that account. The Greater America Exposition was duly adjudged a bankrupt, and Richard S. Horton, plaintiff herein, was appointed its trustee in bankruptcy. He thereupon commenced this suit in the district court for Douglas county against Rohlff and his bondsmen to recover said balance alleged to be due to the corporation. The petition, among other things, set out the contract in full. The defendant answered, setting up several defenses, among which was the defense of the illegality of the contract on account of the agreement contained therein to sell beer and wine (intoxicating drinks), on Sunday. There was a reply filed in the form of a general denial. When the cause came on for trial, a jury was impaneled and the trial commenced. The defendants objected to the introduction of any evidence on the part of the plaintiff, because it appeared on the face of the petition that the contract sued on was illegal and void, and that the petition, for that reason, did not state facts sufficient to constitute a cause of action. The objection was sustained, the court directed a verdict for the defendants, which was duly returned, judgment was rendered on the verdict and plaintiff prosecutes error.

It is agreed by both parties that the legality of the contract is the only question involved herein; and the plaintiff concedes that if the contract provides for the sale of beer and light wines (intoxicating liquors) on Sunday it is void,

and no action can be founded on it. This question must be determined by the language of the contract itself, without any extrinsic aid, and the language used therein will be given its usual and ordinary meaning. It is claimed by the plaintiff that we must presume that the defendant Rohlff would not violate the law by selling intoxicating liquor on Sunday, and that at the time the agreement was made the parties contemplated the making of a legal, and not an illegal, contract; while it is strenuously urged by counsel for the defendants that it will be presumed that a typical German village can not be conducted without the sale of beer; that such sales must necessarily be made on Sunday, and that therefore the contract is void.

We will not presume that the parties, when they entered into the contract, contemplated a violation of law. On a demurrer *ore tenus,* unless by the language of the agreement itself, construed without intrinsic aid, such intention is clearly shown, the contract will be considered valid. It does not appear on the face of the petition that at the time the contract was made it had been determined that the exposition would be open on Sundays, and the word "continuously" relied on by the defendants to render the contract illegal, may reasonably be held to apply only to such days as the exposition would be open to the public; which, in absence of any allegation to the contrary, will be presumed to be week days only. The rule is that the contract should be supported if possible, rather than defeated.

"If a contract admits of more than one construction, one of which will render it inefficacious or nullify it, that construction should be adopted which will carry it into effect. For there is no presumption against the validity of contracts." Nor can we presume that the parties sit down to make a contract providing for a particular event, when that very event would make it void. 2 Parsons, Contracts (9th ed.), 504, note; *Jackson v. Blodget,* 16 Johns. (N. Y.) 172; *Rogers v. Eagle Ins. Co. of New York,* 9 Wend. (N. Y.) 611; *Barrett v. French,* 1 Conn. 354; *Bryan v. Bradley,* 16 Conn. 474.

The trial court was evidently misled by his general knowledge of what had transpired, or by the allegations of the answer in which the defense of the illegality of the contract was pleaded.

A careful examination of the record convinces us that neither upon the face of the petition, nor by the evidence offered, does it clearly and affirmatively appear that the contract was illegal. We therefore hold that the evidence should have been received and the cause tried upon the issues joined.

For the foregoing reasons, we recommend that the judgment of the trial court be reversed and the cause remanded for further proceedings.

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

REVERSED.

THE STATE OF NEBRASKA, EX REL. WILLIAM R. DAVIS ET AL., V. BOARD OF COUNTY COMMISSIONERS OF CASS COUNTY, NEBRASKA, ET AL.

FILED MAY 20, 1903. No. 13,105.

1. **Adjunct School District Act.** Chapter 63 of the laws of 1901, commonly known as the adjunct school district act, provides no method for submitting the question of creating an adjunct district a second time, and no officer or person is thereby granted authority to submit the question or give notice thereof.
2. **Creation of Adjunct School District.** To create an adjunct school district, it requires the concerted action of all of the common school districts embraced therein. And the question must be submitted to, and voted on, by all of such districts.
3. ———: VOID ELECTION. Where the question was submitted to only a part of such school districts, and in many of the districts embraced in the proposed adjunct district no vote was taken on the proposition, the election is void and no adjunct district is created thereby.
4. ———: TAX LEVY: MANDAMUS. In such a case, a writ of mandamus to compel the county board to levy a tax to carry on the business of an adjunct school district must be denied.

ERROR to the district court for Cass county: PAUL JESSEN, DISTRICT JUDGE. *Affirmed.*

Cary S. Polk, for plaintiffs in error.

Jesse L. Root, contra.

BARNES, C.

The relators commenced this action in the district court for Cass county, for the purpose of procuring a peremptory writ of mandamus, against the board of county commissioners and the county clerk of said county, requiring the commissioners to levy a tax of two mills on the dollar valuation of all taxable property in the territory comprising ninety-five school districts situated therein, and to compel the county clerk to extend such tax upon the tax list of said county for the year 1902, for the purpose of meeting the expenses of carrying on the business of an adjunct school district, which it was alleged in the petition had been created under the provisions of chapter 63 of the laws of 1901, which we will designate as the "Adjunct School District Act," comprising all of the school districts in said county, and the territory embraced therein, except five.

It appears from the record that Cass county is divided for school purposes into one hundred school districts; that in ninety-five of these districts the electors are entitled to vote on the question of establishing an adjunct district, but that districts numbered 1, 22, 32, 36 and 95 are high school districts, and can form no part of such adjunct district; that the relators are resident electors of certain school districts in said county, and each of them has a child, who has completed the course of study in the school of his respective school district and whose education can not profitably be carried further in the public schools of the district of his residence, and who is entitled to pursue the course of study provided by law in the high schools of said county; that the districts in which the relators reside are

those entitled to vote on the question of creating an adjunct school district; that four of the five high school districts in said county have been designated by the state superintendent as accredited schools, and have voted to open their said schools for the reception of pupils from an adjunct district; that after the approval of the act in question, which passed with the emergency clause and took effect immediately, the question of establishing an adjunct district in Cass county under the provisions of said act was submitted to the electors of the various school districts in said county to vote thereon at their annual meetings held on June 24, 1901, and that said proposition failed to carry. It further appears that more than fifteen days prior to the annual school meetings held on June 30, 1902, the county superintendent of said county sent a circular letter to the moderators of each of the ninety-five districts above mentioned in which he requested the moderator to submit the question of creating an adjunct school district to the voters at the coming annual meeting; that he also furnished them with blanks for the purpose of returning the vote cast upon that proposition to him. It further appears that this was the only notice or proclamation of any kind relating to the submission of the question ever made by the county superintendent, or any other person or officer, whomsoever. It also appears that each of the ninety-five directors made out and posted a notice of the annual school district meeting in his district, as follows:

"NOTICE.

"For the Annual School District Meeting.

"The annual meeting of the legal voters of school district No. —— of Cass county, Nebraska, will be held at the schoolhouse on Monday the 30th day of June, 1902, at 8 o'clock P. M. for the purpose of electing a director for said district, and for the transaction of such other business as may lawfully come before it.

"_____, *Director.*"

This was the only notice ever published or posted relat-

ing to the annual school meeting in the several districts of the county for the year 1902. It further appears that in seventy-five of the ninety-five school districts above mentioned, the moderators at the annual meeting caused the question of creating an adjunct school district to be submitted to the voters then and there assembled; that in sixty of the districts, the vote taken on that proposition was canvassed and returned to the county superintendent within ten days, which return showed that 315 votes had been cast for an adjunct district and 287 against the proposition; that fifteen districts failed to make return to the county superintendent within ten days, and their votes were not considered, although it was ascertained that in those districts forty-two votes had been cast for and fifty-nine against the proposition. No account whatever was taken of the other twenty districts in which the question does not apear to have been submitted; that in three of these districts, alone, there were eighty-four voters entitled to cast their votes on the proposition, which was a greater number than would be necessary to change the result of the election, as declared by the county superintendent. It further appears that within the ninety-five school districts, entitled to vote on the proposition, there were more than 2,000 legal voters, and yet only 602 votes, cast upon the proposition, were considered by the county superintendent at the time he declared the question carried. It further appeared that in several of the school districts the voters at the annual school meeting had voted to levy a tax of 25 mills on the dollar for school purposes, the same being the largest amount which they could lawfully levy. It was also shown that the respondents, the county commissioners, had made no estimate at the time of their January meeting, at which they were required to make an estimate of the necessary expenses for the ensuing fiscal year, for the purpose of meeting the expense of an adjunct school district, and that the board had levied, for the year 1902, the full amount of county tax which they were entitled to levy under the constitution and laws of this state.

The cause was submitted to the court on the petition and the facts above stated, who found generally for the respondents, denied the writ and dismissed the action. From that judgment the relators prosecute error to this court.

The first question which confronts us is, was the proposition to create an adjunct school district lawfully submitted to the electors of all of the school districts comprising the territory sought to be included in such district? We think not. Waiving the question of the validity of the act, it appears from its terms that it was self-executing as to the submission of the question to the voters at the first annual school meeting after it went into effect. Section 4 reads in part as follows:

"For the purpose of meeting the expenses contemplated by this act, all of the territory of each county of this state not included in any high school district may be constituted as an independent taxing district known as the adjunct district of such county; the common school districts or parts of districts included in such adjunct district shall be the voting precincts of such adjunct districts; it is hereby made the duty of the moderator of each common school district in this state to submit the question of the establishment of an adjunct district in the county in which it is located to a vote of the legal voters of his district at the annual meeting of said district next occurring after the taking effect of this act, and to certify the result of such vote to the county superintendent."

It appears that these provisions of the law were understood by the moderators and electors of the school districts of the county, and the question was properly submitted to the voters at the annual meeting in 1901; that great interest was taken therein; that there was a large attendance of the electors at that meeting and that the proposition failed to carry. This self-executing provision of the law, had then served its purpose and could not be held to require another submission of the question. It is further provided in the act that:

"If the vote provided for in this section in any county

shall be against such adjunct district the question may again be submitted at any subsequent annual meeting of the common school districts embraced in said proposed adjunct district, and any adjunct district may be discontinued by a majority vote of its electors taken in the manner above provided for its establishment."

This part of the law is simply permissive, and is in no sense mandatory. If the question be again submitted, it is necessary that there should be some officer authorized to determine that fact and give notice thereof to the voters of the several school districts to be affected thereby. The self-executing provisions of the law contain no authority and provide no method for a second submission of the question, and the only provision therefor is the one above quoted. The facts in this case clearly show the necessity of having some officer or person designated by the act itself who has the power and is charged with the duty of submitting the question and giving the proper notice thereof, so that there may be a concerted action of all of the school districts interested or affected by the creation of an adjunct district. No such officer or person is designated by the act. The court can not supply this deficiency of the law. To do so would be to engage in judicial legislation. In case the county superintendent, or any other officer or person should assume to submit the question and give the notice of submission, such action would be of no force or effect whatever. As the law stands there is no way of procuring concerted action. It simply provides that the question may be again submitted to the common school districts embraced in the proposed adjunct district. This must be construed to mean all of the districts, and it can not be said that a submission to any number less than all of them is a valid submission or will result in a valid election.

In the case at bar, it appears that a large number of the school districts embraced in the proposed adjunct district took no part in the election, and the question was not submitted to the voters of such districts at their annual school

meeting. If the proposition in question be held to have been adopted by this semblance of an election, it might, with equal reason, be declared to have been carried or adopted by the majority vote of a single district. It was the obvious purpose and intent, and is clearly the letter of the act, that all of the districts affected by the creation of an adjunct district must participate in the election in order to be bound by the result. It appearing on the face of the petition that the question was not so submitted, and that a large number of such districts did not vote on the question at all, we are constrained to hold that there was no proper submission of the question; that the election described in the petition was illegal and void, and that no adjunct school district was created thereby.

It follows that the finding of the trial court in favor of the respondents is sustained by the record, and the judgment denying the writ was right. We therefore recommend that the judgment of the district court be affirmed.

ALBERT and GLANVILLE, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court denying the peremptory writ of mandamus in this case is

AFFIRMED.

CLAY COUNTY, NEBRASKA, v. ADAMS COUNTY, NEBRASKA.

FILED MAY 20, 1903. No. 12,833.

1. **Legal Settlement of Insane Person.** The legal setlement of an insane person, within the meaning of section 26, chapter 40, Compiled Statutes, is the county which would be primarily liable for the support of such person, if a pauper.

2. **Change of Residence.** If a person, neither insane nor a pauper, abandons his residence in one county and removes with his family to another, and settles in the latter with the intention of making it his home, and thereafter becomes insane, the latter county can not recover of the former for expenses incurred on behalf of such

insane person, unless it appears that he became a public charge, as an insane person, less than thirty days after abandoning his residence in the former county.

ERROR to the district court for Adams county: ED L. ADAMS, DISTRICT JUDGE. *Affirmed.*

Ambrose E. Epperson, for plaintiff in error.

John Snider, contra.

ALBERT, C.

For a considerable time previous to June, 1901, a married man resided with his family in Adams county. In that month, he moved to Clay county, taking with him his family and household goods, where he rented a house and went to housekeeping with his family, with the intention of making that county his home.

On the 23d day of August, 1901, upon inquiry duly instituted, the man was found insane and a fit subject for treatment in the hospital for the insane, by the commissioners of insanity of Clay county, and a warrant issued accordingly, in pursuance of which he was placed in such hospital for treatment. Clay county then presented a bill to Adams county for the cost and expenses incurred in the proceedings above mentioned, claiming that the man had a legal settlement in the latter county when such costs and expenses were incurred. From an order of the county board of Adams county rejecting the claim, Clay county appealed to the district court. The district court found for the defendant and gave judgment accordingly. The plaintiff brings error.

The plaintiff's claim is based on section 26, chapter 40, Compiled Statutes (Annotated Statutes, 9615), which is as follows:

"Expenses incurred as herein provided, by one county, on account of an insane person whose legal settlement is in another county of the state, shall be refunded, with lawful interest thereon, by the county of such settlement; and

shall be presented to the county commissioners of the county sought to be charged, which shall be allowed and paid the same as other claims."

The only question in this case is, whether the patient had a legal settlement in the defendant county within the meaning of the section just quoted, when the expenses in question were incurred by the plaintiff, and the solution of that question depends on the meaning of the term "settlement" as used in that section.

The use of the word in the common law, to express the relation of a person to a place or locality, is confined almost exclusively to that portion which relates to the dispensation of public charity, for the support of those who, in the language of our own laws for the support of such person, "shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy or other unavoidable cause," and who are commonly called paupers; it is thus most frequently employed in the reported cases and the statutes of the several states. While pauperism and insanity are by no means synonymous terms, both classes of unfortunates are, to some extent, public charges and recipients of public bounty. From these considerations, we think it may be fairly inferred that the legislature used the term "settlement," in the section under consideration, in the sense in which it is used in the common law relative to the support of the poor at public expense. The term, as there used, is defined by Webster as "the legal settlement or establishment of a person, in a particular town or parish, which entitled him to maintenance, if a pauper, and subjects the town or parish to his support." In *Inhabitants of Warren v. Inhabitants of Thomaston*, 43 Me. 406, 69 Am. Dec. 69, the court say:

"The place of one's settlement is a place where such person has a legal right to support as a pauper."

The foregoing definitions are hardly accurate because, in both, the right of a pauper to temporary support or relief, from a place other than that of his settlement, if actually present in such other place, is overlooked. In such case

the place of his settlement is liable to the place furnishing such support or relief. Section 13, chapter 67, Compiled Statutes (Annotated Statutes, 9362). It would be more accurate to say that one's settlement is the political subdivision primarily liable for his support as a pauper.

The inquiry narrows down to this question: Which of the two counties would have been primarily liable for his support, as a pauper, had he been one when he became insane? Section 11, chapter 67, Compiled Statutes (Annotated Statutes, 9360), is as follows:

"Any person becoming chargeable as a pauper, in this state, shall be chargeable as such pauper in the county in which he or she resided at the commencement of the thirty days immediately preceding such person becoming so chargeable."

The person in question abandoned his residence in Adams county, and moved with his family and effects to Clay county, in June, 1901, with the intention of making the latter county his home, and resided there continuously until the inquiry as to his sanity was instituted by the commissioners of insanity of the latter county, in the latter part of August, of that year. Whether he was sane and capable of forming an intention to change his residence when he left Adams county was one of the questions submitted to the trial court on conflicting evidence, and the trial court having resolved that question in favor of the defendant, it stands as one of the established facts of this case, that he was sane at that time. We need not inquire in this case the precise stage of insanity at which the afflicted person becomes a public charge, because the evidence is sufficient to warrant a finding that such person did not become a public charge until the proceedings were instituted before the commissioners of insanity, which was some two months after he had taken up his residence in Clay county. He was not a pauper, hence, he was not only competent, but free to abandon his former residence and select a new one. It is clear, therefore, that under the provisions of section 11, *supra,* had he become a pauper

at the time such inquiry was instituted, Clay county would have been primarily liable for his support as such. It follows, that at the time such proceedings were instituted and expenses incurred, his legal settlement was in Clay county and not in the defendant county, and that no recovery can be had in this case.

The judgment of the district court is right, and we recommend that it be affirmed.

BARNES and GLANVILLE, CC., concur.

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

AFFIRMED.

FRANK ZNAMANACEK V. FRANK JELINEK.

FILED MAY 20, 1903. No. 12,855.

1. **Vendor and Vendee: SERVITUDES.** Where the owner of two adjoining tracts of land sells one of them, the purchaser takes the tract sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the tract which the vendor retains.

2. ———: ———. Where the owner of two adjoining tracts of land constructs a dam of a permanent character across a stream on one tract, which causes the water to overflow a portion of the other tract; upon a sale of such other tract to one having knowledge of the existence of such dam and its character, in the absence of evidence of a contrary intent, there arises an implied contract that the mutual benefits and servitudes, as regards such dam, shall remain *in statu quo*.

3. **Evidence.** Evidence examined, and *held*, not sufficient to show an intention to the contrary.

ERROR to the district court for Saline county: GEORGE W. STUBBS, DISTRICT JUDGE. *Affirmed.*

Fayette I. Foss, B. V. Kohout and *J. A. Wild*, for plaintiff in error.

A. R. Scott and *George H. Hastings, contra.*

ALBERT, C.

This is an action for damages, alleged to have been sustained by the plaintiff on account of a dam constructed by the defendant across a stream of water, whereby the water was thrown back on the lands of the plaintiff. A trial to the court, without a jury, resulted in a general finding for the defendant and judgment was given accordingly. The plaintiff brings error.

It is conclusively established that in 1882, the defendant was the owner of two quarter sections of land, adjoining each other, one of which we shall call the east, the other, the west quarter. A small stream of water flowed from the west quarter through the east quarter. In that year the defendant constructed a dam across the stream on the east quarter, which threw the water back upon a portion of the west quarter, and, with the exception of a short time when it was destroyed by flood, has ever since maintained the dam at that place. In 1891, he conveyed the west quarter to the plaintiff by warranty deed. At the time of the conveyance, the dam was in existence and its existence and condition were known to the plaintiff. The evidence is sufficient to warrant a finding that the dam was a permanent structure; that the parties so regarded it at the time of the conveyance is clearly shown by the fact that its existence and probable effect on the land was discussed to some extent by them at that time. Whether the dam, since it was first constructed, had always been maintained at the same height that it was at the time the alleged damages were sustained, was one of the issues submitted to the trial court upon conflicting evidence. The trial court by its general finding resolved that question in favor of the defendant. The findings in that regard are amply sustained by the evidence; so it stands as one of the established facts in the case that the dam at no time has been maintained at a greater height than when first constructed, when the conveyance, hereinbefore mentioned, was made to the plaintiff.

The foregoing facts, we think, bring the case within the rule announced in *Lampman v. Milks,* 21 N. Y. 505, and approved by this court in *Fremont, E. & M. V. R. Co. v. Gayton,* 67 Neb. 263, which is as follows:

"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."

The plaintiff contends that the defendant could have no easement in the west quarter while both quarters belonged to him, because one can not have an easement in his own land; that he did not acquire an easement by prescription after he had parted with the land, because this action was brought within less than ten years from the date of the conveyance of the west quarter to the plaintiff, and that there is no evidence of any express or implied grant, consequently, the easement is not established.

It has been held by this court, that a parol grant of an easement will be upheld, where there has been a valid consideration and the grant is certain in its terms, and there has been such a performance on the part of the grantee as would, in the case of a contract for the sale of the fee, take the case out of the statute of frauds. *Gilmore v. Armstrong,* 48 Neb. 92. While that was what is technically called a suit in equity, yet as equity and law are administered by the same courts in this state, there is no reason why the defendant, in an action of this character, may not interpose as an equitable defense a parol grant of an easement. A parol grant of an easement, like any other contract, may rest in implication, as in *Lampman v. Milks, supra,* where the owner of land, across which a stream flowed, diverted the stream so as to relieve a portion of the land which had formerly been overflowed, and it was held, that the parties, under such circumstances, are presumed to contract with reference to the condition of the property at the time of the conveyance. In other words, under

such circumstances, the law implies a contract, mutually binding on the parties, that the mutual privileges and servitudes of the two tenements, as then obviously existing, shall remain *in statu quo*. Such agreement can not be said to be without consideration, because it is a part of the principal contract, evidenced by the conveyance, and is relieved of all uncertainty by the obvious character of the easement.

But the plaintiff contends that the presumption, arising in favor of the existence of the easement, is rebutted by the testimony in this case. The testimony of plaintiff on this point is as follows:

Q. When you bought this land in 1891, you went down to see the dam, did you not?

A. No, I did not. We talked about the dam.

Q. What did you talk about the dam?

A. I talked about the dam. Jelinek tried to sell me the land. I did not talk much with him about it, only he told me there was a dam there.

Q. Don't you recall the fact that Jelinek said that he wanted to take out the pond?

A. I spoke about the water on the land. I said I did not like the water stand on the land. He said he would like to buy it. I tell him if he buy it of me he could keep it.

Q. That was at the time he made the deed?

A. Yes, sir, but before, when I was ready to buy it. * * *

Q. Don't you remember of saying to Jelinek when this deed was made when he said I will measure out the overflow, will not make you a deed for that, and will take that out of the purchase price, and you said I don't want it that way; it would be like a coat that you might have made with a piece cut out of the back?

A. Yes, sir.

Defendant testified:

Q. Was this dam talked over between you and Znamanacek at or before you sold him the land?

A. Yes, sir.

Q. What was said?

A. Well he say he would buy that piece of land; he see that water there; he say he wants that water there, that is the way he put it. I say I measure it to see how much it flood over, as I did not want him to pay me for it, he say if he buy that piece of land with that piece out it would be like buying a coat with a piece cut out of the back of it.

Q. When you had this talk with Znamanacek about buying back a portion of that property he said he did not want to cut any of it out?

A. No, he did not want to cut out any.

Q. When you sold it to him he paid you for the whole of it, did he not?

A. I told him I did not damage the land any. He said he want that whole piece of land.

Q. He wanted the whole of it?

A. Yes, sir, and he wanted that water too.

The testimony of the defendant is corroborated by that of his wife. This evidence, instead of rebutting the presumption, seems to us to strengthen it. The testimony of the plaintiff is not quite clear, but that of the defendant, corroborated by that of his wife, shows clearly that the parties, at the time of the conveyance, understood that the dam was a permanent structure, and that it would be maintained in the future. We think the case falls squarely within the rule announced in the case hereinbefore cited. It follows, therefore, that the judgment of the district court is right, and we recommend that it be affirmed.

BARNES and GLANVILLE, CC., concur.

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

AFFIRMED.

THE GERMAN NATIONAL BANK OF BEATRICE, NEBRASKA, V. BEATRICE RAPID TRANSIT AND POWER COMPANY ET AL.

FILED MAY 20, 1903. No. 12,781.

Supersedeas Bond: PETITION. In an action on a bond executed after judgment and pending the transfer of the cause to this court by proceedings in error, conditioned that the obligors "shall pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal," a petition, which merely alleges that the original judgment of the lower court was affirmed and is unpaid, fails to state a breach of the bond.

ERROR to the district court for Gage county: CHARLES B. LETTON, DISTRICT JUDGE. *Affirmed.*

George A. Murphy, Ernest O. Kretsinger and *Robert Ryan,* for plaintiff in error.

N. K. Griggs, Alfred Hazlett and *Fulton Jack, contra.*

LOBINGIER, C.

This is an action on two bonds executed subsequently to the rendition of certain judgments against the principal obligor and others. Each bond recited the rendition of the judgment, "from which said judgment the said Beatrice Rapid Transit and Power Company has taken an appeal and writ of error to the supreme court of the state of Nebraska," and each was conditioned as follows:

"Now if the said Beatrice Rapid Transit and Power Company shall prosecute this appeal with effect and without unnecessary delay and shall pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal, then the above obligation to be void, otherwise to remain in full force and effect."

The petition alleged that each judgment "was duly affirmed by the supreme court of Nebraska, and a mandate issued therefrom to the said district court for Gage county," and that said "judgment in all things became absolute and was unpaid." The obligors on both bonds were

the same and the petition prayed recovery against three of them. To this petition a demurrer was first interposed which was overruled, and two of the defendants answered alleging, *inter alia,* that they were sureties only on the bonds and urging again the insufficiency of the petition to state a cause of action. The attack on the petition was again renewed at the trial in the form of an objection to the introduction of evidence, but this was likewise overruled and the trial proceeded, resulting in a verdict and judgment for defendants, from which plaintiff brings this proceeding, alleging error in the instructions and admission of evidence. Able briefs are filed on both sides, and a number of important questions are discussed, some of which we do not find it necessary to determine. It will be noticed that the condition of these bonds is not such as is prescribed by sections 588 and 677 of the code relating to supersedeas and appeal undertakings. Plaintiff contends that these instruments are a substantial compliance with section 588 of the code, which in the case of a money judgment requires an undertaking "that the plaintiff in error will pay the consideration money and costs in case the judgment or final order shall be affirmed in whole or in part." It will be observed that these bonds not only do not require the obligors to pay the consideration money, but do not even bind them to perform the judgment of the district court, but merely "to pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal." Defendants contend that these bonds not being in compliance with the statute were insufficient to stay the execution of the judgment and that there was consequently no consideration for them. This, however, is one of the questions which we deem it unnecessary to decide. For, assuming that these instruments are valid as common law contracts, the petition still fails, in our view, to set forth a liability on the part of defendants. The condition that they should "pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal" would not be broken unless a judgment should be rendered by the appellate

court such as would be satisfied by payment; in other words, a money judgment. In *Hamilton v. Jefferson,* 13 Ohio, 427, the condition, much more specific than in this case, was:

"That if the said Tallmadge shall pay the full amount of the condemnation money, in the supreme court, and costs, in case a decree shall be entered therein in favor of the appellant, said writing obligatory to be void," etc.

In the supreme court a decree was rendered against Tallmadge, finding a certain amount due from him and directing the sale of certain securities to satisfy the same. The court said:

"There is no breach of any condition in the bond of the defendants. Their obligation is to pay the condemnation money and costs, in case a decree should be entered in the supreme court in favor of the appellee.

"In this decree there is no condemnation money. The appellant is condemned to pay nothing. The decree merely finds the amount due and directs the sale of the securities for its discharge."

In the case at bar it is not alleged that any money judgment was "rendered by the court upon dismissal or trial of said appeal." On the contrary, it is merely alleged that the judgment of the district court was affirmed and a mandate issued to it from the supreme court. A judgment of affirmance in this court usually includes a judgment for costs. But under section 623 of the code this is entirely under the control and in the discretion of this court and on demurrer the trial court could not presume that even a judgment for costs had been rendered. In no other respect is a judgment of affirmance a money judgment. It is merely the declaration that another judgment, rendered by another court, is valid, and it is followed, as here, by a mandate directing the other court to carry *its* judgment into effect. By a judgment of affirmance this court does not make the judgment of the district court *its* judgment. No execution can be issued from here and the proceedings to enforce that judgment must be taken in the court in which it was rendered.

In *Smith v. Huesman,* 30 Ohio St. 662, 669, the condition of a bond, given on appeal from the common pleas to the district court, was:

"That if the said Lewis Huesman shall and do well and truly prosecute said appeal to effect, and pay the full amount of the condemnation money in the district court aforesaid, and costs, in case a decree should be entered therein in favor of the said complainants," etc.

The appellate court found that appellees were entitled to one-half of the land scrip in controversy and ordered a reference to a master to be appointed by a common pleas court, and that appellants should pay the amount thus found due. This it will be seen was much more nearly the rendering of a money judgment in the appellate court than is alleged in the case at bar. The court said:

"In the case before us, the district court does not decree that any sum shall be paid; it decrees that the party shall pay what another tribunal may direct him to pay. We do not think that, under the circumstances, the surety can be held liable upon his undertaking."

To the argument that the action of the common pleas court in that case was in fact the action of the district court, it was observed:

"We hardly think that this is a just application of the principle of agency. The court of common pleas acts in conformity with the mandate transmitted to it, and yet we do not suppose that it could render a judgment such as that the district court could issue execution upon it. Clearly they are two distinct tribunals, and it would seem to be an unwarrantable strain upon words to say that a bond given to cover a judgment in one should be held to cover a judgment in the other."

Even where the bond requires appellant to pay the amount of the judgment, "rendered and to be rendered" against him in the appellate court, in case the judgment appealed from should be affirmed, it can not be extended so as to bind him for a judgment subsequently rendered in the trial court pursuant to the directions of the appellate

court. *Rothgerber v. Wonderly,* 66 Ill. 390; *Huntington v. Aurand,* 67 Ill. App. 260.

Indeed, a surety's undertaking to pay a judgment rendered by one court will never be so extended as to include a judgment rendered by another court though in the same proceeding. *Hinckley v. Kreitz,* 58 N. Y. 583; *Nofsinger v. Hartnett,* 84 Mo. 549. And this would result here, were we to hold that defendants' undertaking, to "pay whatever judgment may be rendered by the court upon dismissal or trial of said appeal," requires them to pay the judgment of the district court which was affirmed in that proceeding. In all actions upon instruments of this character, the construction, if doubtful, is resolved in favor of the surety. *Winston and Fenwick v. Rives,* 4 Stew. & P. (Ala.) 269; *Young v. Mason,* 3 Gil. (Ill.) 55; *Post v. Doremus,* 60 N. Y. 371. The liability of sureties such as defendants, is *strictissimi juris* and will not be extended beyond the literal terms of the contract. *Hopewell v. McGrew,* 50 Neb. 789; *Godfrey v. City of Beatrice,* 51 Neb. 272.

If it were conceded that defendants' undertaking, "to prosecute this appeal with effect," was not performed by the perfection of the error proceeding and the prosecution of it to final judgment, it would, nevertheless, remain true that defendants did not undertake to pay the judgment here sought to be enforced against them. Their only undertaking respecting payment was to pay a judgment of the appellate court and there is no averment that any judgment was rendered by that court requiring payment.

Our conclusion is that the petition fails to state a cause of action and that plaintiff could not have been prejudiced by the instructions and rulings complained of, conceding that these were erroneous. 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.

ERNEST KLABUNDE, APPELLANT, V. BYRON REED COMPANY, APPELLEE.*

FILED MAY 20, 1903. No. 12,846.

Dismissal for Want of Equity. Record examined, and the findings of the trial court sustained, and its judgment, dismissing plaintiff's action for want of equity, approved.

APPEAL from the district court for Douglas county: CHARLES T. DICKINSON, DISTRICT JUDGE. *Affirmed.*

W. M. Morning and *George W. Berge,* for appellant.

Hall & McCulloch and *J. J. O'Connor, contra.*

GLANVILLE, C.

This is an appeal from the judgment of the district court for Douglas county dismissing the plaintiff's action upon a general finding for the defendant, with the finding that the claim of the petitioner as set out in his petition is without equity. The petition of the plaintiff covers some fifteen pages and no good purpose would be subserved by copying the same. The bill of exceptions contains 338 pages.

The earnestness of the attorney for the plaintiff, manifested in his brief and oral argument, has helped to give us an interest in the case and rendered its examination less tedious than it might otherwise have been.

The action is one in equity to secure the vacation of a decree of foreclosure, in an action brought by the defendant against the plaintiff and others, affecting lands in Douglas county, and for a new trial in said action. Much is set up in the petition that we need not refer to; suffice it to say that the plaintiff claims that the mortgage sought to be foreclosed was never given by himself; that another mortgage which was found to be a lien prior to

* Rehearing allowed. See opinion, p. 126, *post.*

that of the plaintiff, had been given to the plaintiff for a much greater sum than was due; that he never knew that the action, in which the decree sought to be set aside was rendered, was one for the foreclosure of any mortgage; that he was induced by the defendant in this action to employ the same attorney who filed the petition for the foreclosure, and that he supposed the only issue litigated in that action was between himself and his son August.

It seems that the plaintiff's wife had originally owned the property and had died, devising the same to the son August, with the provision in the will that it should constitute a mortgage in favor of the plaintiff to secure the payment to him, from his son, of the sum of $150 annually, and a home and board, both to continue during life. Trouble had arisen between the plaintiff and his son, and the plaintiff was desirous of securing his rights under the will, or else of breaking the will, and obtaining possession of the land. Soon after the service of summons upon the plaintiff in the foreclosure action, the plaintiff, who is an elderly German, and claims not to be able to speak or understand English, went to the office of the defendant company, with a friend to act as interpreter; the visit resulted in a subsequent visit to the attorney who had filed the petition upon the mortgage. The plaintiff claims that a contract was made between himself and the defendant, through the attorney; that the defendant was to help him in securing relief against his son, and that defendant would eventually take the land and pay him the sum of $2,800, in instalments of $250 each year. That the payments were to be made in some way through the court, and that he was to go to the court house each year and get his money, and that a contract or paper was drawn by the attorney to that effect.

It appears that the attorney drew up an answer for the plaintiff, which was filed in the foreclosure action, admitting the giving of the mortgage sought to be foreclosed and the existence of the prior mortgage which the plaintiff now claims to have been fraudulent, and which answer set up, very properly, the plaintiff's claim of a lien upon the prem-

ises by virtue of the will above mentioned, claiming a lien for $150 a year on account of the money payment directed, and $100 a year for home and board, which had been refused him by his son. Another item in this answer, which will hereafter appear to be significant, is an admission of the existence of a mortgage subject to the one being foreclosed.

We are fully satisfied from the evidence, that this answer is the paper which the plaintiff now seems to believe constitutes a contract, that he should get his money from the court house in sums of $250 each year.

During the examination of the plaintiff as a witness in this action, the following evidence was given in regard to what took place between him and a Mr. Reed, representing the defendant company:

Q. Was there anything said as to how much you should have out of the land?

A. Yes.

Q. What was said?

A. He says (this is the language of the interpreter), Mr. Reed had a $3,100 mortgage on the land, he says some cents, he don't how much.

By Mr. O'Connor: Q. Give us what he said:

A. He said that Mr. Reed said he had a mortgage of $3,100 and some cents on the land, he further says, there was still $2,800 would remain for him. $2,800 would be left for him.

In answer to another question he said:

A. He was to have $300 and that was to be paid $300 per annum and that was to be paid into the court house for him.

In answer to another question, this was given:

A. He says he would be satisfied with $250 per annum.

Q. What did (naming the attorney) say to you?

A. He says he drew up a paper that he was to have $250 per annum, and that he was to get that at the court house.

Q. Now did (naming the attorney) write that down on paper, that you should have $250 each year and get it at the court house?

A. He says he read it to him from the paper.
Q. Did he ask you to sign the paper?
A. He says yes.
Q. Did you sign it?
A. He says he made a cross.
Q. Did he give you that paper or a copy of it?
A. No. He says he kept the papers.
Q. Do you know where it is?
A. He says he does not know where it is. It is supposed to be in the court house, or should be in the court house.

There can be no doubt that the paper referred to is his answer; he signed the verification by his mark, and the prayer contains the words "and should any surplus remain, that the same shall be retained by this court to pay this defendant any amounts accruing to him by reason of his lien on said premises as aforesaid."

The theory upon which the answer was drawn is, that any surplus remaining after the satisfaction of the mortgage, upon a sale of the property, would belong to the son, subject to the plaintiff's lien for the annual payments and the value of his home and support, and that the court would, in its decree, provide for annual payments of $250 each to the plaintiff. Afterward, the plaintiff employed another firm of attorneys to represent him in the case, and an amended answer was filed by them, which differed from the other answer, so far as the mortgages are concerned, only in the denial of the subsequent mortgage as one joined in by himself, and a claim of part payment of a small prior mortgage. His reason, as he claims, for securing the services of the other attorneys was, that one of them could speak German. They, alone, represented him thereafter to the end of the case.

We say, the fact, that this subsequent mortgage was admitted in the first answer and repudiated in the amended answer, is significant, because it shows conclusively that there must have been some talk between him and his new attorneys as to the action being one involving the mortgage liens. No claim is made either in the pleadings or the

evidence that his new attorneys were not fully competent; that they did not act in the best of faith; that he was induced to secure their services by the advice or suggestion of the defendant or that there was any collusion between them and the defendant.

The foreclosure suit was tried upon the issues made by the other pleadings and plaintiff's amended answer and resulted in a decree in favor of this plaintiff, subject to the lien of the mortgages admitted in his answer in the sum of $3,398.90, as a lump sum, equivalent to the annual payments due him and the value of home and board, based upon his expectancy under the Carlisle tables. In the decree the court found the value of the home and board secured by the will to be $150 per annum, instead of $100 as is claimed in both answers. Subtracting the difference which this made in the amount due, it would leave a little over $2,800 as plaintiff's claim, which is the amount he claims was to be coming to him, and the decree fixes the amount of prior liens at $3,125.25.

The court below refused to allow evidence to be introduced showing fraud in the inception of the mortgages. Of course such fraud could not alone justify setting aside the decree based on the mortgages because, "fraud in an antecedent transaction not connected with the judgment is not of itself sufficient." "Fraud which is available as a ground for avoiding a judgment by a court of equity, must have intervened in the action or proceeding in which the judgment was obtained." *Slaufeldt v. Gandy,* 34 Neb. 32. Such evidence, however, may have been competent to show that the plaintiff had a good defense to the former action, and because of its exclusion we have refrained from discussing the question of the sufficiency of the evidence to show the existence of such defense.

Many things are complained of by the plaintiff which have no bearing upon his rights; much is said about his being informed by the defendant that the son, August Klabunde, had appealed the case, and that he did not find out that the appeal had not been perfected until it was too late

for the plaintiff herein to appeal. From the record it appears that the plaintiff obtained in that action the utmost that could be given him under his own pleadings, and it is evident that an appeal by himself was not contemplated.

Much stress is laid by the plaintiff's present counsel, upon the fact that he is a German, aged, and somewhat enfeebled in mind, and we suspect that these are reasons why he is now mistaken about what took place between him and the defendant and his attorneys during the pendency of the foreclosure action.

There are many other things in the record and evidence that have helped to lead us to the conclusion we have reached, but no good would be accomplished by mentioning them in this opinion.

We have examined the record and evidence with care, aided by the briefs of counsel, and are satisfied that the judgment of the lower court is right and should be affirmed.

The plaintiff no doubt was disappointed in the final result of the former action, but we believe his interests were looked after properly therein by all of his attorneys; but if not, this court has held:

"A court of equity will not afford relief against a judgment or decree obtained against a party through the negligence of his attorney." *Funk v. Kansas Manufacturing Co.*, 53 Neb. 450.

The practice by attorneys of taking charge of the interests of parties on opposite sides of adversary proceedings is not to be commended and, when there is any real contest between the parties, can not be too severely condemned by the courts; but it is not uncommon, or always improper, for the same attorney to represent prior and subsequent lien-holders in the same action, when there is no dispute as to priority and amount.

We agree with the lower court in its findings, and recommend that the judgment appealed from be affirmed.

BARNES and ALBERT, CC., concur.

By the Court: The conclusions reached by the commissioners are approved, and it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the district court be

AFFIRMED.

The following opinion on rehearing was filed January 21, 1904. *Former judgment vacated, and decree of district court reversed:*

1. **New Trial:** EQUITY: THEORY OF CASE. In an equitable action for a new trial, evidence offered for the purpose of proving the plaintiff had a substantial and meritorious defense in the prior action was objected to and excluded on the ground of irrelevancy and immateriality, and a ruling of the trial court procured limiting the evidence to the alleged ground of fraud, and the suit was tried upon that theory. *Held*, on appeal to this court from a judgment dismissing the suit, that it is proper to adopt the same theory in determining whether the plaintiff is entitled to a new trial and that, for the purpose of the case, it will be assumed that a valid and meritorious defense existed in his favor in the original action.

2. ———: ———: FRAUD. Equity will relieve against a judgment or decree on the ground of fraud, actual or constructive, committed by the successful party or where, from excusable neglect, a defendant has been prevented from interposing a meritorious defense or establishing grounds entitling him to affirmative relief in such action.

3. ———: ———. The plaintiff, a German advanced in years, illiterate and unable to speak or understand the English language, was made a defendant in a mortgage foreclosure proceeding, affecting land in which he had an equitable interest under the provisions of a will made by his deceased wife. After the commencement of the suit, he conferred with the plaintiff and, at its suggestion, counseled with its attorney who drew his answer asserting his equitable interest in the land but admitting that it was inferior to the plaintiff's under its mortgage; a decree was entered accordingly and the land sold for little more than enough to satisfy the prior lien. The defendant acted throughout the litigation under the belief, induced by the plaintiff and its attorney, that his interests and those of the mortgagee were harmonious and that he should secure the full amount due him under the provisions of the will by a sale of the land. *Held*, under the facts and circumstances as delineated in the opinion, that he was not culpably negligent in adopting the course pur-

sued and that the loss of substantial rights, by reason of his equitable interests in the land being fixed as a junior lien, was brought about from causes which render it proper for equity to intervene and grant a new trial.

HOLCOMB, C. J.

This cause, now submitted on rehearing, comes here by appeal from a judgment of the district court for Douglas county dismissing, for want of equity, plaintiff's suit begun in that court. For former opinion, see *Klabunde v. Byron Reed Co., ante,* p. 120. By the petition filed in the trial court, it is sought to obtain relief from a decree in foreclosure proceedings establishing in the mortgagee, plaintiff in that action, a lien on the real estate covered by the mortgage superior to the right and interest of the plaintiff, appellant, defendant in the foreclosure proceedings, who claims under the provisions of a will made by his deceased wife, who in her lifetime was the owner in fee of said premises. The pleadings are of too great length to be here reproduced. The petition or bill in equity is very lengthy, containing much of repetition, by way of argument, and matters properly to be introduced as evidence. The substance, however, of plaintiff's cause of action is to the purport and effect that by provisions of the will, under which he claims, he was the beneficiary of a trust estate in the real property devised by his wife for the purpose and with the object of providing for his support and maintenance during the remainder of his life, which was a first and paramount charge and lien on the real estate covered by the mortgage, under which the defendant company claimed and established its right in the foreclosure proceedings, theretofore by it instituted; that, in the foreclosure action, he was prevented from presenting a defense and deprived of the opportunity of doing so and of asserting his superior right and interest in and to such real estate, because of the wrongful action and conduct of the plaintiff in that action, its officers, agents and attorney, and that by such action and conduct, a fraud was perpetrated on him which

resulted in the loss of substantial and valuable rights, which otherwise he would have shown himself entitled to. He prayed to have the former decree vacated and set aside; that he might be permitted to plead further in that action; that a new trial be had, and that a decree be entered establishing his equitable interest in and to the real estate, as a charge thereon superior to that of the plaintiff and to any other lien appearing as a charge on such real estate. The answer traverses the allegations of the bill wherein a prior lien is asserted and especially those portions thereof asserting fraud as a ground for vacating the prior decree and granting a new hearing in the action. By the appeal, the whole record is brought to this court for trial *de novo,* and in the determination of the issues of fact, we are required to reach an independent conclusion from the evidence, uninfluenced by the finding and judgment rendered in the trial court. Sec. 681*a* of the code. Whether under the section cited, we should give any weight to the findings of the trial court, we will not stop here to consider as that question has not been presented or discussed and we feel able to dispose of the case to our satisfaction without determining to a nicety such question at this time.

At the commencement of the trial of the present suit in the lower court, the plaintiff sought, by competent evidence, to show that he, as a defendant in the foreclosure suit, had a substantial and meritorious defense to the plaintiff's cause of action as pleaded in its petition and had a superior lien on the land involved, and was entitled to a decree establishing his precedent claim and interest therein, but to such offer the defendant company interposed the general objection that such proffered testimony was irrelevant, incompetent and immaterial under the issues raised.

The court thereupon ruled as follows:

"I am going to limit the plaintiff's testimony to the transactions that took place between the Byron Reed Company and the parties after the commencement of the foreclosure suit. I am sitting here now to know, whether or

not I am to set aside the decree of foreclosure that was rendered in that case. If that is set aside, then the defendant in that action will be permitted to file his answer and make his defense to the foreclosure suit and to these mortgages. I will not go into that question of defense in this action, so I will confine you in your proof to what took place from and after the commencement of the foreclosure suit."

Counsel say in their brief in this court after quoting the foregoing ruling:

"So that this case, the one now before the court, started out upon the proper theory, that is, that the question to be determined was whether or not the decree in the foreclosure suit was fraudulently obtained. If it was, then the court would set it aside. If it was set aside, then whatever defense might be made to the foreclosure could be made in that action."

Having been successful in preventing the plaintiff from establishing the fact, that he had a meritorious defense in the foreclosure suit, and having secured the trial court to adopt the theory, that the only question to be tried was, whether in equity and good conscience the plaintiff ought to have a new trial because of the acts complained of, and that issue being the only one tried, we feel at liberty to adopt the same theory in disposing of this appeal, without at all committing ourselves to the rule that a party who seeks to be relieved against a judgment or decree need not plead and prove a good defense thereto, and therefore, for the purpose of this case, we will assume that the plaintiff has a valid defense and a good cause of action for affirmative relief which gives him precedence over the defendant, who claims a lien by virtue of the mortgage pleaded in its petition in the foreclosure suit.

The character of the suit, the nature of the relief prayed for and the facts upon which these are based appeal with peculiar force to the conscience of a court of equity. The plaintiff is an aged German of more than seventy years, illiterate, who speaks and understands the English lan-

guage most imperfectly. He requires the assistance of an interpreter when conversing with those speaking the English language, when giving his testimony in court or when engaged in any transaction where that language is used and when the comprehension thereof is essential to intelligent action thereon. He apparently has no very clear conception of the ordinary business transactions, other than those of the most simple kind, or of the methods by which controversies of a legal character are conducted and litigated in the courts. He and his wife were occupying the real estate over which the controversy arises, as a homestead, the legal title being in her name. At her demise, the land was devised to a son (August Klabunde) with the following provisions incorporated in the will for the support and maintenance of her surviving husband and under which he claims whatever equitable interest and right he may have in and to the real estate over which the parties are litigating. After the words of devise to the son it is provided:

"With the following condition that my son August Klabunde shall give to Ernest Klabunde, my husband, a good home with board and $150 per year, during the natural term of Ernest Klabunde's life; and this shall be a mortgage upon above described premises, nor shall my son August Klabunde have a right to sell the within described real estate without the consent of my husband, Ernest Klabunde."

The mortgage under which the defendant claims was executed subsequently to the probating and allowance of the testamentary instrument from which we have just quoted. The evidence preserved by bill of exceptions is quite voluminous, covering some 335 typewritten pages. We can not here reproduce it or such parts thereof as would give an intelligent understanding of the tendency of the whole, without extending this opinion to an unwarrantable length, and must content ourselves by stating the inferences we deem properly drawn therefrom and our conclusions of fact, from a careful consideration of the whole. The son

and the father were not able, it appears from the record, to live peaceably together and the plaintiff had sought a home elsewhere. The defendant, the Byron Reed Company, began foreclosure proceedings on its mortgage, making August Klabunde, his wife, Ernest Klabunde, the plaintiff herein, and others, defendants. After the institution of the foreclosure suit, the plaintiff, in company with a person acting as interpreter, went to the office of the defendant company, for the purpose of securing information regarding the suit, its nature and purpose; and it is testified to by him and insisted by his present counsel, that by the action, promises, and agreement of the defendant company and its attorney, he was misled to his detriment and prejudiced and failed, because thereof, to make his defense in said action and establish his interest in the land under the provisions of the will as a first charge and lien thereon. It is the contention of the plaintiff that the defendant, through its officers and agents, promised that he should have from the proceeds of a sale of the land $2,800 to pay for his support and maintenance, which he could draw annually in stated amounts from the court where the suit was pending; and that he would thereby and by such arrangement, receive what he was entitled to under the will. It is also testified and urged upon us as a warrantable inference from the evidence, that he was given to understand that the interests of the Byron Reed Company and himself were identical, and that it would be advisable for them to cooperate together, proceed with the suit and sell the land in order to deprive the son, August Klabunde, who had refused to provide for the father according to the terms of the will, of whatever interest he might have in the land and thus dispossess him and realize from a sale of the land a sufficient sum to meet the demands of both; that from that time forward Ernest Klabunde, in pursuance of such an agreement and understanding, acquiesced in and submitted to such further proceedings as resulted in a trial and the establishment by decree of court of the mortgage lien of the defendant and another prior thereto, as being superior

to the defendant's trust estate under the will, and the sale of the land in pursuance of a decree of court for but little more than enough to satisfy such prior liens, leaving to the plaintiff but a very small sum, scarcely enough to pay his attorneys, for the satisfaction of his claim under the will. The defendant vigorously challenges the truth of the narrative as related by the plaintiff and it is but just to say, that the version of the defendant, of the several transactions had, is more nearly the correct one; nevertheless, as will be seen by a further discussion, we think the plaintiff without fault on his part was led into a grievous error and suffered the loss of substantial rights from which equity ought to relieve him. It is true, and it is admitted on all hands, that after the foreclosure suit was instituted, the plaintiff with an interpreter, as has been stated, visited the office of the defendant company and there conversed with those in its employ about the suit and the proper course for him to pursue in relation thereto; that the attorney for the defendant company was called in for his advice and counsel, and that at the request of the company or its attorney, the plaintiff went to the office of the attorney, where an answer was drawn, in which the mortgages pleaded in the petition of the defendant company in the foreclosure action were admitted to be first and prior liens, and, upon proper averments it was asked that the plaintiff's equitable interest, by virtue of the will, be fixed and established by the court as a junior lien on the mortgaged premises. The answer thus prepared and the conference leading up to it, we doubt not, are the action and conversation referred to by the plaintiff, as an agreement to pay him $2,800 and the making of a contract to that effect which he had signed; nor have we any doubt, from the representations made to the plaintiff and from his understanding thereof, he believed that his lien would be established by decree of court, that he would get the full amount which it was admitted or agreed he should have under the terms of the will, and that it would be paid to him annually at the court house. This was the agreement made

with the defendant as understood and testified to by the plaintiff. Having regard to plaintiff's expectancy of life and estimating his board to be worth $100 per year in cash, the present value of the charge upon the real estate, including the $150 cash annual payments, was, as found by the court, the sum of $2,800. While the defendant and its attorney were arranging with him to obtain a decree of court awarding him $2,800 to be paid out of the proceeds of the land and by the clerk of the court, provided such amount could be realized over and above the prior mortgage liens, the plaintiff himself understood and believed that such an amount would be paid him absolutely and without the contingency of the land being of sufficient value to satisfy, first, the mortgage liens aggregating more than $3,000. This difference as to the order of payment, we conceive to be, in a large measure, the explanation of the seeming contradiction in the testimony introduced in the case. It is shown, quite conclusively, that the plaintiff was relying upon the statement that he would receive money from the court house and that he was inquiring about it, was expecting it and was disappointed in its not being forthcoming. In this connection we quote briefly an excerpt from the testimony of defendant's attorney as to what transpired when he drafted the answer of the plaintiff in the foreclosure suit. He says:

A. I explained to him just how that he could realize on the will.

Q. And you told him that money would be paid into court and he could get some there each year until it was all gone?

A. I can repeat again what I told him.

Q. I am asking you.

A. I told him that at the time of the trial, now, it would be determined how much was due him from August by reason of the provision of the will wherein he was to give him, Ernest, $150 every year and provide him a home, which we considered worth $100 a year—that would be $250 a year. Now then it would be determined by the

court what that amount would be, at the time of the trial, and then, that the property would be sold and he would have a lien on it for that amount, and if the land sold for anything, why he would get that money—whatever the court found for him—and that if it sold for any more than enough to pay that—pay up all and pay that off——

Q. What?

A. The amount that would be found by the decree in his favor by reason of the construction of the will—his lien on the land. If there was any surplus money above that, that it would lay over there in the court, by the terms of the decree that he could go in there every year and get $250.

Q. That was on June 29, 1896?

A. That was what I explained to him when I drew up the answer.

The plaintiff was laboring under the impression that his interests and the interests of the Byron Reed Company were harmonious, when in fact they were antagonistic. He relied upon the advice of the company's attorney and employed him to represent him in the case under that belief. Although it is testified that his answer was explained to him before he signed it, in which the mortgages were admitted to be prior, it is manifest that he did not understand the legal effect of such admission nor that the admissions as made jeoparded his rights under the provisions of the will. The attorney, acting apparently upon the conviction that there was no real conflict of interests between plaintiff and defendant, undertook to represent both parties and pursued the course herein indicated. It is true that later on, other counsel was employed by the plaintiff, who could speak the German language, but this employment, it appears, was only for the purpose of contesting a third mortgage executed by the son, August Klabunde, and his wife, on the real estate devised by the will and no effort was made to raise any issue as to priority of right between the defendant company and the plaintiff. The plaintiff, we are satisfied, through the entire litigation and until after

a sale of the premises, acted under the belief, formed at the beginning of the litigation from the transactions referred to, and with the expectation that as between him and the defendant company, his interests in the premises would be protected and that he would receive all he claimed to be due him under the provision of the will. At the suggestion if not solicitation of the defendant's agents, he counseled with its attorney and acted on his advice. There is evidence positive in the record that the company sought to yoke its interest in the litigation with that of the plaintiff, and that both of them should make common cause against the son who, it is evident, was not executing the trust imposed on him by the terms of the will, of which he was the principal beneficiary.

It is obvious that the plaintiff had no clear conception of the clashing of interest as between him and the defendant; that he regarded himself as an ally and not as an antagonist, and that this *status* was the result of the conversation and conduct and encouragement of the defendant's agents and was maintained until the end of the suit.

Assuming, as we do for the purpose of this case, that the plaintiff had a superior equity in the land, devised by the will, which was covered by the subsequent mortgages, he is not, in our judgment, guilty of such neglect as would be inexcusable because his demand for relief was not properly presented for adjudication at the former trial. It seems to us quite clear that he was led astray by the negotiations first had between himself and the agents of the defendant company, at the time he sought information regarding the case and when his first answer was prepared and filed, and that the wrong course then adopted, for which, we are of the opinion, he is to be excused, under the circumstances disclosed by the record, attended his after movements and conduct throughout the entire course of the litigation. While what was said and done was not in its nature a compromise of differences, it partakes somewhat of the character of a compromise. The plaintiff was led to believe, it may be without intentional wrong by the

defendant or its attorney, that both he and the company were working to attain a common object, that their interests were mutual; that it was advisable for them to thus work together to dispossess the son, who was in opposition to both of them in their endeavor to have their respective rights in the land adjudicated, and that his interests under the will would be amply and fully protected without loss or reduction of the amount believed to be due him. He was thus misled greatly to his injury and when, too late for rectification in that litigation, he discovered that, while having a decree for the payment out of the land of all that which his deceased wife had provided for his support in his declining years, such decree was but a shadow and without substance, because the land itself had been wrested away from him under other claims adjudged to be prior in time and right to the one accruing in his favor under the terms of the will.

We do not say there has been any action on the part of defendant or for which it should be held responsible, which worked an actual fraud on the plaintiff's rights. It is not necessary that we should, nor do we think we would be warranted in so saying. There is, however, sufficient in the record to warrant the inference that he has suffered a wrong which equity will relieve against. There is at least constructive fraud. The plaintiff was lulled into a feeling of ease and safety, because of what he understood and what he was justified in believing was the promise and agreement of the defendant and because of the information received from its counsel, who undertook to represent him also in the litigation. Their interests were in fact conflicting and antagonistic, but from the explanation made to him, he believed them to be mutual and harmonious, and trusted both the defendant and its attorney for the safeguarding of his rights. He did not comprehend that the trust that he sought to impress on the real estate was endangered by the claims of the defendant company. He was satisfied from what had been told him that he would suffer nothing by having his case conducted by the same

attorney having in charge the defendant's litigation. Therefore he inquired no further. But if his theory in the present case is correct, then a most substantial and valuable right to him, at his age in life, was lost because an issue was not made as to the superiority of his rights over those of the defendant, and for not raising this issue, under the facts and circumstances in this case, we feel quite confident he is excusable and equity may properly intervene and grant relief against a decree thus obtained—a decree cutting off all his rights in the land, until and unless the amounts due on the two mortgages, hereinbefore mentioned, were first satisfied. The following authorities, bearing more or less directly on the question we have been discussing, illustrate the rule as to when equity will relieve against judgments obtained by fraud, actual or constructive, and on the ground of excusable neglect, and which, in the main, support the conclusion we have reached in the case at bar: *Nord v. Marty,* 56 Ind. 531; *United States v. Throckmorton,* 98 U. S. 61; *Payton v. McQuown,* 97 Ky. 757, 53 Am. St. Rep. 437, and notes to the same; *Arrington v. Arrington,* 116 N. Car. 170; Pomeroy, Equity Jurisprudence, page 1393, note 1 to section 960; 2 Freeman, Judgments, sec. 492.

While we have assumed, for the purposes of this case, that the plaintiff's equities in the land involved in the litigation were superior to those of the defendant company, it is of course not determined in this action that such is the case, either in law or in fact. The rights of the respective parties in this respect can be determined in the further litigation of the cause. All that is adjudged here is, that the plaintiff should be given an opportunity in the foreclosure suit to present his defense and set forth his alleged rights, by virtue of the provisions of the will, as being prior and superior to those of the defendant company, under its mortgages, and have the matter properly litigated and determined upon such issue

The former judgment of affirmance is vacated. The decree of the district court, dismissing the plaintiff's bill,

is reversed, and the decree entered in the foreclosure suit is vacated and set aside as prayed for in the plaintiff's petition, a new hearing allowed, and this cause is remanded for further proceedngs.

REVERSED.

HERMAN J. MEYER V. ADOLPH MICHAELS; WILLIAM R. LEARN, INTERVENER.*

FILED MAY 20, 1903. No. 11,286.

1. **Chattel Mortgage:** POSSESSION BY MORTGAGEE. The discretion conferred upon the mortgagee by a clause in a chattel mortgage, authorizing him to take possession of the mortgaged property whenever he may deem himself unsafe or insecure, is not to be exercised arbitrarily; such belief must rest on reasonable grounds.

2. ———: ———. The facts that would warrant such belief must be such as did not exist, or of which the mortgagee was ignorant, at the time of taking the mortgage.

3. **Levy:** ABANDONMENT. When an officer effects a valid levy on personal property consisting of ponderous articles, the fact that he leaves such property on the premises of the debtor, in charge of a custodian, who is in the employ of the debtor, and who permits the debtor to use such property, does not constitute an abandonment of the levy as to the debtor and those having notice.

4. **Mortgage by Partnership.** Where a chattel mortgage is signed by one member of the firm, without authority and without the knowledge or consent of his partner or the mortgagee, and delivered to a third party to be delivered to the mortgagee, and the mortgagee upon learning of such mortgage takes time to decide whether to accept and does not accept it until after a dissolution of the firm and until after he had notice of such dissolution, such mortgage is not binding on the partner not joining therein.

5. **Replevin:** INSTRUCTION. In an action of replevin, where one of the parties claims the property by virtue of a levy thereon by him as an officer, it is not error to direct the jury, in case they find for him, to find the fair, reasonable and market value of such property, without at the same time directing the attention of the jury to the manner in which said property must be sold by the officer, and his want of discretion, possesed by other owners of goods, to accept or reject such offers as are not considered a fair equivalent for them.

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* Rehearing allowed. See opinion, p. 151, *post*.

6. ———: ABANDONMENT. If the plaintiff in replevin to whom the property has been delivered may, under any circumstances, show that, subsequent to the delivery, the property has been taken from him under an execution against the defendant in the action, he can not do so without at the same time abandoning any claim of his own to the property and consenting that it may be applied in satisfaction of the judgment on which the execution against the defendant issued.

ERROR to the district court for Douglas county: WILLIAM W. KEYSOR, DISTRICT JUDGE. *Affirmed.*

Crane & Crane and *L. D. Holmes,* for plaintiff in error.

Edmund G. McGilton, Richard S. Horton and *James McCabe, contra.*

DUFFIE, C.

This is an action in replevin brought by Herman J. Meyer against Adolph Michaels for the possession of a certain stock of goods and trade fixtures. William R. Learn intervened, claiming a portion of the property as against both the other parties. There was a verdict for the intervener for that portion of the property claimed by him, and for the defendant for the remainder. From a judgment rendered thereon the plaintiff prosecutes error to this court.

To a proper understanding of the questions hereinafter considered, a somewhat extended statement of the facts leading up to this action is necessary. About the first day of May, 1896, the defendant and one Fred H. Meyer, a son of the plaintiff, formed a partnership to engage in the wholesale business of watch-makers' tools, supplies and materials and other goods, in the city of Omaha, under the firm name of Michaels & Fred H. Meyer. Of their capital $4,482 were borrowed and evidenced by twenty-four notes, each for $186.75, so arranged that one of the series fell due every sixty days. The notes were signed by the members of the firm as principals, and by the plaintiff as surety. On December 5, 1896, the principals on the notes signed

a note payable to the plaintiff for the amount then unpaid on the said series of notes, and at the same time signed a mortgage, purporting to secure such note, covering their stock and trade fixtures, ostensibly for the purpose of indemnifying the plaintiff against loss or damage by reason of his suretyship. Whether such note and mortgage were ever delivered was an issue in this case. They were, however, placed in the hands of a third party, then in the employ of the firm, for safe keeping. For some time they were thought to have been lost. On May 21, 1897, Fred H. Meyer, in the firm name, signed a note, payable in thirty days, to the plaintiff, for the amount then unpaid on the said series of notes, and a mortgage, purporting to secure such note, on the stock and trade fixtures of the firm. This note and mortgage were ostensibly given for the same purpose as the former note and mortgage. It is claimed by the plaintiff that this note and mortgage were given in the place and in renewal of the first note and mortgage, which was then believed to have been lost. This second note and mortgage were placed in the hands of Mr. Crane, an attorney, by Fred H. Meyer. On June 3 following, the firm of Michaels & Fred H. Meyer was dissolved, the junior member transferring his interest therein to the defendant. On learning of this second note and mortgage and that it contained a clause providing that it should not be filed for thirty days, the plaintiff hesitated to accept it, but finally decided to do so and it was delivered to him June 22, 1897. It is claimed by the defendant that this note and mortgage were signed and delivered without his knowledge or consent, and without authority on the part of his said partner to bind him thereby. At the time they were made, suits, aided by attachment, were pending against the firm, and some of the trade fixtures, covered by the mortgage, had been seized, under the writs issued in such suits, by the intervener as constable. The property thus seized was mostly ponderous articles which were not removed from the place of business of the firm, but were turned over by the intervener to a custodian, sworn by him, who receipted

therefor to the intervener. The custodian at the time was in the employ of the firm, and the firm continued to use the attached property in the course of business, as they had used it before the levy was made. This action was commenced on June 22, 1897, the day the last note and mortgage were delivered to the plaintiff. By his amended petition the plaintiff claims a right to the possession of the property in controversy, by virtue of said mortgage, which he alleges was given in place and in renewal of that given December 5, 1896; the intervener claims by virtue of the levies made by him.

It is conceded that neither the first note payable to the plaintiff nor that made May 21, 1897, were due at the commencement of this action. Plaintiff's right to possession of the property in controversy, under either or both mortgages, is based on a clause therein giving him the right of possession at any time he might deem himself unsafe or insecure. The court instructed the jury on the theory that there was no evidence that any facts or circumstances arose after the delivery of the second mortgage and before the commencement of this action, which would justify the plaintiff in taking possession of the property. In this state the discretion conferred by such clause may not be exercised arbitrarily. The mortgagee must have reasonable grounds for believing himself unsafe or insecure. *Newlean & Hoard v. Olson,* 22 Neb. 717; *Case Plow Works v. Marr,* 33 Neb. 215; *Rector-Wilhelmy Co. v. Nissen,* 35 Neb. 716. The grounds must be such as did not exist or were not known to the mortgagee at the time of taking the mortgage. *Roy v. Goings,* 96 Ill. 361; *Barrett v. Hart,* 42 Ohio St. 41. The instructions of the court in this case perhaps go a little further than the authorities warrant, in that they ignore the fact that certain conditions might have existed at the time the mortgage was given, which, coming to the knowledge of the mortgagee for the first time after taking the mortgage, would justly cause him to feel unsafe and insecure and would entitle him to the possession of the property. The second mortgage was signed May 21, 1897;

the evidence is conclusive that it was not accepted by the mortgagee until June 22 of the same year, the day on which this suit was commenced. It is not shown in evidence that any fact or circumstance arose or came to the knowledge of the plaintiff between the time of his acceptance of the mortgage and the commencement of this suit, that would justify the seizure of the property under the unsafe or insecure clause. All the facts and circumstances that would justify a feeling of unsafety or insecurity on his part, existed and were known to him at the time he accepted the mortgage. Hence, if there be error in this regard it is error without prejudice.

There is evidence tending to show that at the time the plaintiff became surety on the notes of the firm, it was agreed between him and the principals that they would indemnify him by security on the stock. The plaintiff contends that this agreement was in effect a verbal chattel mortgage and that the plaintiff would be entitled to possession thereunder, if for any reason the written chattel mortgages were invalid. A sufficient answer to this contention is that the plaintiff bases his right of recovery on the written instruments. We discover no allegation that he claimed the right to the possession of the property by virtue of any verbal mortgage. Consequently, it was not error for the court to ignore that theory of the case.

Complaint is made that the court in effect directed a finding in favor of the intervener for the goods claimed by him by virtue of his levy of the writs of attachment thereon, thus ignoring plaintiff's theory that there had been an abandonment of such levies. The record of the attachment cases, including the officer's return, were introduced in evidence. They show a valid levy. The other evidence in the case on that point is to the effect that the intervener after making the levy appointed a third party custodian of the property, which consisted of ponderous articles, and they were left in the place of business of the defendants in the attachment case and were used by the firm as before the levy. We do not think these facts show abandonment

of the levy as between the parties to this suit. A different question might arise were this an action brought by a *bona fide* purchaser or creditor of the defendants in the attachment case, without notice. The levy was good as to such defendants and as to all other persons having notice thereof at least, and the court properly directed a finding for the intervener on that point. *Corniff v. Cook,* 95 Ga. 61, 51 Am. St. Rep. 55.

Another ground of complaint urged by the plaintiff is that the court erred in giving an instruction based on the theory that there was evidence tending to show that the plaintiff had knowledge of the dissolution of the firm of Michaels & Fred H. Meyer, at the time he accepted the second mortgage. A sufficient answer to this complaint is that there is ample evidence to warrant the court in instructing upon that theory. In fact, that he had such knowledge at the time he accepted the second mortgage is practically admitted by the plaintiff in his testimony.

The plaintiff complains of another instruction because it does not cover the hypothesis, that the second mortgage was delivered to Mr. Crane by Fred H. Meyer, who professed to have made it on behalf of the firm for the plaintiff. It is insisted that, if the mortgage was so delivered to Mr. Crane, such delivery was in effect a delivery to the plaintiff on the date thereof, namely, May 21, 1897, although it was not actually delivered to him until June 22, thereafter, and, as it is conceded that the firm was not dissolved until about June 3, 1897, the mortgage was the deed of the firm. There is one fact which stands in the way of this theory and that is the plaintiff did not accept the mortgage until after the dissolution of the firm. It is a trite saying, that it takes two to make a bargain. On learning that such mortgage had been made the plaintiff wanted time to think it over before accepting it, and took such time. Until he accepted it, it was not a binding contract. When he finally elected to accept it, the firm was out of existence and the parties constituting it shorn of their power to bind each other. If the mortgage in the first

instance was made by one partner without the knowledge or consent of the other, the defendant in this case, and was not accepted until after the firm was dissolved and until after the plaintiff knew of such dissolution, and it was then delivered to him without the knowledge or consent of the defendant, such mortgage was not an obligation of the firm and was not binding on the defendant.

Complaint is made of the following instruction which was given by the court at the request of the defendant:

"The jury are instructed that the testimony of plaintiff's witnesses is to the effect that the mortgage of December 5, 1896, and that of May 21, 1897, were each executed to secure the plaintiff as to the indebtedness to the Omaha National Bank, on which Mr. Meyer was surety, and that Mr. Meyer was aware of this.

"If these mortgages were tendered to plaintiff as security only, he would be bound to accept them as such or not at all. Should you find that these mortgages or either of them were accepted by plaintiff with intent to claim them, or either of them, to evidence absolute indebtedness and to enforce that claim by foreclosure, acceptance with such intent would not be an acceptance of the mortgage as tendered, and without such acceptance the mortgage is invalid."

The specific objection to this instruction is, that it is not based on the evidence. We have examined the evidence and the record with some care and are satisfied that there is sufficient evidence to warrant the submission of the question involved in the foregoing instruction to the jury.

Another ground of complaint is that the court directed the jury, in effect, that in case they found for the intervener they should find the fair, reasonable, market value of the property claimed by him, and if they found for the defendant also, they should find the fair, reasonable, market value of the remainder of the property in controversy. As to the property claimed by the defendant and not seized under the writs of attachment, the instruction as to its value is proper. *Baum Iron Co. v. Union Savings*

Bank, 50 Neb. 387. As to the intervener, his right to the possession of the property claimed by him was based on his levy thereon as constable. As was said in *Merchants Nat. Bank v. McDonald,* 63 Neb. 363:

"The true inquiry in such case is what the value of the goods was at the time of the taking in the situation in which they then were, having a view to the manner in which the sheriff, if his possession had not been disturbed, would lawfully have disposed of them."

If the inquiry be confined to such limits, it follows irresistibly that the ultimate fact to be ascertained from such inquiry must be within the same limits. We can not presume that at a sale of goods under such circumstances they would bring their fair, reasonable, market value. It is the experience of all who have any connection with the forced sales of property, that the full market value thereof is rarely obtained. The officer must sell at a particular time and without the advantages possessed by the merchant to advertise and display his goods and to sell or not, as he thinks the price offered fair and reasonable or disproportionate to their value. These are matters which we think should have been called to the attention of the jury, and which it should have been directed to take into consideration in arriving at the damages sustained by the intervener, by being dispossessed of the goods. It follows, therefore, that the instruction complained of, so far as it relates to the property claimed by the intervener, was erroneous.

Complaint is also made of the following instruction given by the court on its own motion:

"In passing upon the value of the goods attached or replevied you are not conclusively bound by the opinions of witnesses in relation thereto and may reject the same if for good reason you see fit so to do. You are the judges of the value of said property, but you should take into consideration the opinions of the witnesses in connection with all the other evidence in the case and it should be viewed by you in the light of your experience and you should say from all the credible evidence what, in your business judg-

ment, was the fair and reasonable market value of said goods and chattels."

We do not think that this instruction is subject to the criticism made, that it authorizes the jury, if they see fit, to entirely disregard the opinion given by the witnesses relating to the value of the goods. On the contrary, it directs them to take into consideration the opinion of the witnesses in connection with all the other evidence in the case, but to view it in the light of their own experience. The rule is well established that triers of fact are not generally bound by evidence of value, even when it is not met by opposing proof. *Lincoln Land Co. v. Phelps County*, 59 Neb. 249. The instruction we think fairly reflects the law as announced in *Head v. Hargrave*, 15 Otto (U. S.) 45, and other cases relating to directions given to the jury in cases of this character.

There is evidence to the effect that the defendant was present at the sale made by the plaintiff under the foreclosure of the chattel mortgage, made no objection to the sale, and bid on some of the property offered for sale. Covering that branch of the testimony the plaintiff tendered the following instruction:

"The jury are further instructed that if they find from the evidence that Adolph Michaels, the defendant in this case, was present at the sale of the mortgaged property, upon advertisement for foreclosure under the mortgage dated the 21st day of May, 1897, and bid upon said property, and made no objection to the said sale, then you may take all such circumstances in consideration in weighing your evidence in this case. And if you believe from the evidence that the said Michaels, by his bid at said sale and by his other acts in connection therewith, ratified the validity of said mortgage, then you are warranted in finding that he is estopped from questioning its validity in this action, and you would be warranted in finding that the said mortgage is valid and binding as between the said Michaels and Fred H. Meyer, and the said Michaels, on the one part, and Herman J. Meyer, on the other part."

Its refusal is now assigned as error. This instruction is incomplete. Its manifest purpose was to submit to the jury the question of ratification, without defining what constitutes ratification.

Complaint is made of the refusal of the court to give the third, seventh and eleventh instructions asked by the plaintiff. The plaintiff sought by these instructions to submit, among other things, the validity of the lien claimed by the intervener. As stated in a former part of this opinion, the validity of such lien was conclusively established. The instructions were properly refused. Error is assigned on the refusal of the court to give certain other instructions asked by the plaintiff. They are voluminous and we are unable to discover any error in their refusal.

On the trial of the case the plaintiff offered to prove that a portion of the goods, taken under the writ in this case, had been subsequently levied upon under executions issued on judgments against Michaels & Fred H. Meyer, and that the officer making the levy took such property from the possession of the plaintiff who still retained possession thereof under such executions. The offer was refused and its refusal is now assigned as error. We think the weight of authority is to the effect, that in an action of trover the defendant may show in mitigation of damages that the goods had been appropriated under legal process issued against the plaintiff. *Irish v. Cloyes,* 8 Vt. 30, 30 Am. Dec. 446; *Pierce v. Benjamin,* 14 Pick. (Mass.) 356, 25 Am. Dec. 396; *Curtis v. Ward,* 20 Conn. 204; *Stewart v. Martin,* 16 Vt. 397; *Dodson v. Cooper,* 37 Kan. 346; *Watson v. Coburn,* 35 Neb. 492.

These cases establish the rule that when goods have been converted and the owner afterwards receives back the whole or a portion thereof or the proceeds arising from their sale, while he does not thereby bar his right of action for the original wrongful taking, such fact may nevertheless be shown in mitigation of damages. And it is urged in argument in this case that, if the goods taken by the plaintiff under his writ of replevin were afterwards levied

upon under the executions referred to, and held by the sheriff to satisfy an execution against Michaels, such fact would render the plaintiff unable to comply with any judgment that might be rendered against him for a return of the goods, and that no judgment for their value ought to be entered against him. The theory urged being that if the goods are applied for the benefit of the defendant in satisfaction of a judgment standing against him, it would be unjust and inequitable to allow him to recover the value of such goods from the plaintiff in the action, thus giving him double damages; first, by their being applied upon his judgment; and second, by taking a judgment against the plaintiff for their value.

No argument is needed to establish the injustice that would arise from such a proceeding, but it is not apparent that such a result would or could arise in this case from the failure of the court to receive the proof offered. The creditor who levied the executions upon this property was in privity with the defendant. He could obtain no title or right of possession under his executions, except such title and right of possession as the defendant then had, and it is clear that a defendant in replevin can not regain possession of the property taken from him, by causing another writ to be levied thereon while the replevin action is pending. In *Shull v. Barton*, 56 Neb. 716, 727, it is said:

"There is no conflict of authority upon the proposition that when property has been attached and then replevied, the plaintiff in the attachment, while the replevin suit is pending, can not levy an execution or attachment thereon. Indeed, some authorities go so far as to say that property attached and then replevied is in the custody of the law, and while the replevin action is pending can not be seized on attachment or execution at the suit of any person. *Bates County Nat. Bank v. Owen*, 79 Mo. 429. But every court to which the question has been presented, we think, has denied the right of a plaintiff who has attached property after it has been replevied from him and while the replevin action was pending, to levy another attachment or execution upon it."

In this condition of the law, the plaintiff might at any time reclaim possession of the property from the sheriff or recover its value to the extent of his interest therein. Without now saying whether the plaintiff could under any circumstances have the benefit of the proof offered, it is entirely clear that without going further than he did and embracing in his offer a willingness to relinquish all claim to the property, and to allow it to be applied in satisfaction of the executions against the defendant, the offer was inadmissible. The plaintiff evidently desired to occupy the very position which he urges as a reason for admitting this evidence against the defendant. He desires by this offer to avoid a judgment against him for the value of the property taken in case he failed in the action, while still retaining his right to proceed against the execution plaintiff to recover the property or its value. If he was willing that the property should be applied upon the defendant's judgment he should have relinquished all claim to it and abandoned any attempt to establish a right to its possession. He can not litigate with the defendant his right to the property, and at the same time assert that it has been appropriated by a third party, but to the use and benefit of the defendant.

Complaint is made of the ruling of the court in the admission of evidence, on behalf of the defendant, of certain transactions of third parties with Fred H. Meyer, wherein he obtained certain goods from such third parties, and of his conversation in regard thereto. Neither the transactions nor the conversations were brought home to the plaintiff. The evidence was not offered for the purpose of impeachment. It was irrelevant and served no legitimate purpose in the case. It tended to mislead and create prejudice, and should have been excluded. The admission of certain other testimony is complained of by the plaintiff but the complaint is unfounded. While other errors are assigned, most of them would involve a discussion of questions already considered, and none are so serious as to call for a reversal of the case.

While we can not say that we are entirely satisfied with the value of the goods as found by the jury, there is evidence amply sufficient to sustain the finding, and we can not interfere therewith.

For the error of the court in failing to fully instruct upon the value to be fixed upon the interest of the intervener in the goods claimed by him, the case should be reversed and remanded for another trial between the plaintiff and intervener, and the judgment in favor of the defendant in error against plaintiff in error should be affirmed and we so recommend.

By the Court: We are satisfied with the conclusion of the commissioner in regard to the judgment in favor of the defendant Michaels; but the reason given for reversing the judgment in favor of the defendant Learn is not satisfactory. It is true that the jury, in determining the value of the property replevied from the constable, should consider the manner in which the officer, if his possession had not been disturbed, would lawfully have disposed of the property, and should also have considered all other circumstances surrounding the transaction as disclosed by the evidence. It is proper in such cases that the court, in its instructions, should call the attention of the jury to their duty in that regard; but, since the fair, reasonable value of the property is the true measure of damages, and the circumstances referred to are to be considered for the purpose of determining what, in the particular case, was the fair, reasonable value of the property, we do not think that the instruction complained of can be said to be erroneous. If a more explicit and comprehensive instruction in regard to the method of arriving at the real value of the property at the time was desired by plaintiff, he should have presented such instruction to the court and can not now predicate error upon the failure of the court to so more explicity instruct.

The case of *Merchants Nat. Bank v. McDonald*, 63 Neb. 364, is to be distinguished. It was tried to the court with-

out a jury. It was claimed that the damages allowed by the court were excessive, and it was plain from the evidence and the whole record that the court had disregarded the circumstances surrounding the transaction, and that the finding was not sufficiently supported by the evidence. The court when acting as a trier of fact should take the circumstances referred to into consideration in determining the true value of the property, and it appearing that this had not been done, the finding was set aside. There is no sufficient reason shown for reversing the judgment in favor of the defendant Learn.

The judgment of the district court is

AFFIRMED.

The following opinion on rehearing was filed December 16, 1903. *Judgment of affirmance adhered to. Remittitur ordered:*

PER CURIAM.

A resubmission and reconsideration of this cause upon oral arguments on the motion for a rehearing is productive of no different result or change of views from those heretofore expressed (*Meyer v. Michaels, ante*, p. 138), except with relation to the question of the alleged excessive verdict returned by the jury. Further examination of the record and consideration of this question convinces the court that the verdict is excessive and can not be upheld under the evidence as preserved by bill of exceptions. The value of the stock originally purchased, including fixtures, may fairly be said to be worth the sum paid; to wit, $5,482. New stock was purchased during the continuation of the business approximately of the value of $10,000, total $15,482. From this total stock, goods were sold in the ordinary course of trade for which were received, approximately, $15,000. In these receipts was included a profit of 30 per cent. thus making the cost of the goods sold amount to $11,538.46. Taking the value of the goods thus

sold from the value of the total stock as above found and the result is the value of the stock including fixtures at the time replevied, which equals $3,943.54. From this sum should be deducted the sum of $557.20, the value of the constable's interest and the remainder $3,386.34, with interest at the rate of 7 per cent. from the date of the replevin proceedings, represents the highest amount of recovery which the defendant is entitled to. The judgment of affirmance is vacated, as to defendant Michaels, and the judgment rendered in the court below in favor of defendant Michaels is reversed and the cause remanded, unless the said defendant Michaels shall, within twenty days from the rendition of this judgment, file a remittitur of the judgment recovered, of all thereof in excess of the said sum of $3,386.34 and also remit a proportional amount of the total sum assessed as damages for the unlawful taking and detention of the property replevied by the plaintiff. In the event the remittitur is filed within the time stated, the judgment of affirmance is adhered to.

AFFIRMED.

JOHN E. HILL, RECEIVER OF THE LINCOLN SAVINGS BANK AND SAFE DEPOSIT COMPANY, ET AL. V. STEPHEN A. D. SHILLING, RECEIVER OF THE MERCHANTS BANK.

FILED MAY 20, 1903. No. 12,821.

1. Savings Bank: POWERS: ACQUIRING STOCK. A savings bank organized under the laws of this state may acquire title to shares of stock of another corporation, where such stock is taken in compromise or discharge of the indebtedness of an insolvent debtor, and where no circumstances casting suspicion on the transaction are shown, but it fairly appears that the directors of the bank acted in good faith and in the belief that the acceptance of the stock was for the best interest of the bank.

2. ———: LIABILITY. After acquiring the stock the savings bank becomes subject to any liability thereon the same as other stockholders.

ERROR to the district court for Lancaster county: LINCOLN FROST, DISTRICT JUDGE. *Affirmed.*

L. C. Burr and *A. S. Tibbetts,* for plaintiffs in error.

Allen W. Field and *Guy A. Andrews, contra.*

DUFFIE, C.

The Merchants Bank of Lincoln became insolvent, and was placed in the hands of a receiver. After exhausting the assets of the bank, the claims allowed against the same being still unpaid, the court directed the receiver to institute suit against its several stockholders to enforce their liability upon their respective shares of stock. The Lincoln Savings Bank and Safe Deposit Company is also in the hands of a receiver, and among the assets reported by the receiver are thirty shares of one hundred dollars each of the stock of the Merchants Bank. Shilling, the receiver of the Merchants Bank, in compliance with the order of the court, commenced an action against John E. Hill, receiver of the Lincoln Savings Bank and Safe Deposit Company, and other stockholders of the Merchants Bank, to recover upon the statutory liability of said stockholders, and obtained judgment against the Lincoln Savings Bank and Safe Deposit Company, in the sum of $3,575.90. The defendant bank has brought the record here for review. The parties stipulated the evidence upon which the case was tried; and the circumstances under which the savings bank became possessed of the stock are agreed upon as follows:

"That on the 27th day of September, 1892, one D. L. Brace was the owner of thirty shares of stock in the plaintiff bank, and on said day he borrowed and the defendant bank loaned to him the sum of $2,500 evidenced by a note of that date due January 1, 1893; that said note was payable to the order of the defendant bank and signed by D. L. Brace, the bank taking said shares of stock as a collateral to the said note. That on the 23d day of February,

1893, by mutual agreement between said D. L. Brace and the defendant bank, the said thirty shares of stock belonging to said D. L. Brace were taken up and canceled by said plaintiff bank and the thirty shares of stock involved in this action were issued and delivered to Mr. Miller, the secretary of the bank as hereinbefore agreed, with the mutual understanding between said D. L. Brace and the said defendant bank, that at any time when he could pay said $2,500 note and interest thereon, he could take up, and the said bank would surrender to said Brace said thirty shares of stock; that the court shall take and accept of these facts and consider the same as evidence in the case. It being further agreed that D. L. Brace above named was on February 23, 1893, and ever since has been insolvent, and that the stock referred to was listed by the receiver, J. E. Hill, as the property of said Lincoln Savings Bank and that no dividends have been paid upon said stock since February 23, 1893."

Article 3 of the charter of the savings bank is as follows:

"The business to be transacted by said corporation, is receiving money on deposit, paying interest thereon, investing the money of said corporation in bonds, notes, mortgages and other securities; the renting of vault boxes, and receiving and keeping in the vaults of said corporation, papers, securities, and such other valuables as may be deposited with said corporation for safe keeping; the purchasing or renting of such real estate as may be necessary for a place or places of doing and transacting the business of said corporation, and purchasing such real estate as may be necessary to secure debts due or to become due said corporation, and selling, leasing, mortgaging or otherwise disposing of real estate so acquired."

The plaintiff in error insists that, by its charter, the bank was restricted in its business to receiving money on deposit, paying interest thereon, investing its money in bonds, notes, mortgages and other securities, and that it had no authority or power to invest in stocks or to become a stockholder in another corporation and thus endanger or

place in jeopardy the savings of its depositors. *Bank of Commerce v. Hart,* 37 Neb. 197, is relied on as an authority for this position. It was there held that a banking corporation organized under the laws of this state had no power to become a stockholder in an insurance company. The opinion shows that Hart was indebted to the bank in the sum of $20,000 and, when sued upon his note, claimed to have made payment of something over $14,000 by a sale to the bank of certain shares of an insurance company, through one Johnston, its cashier. Accepting the theory of the transaction as given by Johnston as true, and that a sale of the stock had been made, the question fairly arose whether a banking corporation, organized under the laws of this state, could make a direct purchase of the shares of stock of another corporation, and this question, following the great weight of authority, was determined in the negative. The case at bar, however, presents a very different question, namely: Whether a bank, in order to secure a debt due from an insolvent debtor, may take from him shares of stock in another corporation in settlement of his liability. The general rule undoubtedly is that this may be done. In *Bank of Commerce v. Hart, supra,* it is said:

"It is doubtless true that the bank could legally take the stock of another corporation as security for a debt previously contracted. Possibly it might make a loan on the strength of the stock as security at the time. On this point the authorities are not in harmony, and as it is not material here we do not decide it. An emergency might arise when a bank's board of directors would be justified in taking the stock of another corporation in settlement, adjustment, or compromise of a doubtful claim or debt, acting in the honest belief that only by so doing could a serious loss to the bank be averted. None of these reasons, however, existed in the case at bar, or, if they did, the record before us does not disclose them."

Whether the savings bank might take this stock as collateral to the loan made to Brace is not we think material to be determined. At the time the loan was made no

statute of the state existed directing what investment such bank should make of its funds or what security should be taken on loans made. Our present statute, section 31, chapter 8, Compiled Statutes, 1901 (Annotated Statutes, 3731), directing the investment of the funds of a savings bank in bonds of the United States or of any state in the United States, or in the public debt or bonds of any city, county, township, village or school district of any state of the United States, which shall have been authorized by the legislature of the state, or that such funds be loaned on negotiable paper secured by any of the above mentioned classes of security or upon notes or bonds secured by mortgage lien upon unencumbered real estate, etc., was not enacted until 1895, three years or more after this loan to Brace was made; and the fact that the legislature undertook to direct what security should be taken upon loans made by a savings bank in this act, leads us to believe that prior to its enactment the general understanding was that collateral other than that named in the statute might be accepted by such banks as security for money loaned to its customers. However this may be, the stipulation of facts entered into between the parties is clearly to the effect that, at the time the savings bank accepted this stock in payment of the loan, Brace was insolvent, and in the absence of any showing that the stock was worthless the presumption must obtain that the directors of the bank acted honestly in the transaction and believed that the stock was valuable, and that they were serving the interests of the bank in accepting it in discharge of this claim against an insolvent debtor. There is no intimation that this stock was taken with any intention upon the part of the savings bank to obtain a controlling interest in the plaintiff bank, or that it was contemplated to speculate in this stock. Upon its face the transaction bears the stamp of an honest endeavor by the directors of the bank to secure a demand due the corporation from an insolvent debtor, and the authorities are numerous that such a transaction will be upheld. *Latimer & Inglis v. Citizens State Bank,* 102 Ia.

162, 71 N. W. 225; *Tourtelot v. Whithed,* 9 N. Dak. 467, 84 N. W. 8; *First Nat. Bank of Charlotte v. National Exchange Bank of Baltimore,* 92 U. S. 122; *Holmes & Griggs Mfg. Co. v. Holmes & Wessell Metal Co.,* 127 N. Y. 252; 4 Thompson, Corporations, sec. 5719; 2 Morawetz, Private Corporations (2d ed.), secs. 648, 649.

The savings bank having become the owner of the stock, was liable thereon as any other stockholder. *National Bank v. Case,* 99 U. S. 628.

We recommend the affirmance of the judgment.

POUND and KIRKPATRICK, CC., concur.

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

AFFIRMED.

STATE OF NEBRASKA, EX REL. C. T. BRADBURY, RELATOR, V. JOHN R. THOMPSON ET AL., AS JUDGES, RESPONDENTS.

FILED MAY 20, 1903. No. 13,159.

Mandamus: MANDATE TO DISTRICT COURT. The district court should proceed in a case as directed by the mandate of this court. In an action to foreclose a mortgage, the mandate directed the district court to enter a decree in favor of the plaintiff for the amount due on the mortgage. On the case being remanded, certain parties claiming to have acquired an interest in the mortgaged premises pending the appeal were allowed to intervene in the case, and the court refused to enter a decree in favor of the plaintiff, as directed by the mandate, until the rights of the interveners had been heard and determined. *Held,* That the plaintiff was entitled to a mandamus, commanding the district court to proceed in the case as required by the mandate of this court.

ORIGINAL application for a writ of mandamus directed to the judges of the district court for the eleventh district. *Writ allowed.*

C. C. Flansburg and *Richard O. Williams,* for relator.

A. M. Robbins, contra.

DUFFIE, C.

This is an original action for a mandamus directed to the judges of the district court for the eleventh judicial district commanding them to carry into effect a mandate of this court. The petition discloses the following facts:

Bradbury, the relator, brought an action in the district court for Wheeler county against Jesse Kinney, and other defendants, to foreclose a mortgage on the southeast quarter of section 12, township 22 north, range 11, in said county. Upon the hearing of said cause, the district court found that the mortgage was not a lien upon said premises, and entered a decree ordering the cancelation of the mortgage of record. The relator herein appealed from said decree to the supreme court, and on February 6, 1902, obtained a judgment in this court reversing the decree appealed from, and remanding said cause to the district court with instructions to enter a decree for the amount of the mortgage and interest in favor of the plaintiff in said suit. It is alleged that the judges have refused to follow the mandate of this court and have disobeyed the same, and have refused and still refuse to enter a decree in accordance with the terms, commands and directions of said mandate. The answer of the respondents, among other things, alleges that at the time of the entry of the decree in the district court directing cancelation of the mortgage, a supersedeas bond was fixed in the sum of $100, to supersede said decree pending an appeal to this court; that said bond was to be filed within twenty days from the rendition of the decree. They further state that as a part of said decree it was ordered, that said mortgage be canceled of record and that the clerk of the district court should certify the same to the county clerk with orders that the said mortgage be canceled of record; that Bradbury, the plaintiff in the said action, failed and refused to give the supersedeas bond to stay said judgment and decree and that after the expiration of twenty days the order so made by the judge of the district court was certified to the county

clerk, and the county clerk in pursuance thereof canceled said mortgage of record; that when said mandate from the supreme court was received by the clerk of the district court for Wheeler county, and at a session of the court shortly thereafter, there was filed in said court a petition for intervention by A. M. Robbins and T. D. Meese; alleging further that the order of the district court was certified by the county clerk, and said mortgage was released of record by the county clerk and that after the same had been released and canceled, Chris Bellsley and wife, two of the defendants in said cause and the owners of the land in question, conveyed by general warranty deed to said A. M. Robbins and T. D. Meese, the west half of the mortgaged premises, and they asked that the said decree ordered by this court might be limited to the east half of said quarter section, and that the west half be declared free from said sale under said mortgage, and that thereupon the district court allowed them, the said Robbins and Meese, to file an answer setting up their interest in said premises, to wit, in the west half of said quarter section; that respondents have not been requested to enter a decree as against the east half of the quarter section, and that they now are and always have been willing to do so. They further set forth that, from the facts set forth in the petition of intervention of said Robbins and Meese, they considered it their judicial duty, and in view of the fact that plaintiff had failed to give a supersedeas bond, and in view of the fact that, as they considered, said judgment had not been in any manner superseded, it was proper and right to allow said A. M. Robbins and T. D. Meese to show their interest in said premises, in order that the rights of all persons might be protected and with no desire or intention of interfering in any manner with the decree of the supreme court, but to give effect thereto in all respects.

A stipulation of facts was filed in this court, from which it appears that A. M. Robbins and T. D. Meese, who now claim to own the west half of the mortgaged premises, were attorneys for Chris Bellsley, one of the defendants in the

foreclosure proceeding and the owner of the equity of redemption. Whether they, as attorneys with knowledge of all the facts in the case, could obtain title to any part of the mortgaged premises as against the decree of foreclosure ordered by this court, it is not now necessary to determine. The only question to be considered is the right of the district court to refuse to enter a decree conforming to the mandate of this court, and to allow other parties not originally impleaded in the case to assert claims against the land acquired since the appeal was taken. The rule, we think, has prevailed without exception that it is the duty of the district court to carry into effect the mandate of this court. In respect to this duty no discretion exists. The question was fully examined in *Gaines v. Rugg,* 148 U. S. 228, 37 L. ed. 432, and it was there said:

"Obeying the mandate of this court, and proceeding in conformity with its opinion in the present case, are not matters within the discretion of the circuit court, and, therefore, the cases which hold that this court will not direct in what manner the discretion of an inferior tribunal shall be exercised," have no application to a petition for a mandamus to require the circuit court to obey the mandate of this court.

In re Sanford Fork & Tool Co., 160 U. S. 247, 40 L. ed. 414, it is said:

"When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court can not vary it or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded."

The orderly conduct of litigation and public interests alike require that the mandate of this court directing the

proceeding to be had or the judgment to be entered by the district court should be strictly carried out. Without now attempting to determine what, if any, rights Robbins and Meese have acquired by their deed, we are convinced that to hold that such rights might be inquired into by the district court before entering the decree required by the mandate of this court, would establish a precedent which would give rise to the practice of attempting to litigate rights acquired by third parties in the subject matter of the action, during the pendency of an appeal, after the case was remanded for final decree; and that the party, who successfully asserted his claim in an appeal to this court, would be met by new conditions and new claims made by third parties, acquired while the appeal was pending, and the enforcement of his rights, as against the original parties to the action, would be held in abeyance until the rights of the new claimants could be determined.

As was well and tersely stated in *State v. Dickinson,* 63 Neb. 869:

"If this may be accomplished, then, indeed, would a suitor be confronted with unsurmountable obstacles barring a final disposition of his cause in conformity with rights regularly adjudicated in his favor. The mandates of this court would furnish a basis for a retrograde movement, rather than stand as a monument of the progress made in successive steps of litigation and serve as a guide for future proceedings. The force and effect of the provisions of a mandate ought not thus to be overcome and neutralized."

Whatever rights Robbins and Meese have obtained in the mortgaged premises, can be safely asserted after the entry of the decree required by the mandate of this court. If carrying into effect the provisions of the decree would impair their rights in any respect, the injunctional order of the court may be invoked against the execution of the decree until their rights are examined and ascertained. In this method of procedure no harm can accrue to any of the parties interested in the subject matter of the action,

and an orderly course of procedure will be observed. Without in the least doubting the honest motive of the respondents in the course pursued, we are convinced that they have mistaken the rights of the several parties and the rule of law to be observed in this case.

We therefore recommend that the writ prayed for be allowed commanding the respondents to carry into effect the mandate of this court.

POUND and KIRKPATRICK, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the writ prayed for is allowed, commanding the respondents to carry into effect the mandate of this court.

WRIT ALLOWED.

STATE OF NEBRASKA V. JAMES FORCE.

FILED MAY 20, 1903. No. 12,558.

1. **Criminal Law: EVIDENCE: CONFESSIONS.** In a criminal prosecution, only such confessions of the defendant as are shown to have been made voluntarily, without fear of punishment or hope of reward, are admissible in evidence.

2. **Confession Held Inadmissible.** The father of the accused, shortly after the commission of the alleged crime, pointed a shotgun at his head and said: "James, you are my prisoner; I have a right to arrest you; you shall go to Harrison and tell the sheriff, county attorney and coroner's jury all about the killing of H. R., and you will get clear; but if you don't you will get convicted." Accused consented to the demand of his father, and made a confession to the officers named. *Held*, That evidence of such confession was inadmissible.

3. **Further Confessions Inadmissible.** Further confessions by the accused, subsequent to such extorted confession, will be equally inadmissible, if so related in point of surrounding circumstances and proximity of time as to raise a presumption that the influences resulting in the first confession have not ceased to operate upon his mind.

4. **Evidence: CONFESSION HELD ADMISSIBLE.** Evidence examined, and *held*, that certain subsequent confessions were surrounded by such

circumstances, and removed from the influences leading to the first confession by such a lapse of time, as to raise a presumption that they were voluntary, and therefore admissible against accused.

ERROR to the district court for Sioux county: JAMES J. HARRINGTON, DISTRICT JUDGE. Exceptions to the rulings of the trial court, on the admission of evidence, under section 483 of the criminal code. *Exceptions sustained.*

M. J. O'Connell, Albert W. Critcs and *W. H. Fanning,* for the state.

Francis G. Hamer, contra.

KIRKPATRICK, C.

This is an error proceeding prosecuted by the county attorney of Sioux county under the provisions of sections 515, 516, 517 of the criminal code, from a judgment of the district court for that county, directing the acquittal of James Force, charged with the murder of one Harvey Russell on June 16, 1901. The trial was had on December 5, 1901. Very little material or competent evidence was offered and received by the trial court, and, upon the evidence received, the jury would hardly have been justified in finding the defendant guilty. The peremptory instruction of the trial court was therefore right; and the only question requiring consideration is: Whether the trial court erred in excluding certain evidence offered by the prosecution, tending to establish the guilt of the accused. This evidence relates to alleged confessions and statements made by defendant, which it was contended, on the part of the defense, were not voluntarily made, and were therefore inadmissible.

It is disclosed that Harvey Russell was found dead on June 16, 1901, having been shot with a rifle once through the head, and once through the body, and having also sustained a slight flesh wound in the abdomen. Either of the first mentioned wounds would necessarily have proved

fatal. It is disclosed that James Force came to his home, the residence of his father and mother, some time in the forenoon of June 16, his parents both being in the house at that time. A younger brother of the defendant, as well as a hired hand, seem to have been outside caring for the horses. It seems that defendant made some statement to his mother, who thereupon said to her husband, Franklin Force, "James has shot Harvey Russell." While testimony regarding these facts was being received, the jury were excused from the court room, and the mother, whose name for some unknown reason was not indorsed upon the information, was called as a witness by the defense, for the purpose of showing that the alleged confession which was about to be offered was not voluntary; and what transpired at the trial may best be shown by her testimony as follows:

Q. You remember June 16, about 10 o'clock in the forenoon?
A. Yes, sir.
Q. Were you in your kitchen about that time?
A. Yes, sir.
Q. Who was there with you?
A. James.
Q. Your son?
A. Yes, sir.
Q. Where was his father, Franklin Force, at that time?
A. In an adjoining room.
Q. Did anybody go into the room where Mr. Force was?
A. I stepped to the door.
Q. What did you say to Franklin Force?
A. I said, "James has shot Harvey Russell."
Q. What did Mr. Force then do?
A. He came out.
Q. Where was Frank Houston at that time?
A. Well, he went out and ordered Frank to get the team.
Q. Did Frank go and get the team?
A. Yes, sir.
Q. Then what did Mr. Force say to James?

A. He said, "James, you will have to go to Harrison and tell the sheriff, county attorney and coroner's jury all about the killing of Harvey Russell; if you do you may get clear, and if you don't you may be convicted."

Q. State anything more he said there that you remember.

A. James said, "I don't want to go, Pa, till I have an attorney."

Q. Did he mention any attorney that he wanted to get?

A. Attorney Harrington.

Q. What did he say about that, what did James say, if anything, further?

A. He said he wanted attorney Harrington.

Q. Before he said or did anything?

A. Yes, sir, before he said or did anything. * * *

Q. Now, then, what did his father say when his son said that he did not want to tell anything or do anything until he got his attorney?

A. He stepped aside to a room and picked up a shotgun and said, "James, you are my prisoner; I have a right to arrest you; you shall go to Harrison and tell the sheriff, county attorney and coroner's jury all about the killing of Harvey Russell and you will get clear, but if you don't you will be convicted."

Q. What did James say?

A. He said, "Well, Pa, I will go then."

The father, the mother and the defendant, who was then about twenty years of age, got into the wagon and went to Harrison, where the defendant gave himself up to the sheriff; and the sheriff, acting as coroner, summoned a jury, and with the defendant, the county attorney, and members of the coroner's jury, repaired to the place where the homicide was committed. The father and one or two other persons were also present at the place where the body was found. After examining the body and the surrounding ground, the jury were sworn, as also was the defendant, who thereupon told his story to the jury, which was taken down in writing by one of the members thereof. The prosecution sought to show the statements made by

the defendant on this occasion at the scene of the homicide, as to the manner in which the difficulty arose, and the killing occurred. This was objected to by the defense, on the ground that defendant had been coerced by his father to make the confession, and that he had been under restraint and duress; and also that the statement of his father to him that he would be acquitted if he told the whole story was such an inducement as rendered the whole confession incompetent. It was shown that no threats were made against him by any of the persons present at this meeting, and that no promise or hope of reward was held out other than that coming from his father, as disclosed in the testimony of the mother already quoted.

"The rule is well settled that a promise of benefit or favor, or a threat or intimation of disfavor connected with the subject of the charge, held out by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such inducement, either of hope or fear." *Heldt v. State,* 20 Neb. 492; *Furst v. State,* 31 Neb. 403.

Measured by this rule, we are satisfied that the testimony of defendant given at the coroner's inquest, and the statements and explanations made by him, at that time, to the members of the coroner's jury, the sheriff and county attorney, were not voluntary statements within the meaning of the rule. If the trial court believed the testimony of Mrs. Force, given regarding the transaction, which we assume it did, then the confessions and statements were not such as were properly admissible against the accused. It is quite clear that had the defendant been left to his own volition, he would not have gone to Harrison and delivered himself up to the sheriff; at least, not until he had counsel; and it is equally clear that he would not have given his testimony before the coroner's jury. While the father was not, probably, strictly a person in authority, within the rule recognized in most of the cases, yet, it should be remarked that the defendant was a minor residing at the home of his parents, his father exercising parental author-

ity over him, for which reason we think the case comes reasonably within the rule. It follows, therefore, that the ruling of the trial court in excluding the evidence regarding the confessions of defendant under these circumstances, and his statements made to the officers and members of the coroner's jury, is correct and should be sustained.

It appears that the names of the mother, the younger brother of defendant and Frank Houston, all of whom doubtless heard the conversation, were not indorsed on the information, the reason of the failure of the prosecution so to indorse these names not appearing anywhere in the record. The testimony of these witnesses would manifestly have been material. It is further disclosed that from the time of the homicide until the trial, almost six months, the defendant was in the custody of one Ernest Lyons, who was acting as jailor and who had also been a member of the coroner's jury. It seems that some time during the six months intervening between the homicide and the trial, the defendant, who took his meals with the jailer at the latter's residence, made certain statements to the jailer, and the prosecution sought to show these statements, by calling him as a witness. His testimony was objected to on the ground that he had been a member of the coroner's jury, had heard the involuntary statements and confessions of defendant, wherefore the defendant would as a matter of course tell the same story that he had previously told, the duress of the father which had extorted the first confession still existing. Lyons testified as follows:

Q. How long have you known him (meaning the defendant)?

A. I saw him first on the 16th day of June.

Q. Have you known him since then?

A. Yes, sir.

Q. I will ask you whether since that time, during the whole or any part of the period, he has boarded at your house?

A. Yes, sir.

Q. Did you since that time, and while he was boarding

there, have any conversation with him in reference to the killing of Harvey Russell, of which he stands charged?

A. Not, but very little.

Q. Did he make any statement to you at any time since as to the manner of the killing of the deceased, Harvey Russell?

To this objection was interposed, and upon cross-examination, it was shown that this witness had been a member of the coroner's jury, and had been acting as jailer, having the defendant in charge.

Among other interrogatories put to this witness, were the following:

Q. Did you make any promise of immunity or advantage, or any threats of what would be done, to induce him to make such statement?

A. I did not.

Q. Now, you may go on and state what he said to you, where it was and when it was, in relation to the killing of Harvey Russell.

Objection was interposed to this question in the following words:

"The defendant objects as incompetent, irrelevant and immaterial; and because the witness was one of the coroner's jury; and furthermore, that the defendant was at this time in the custody of the sheriff through his jailer, and any statement made to him is the same, in law, as if made to the sheriff, and that said statements were not voluntary." This objection was sustained.

The prosecution thereupon made the following offer:

"The state offers to prove by this witness, that at the residence of the witness, while the accused was in the presence of the witness and his wife, the accused said, among other things, that he met Harvey Russell out there on that day; that they had some words together; that the accused pulled up his gun and fired three shots at the deceased by which he came to his death; the last of which shots was fired as he lay at or near the bottom of a ravine already testified to by other witnesses, and after having

been dragged by his horse by the stirrup some thirty feet or more. These are a part of the things which we have to prove by this witness, by his answer to this question and other succeeding questions."

The same objection was interposed to this offer as quoted above, and in addition, "that the statements, if so made, were made under the threats and promises and inducements heretofore held out and not withdrawn."

The objection to the offer was sustained and the offer denied. It appears that about a week before the trial counsel for the defendant asked to have the sheriff take the defendant and go out with them to the scene of the homicide. As court was not in session at the time, and it being impossible to get an order from the court for the purpose indicated, counsel for defendant notified the county attorney of his desire, and the latter assented thereto, but said that he would go along with them. Accordingly, two of the counsel for defendant, the county attorney, the sheriff, the jailer, and one or more members of the coroner's jury who seem to have gone with the party as drivers of the teams, went out to the scene of the homicide, went over the ground, made measurements, etc., and there the defendant seems, in answer to questions of his counsel and other members of the party, to have made certain statements regarding the way the killing occurred.

Goodson Lacey was called by the state, and interrogated as follows:

Q. You may state all that was said and done on that occasion last Friday, between the parties who were there present, including the defendant, his counsel, M. F. Harrington and Grant Guthrie, the sheriff, county attorney, Mr. Patterson, Mr. Elmer Smith and yourself.

This question was objected to by the defense for four reasons, in substance as follows: (1) That anything the defendant said or did was in the presence of the sheriff, two members of the coroner's jury and the county attorney, and would naturally be repetitions of the alleged confession; (2) that under the testimony of the county attor-

ney any statement made or act performed, was to be heard by him or performed in his presence, or in the presence of the sheriff, both of whom had heard the alleged confessions; (3) that any statement made by counsel for defendant can not be binding upon the defendant or prejudicial to him; (4) that the matters sought to be introduced are incompetent, irrelevant, immaterial and prejudicial to defendant.

This objection was sustained, and the prosecution then made an offer as follows:

"The state here offers to prove by this witness now on the stand, and by this question and other succeeding questions, the following facts, being the same that we offered to prove by the witness Lowry, which are as follows: That one week ago tomorrow this witness went out to view the scene of the homicide at the request of counsel for defendant, that defendant went along in the custody of one Patterson; that M. F. Harrington, the counsel for the accused, went along; that Grant Guthrie, another counsel for the accused, went along; that defendant's father was absent; that the sheriff, county attorney, Elmer Smith and Patterson, were there together; that M. F. Harrington asked this witness to ask defendant if he saw Harvey Russell have a gun on that day, referring to the day and occasion of the homicide, to which the defendant in the presence and hearing of all the parties said that he did not; that said Harrington in the presence of these persons asked him the further question, whether he saw anything drop, to which the defendant replied in the presence and hearing of all these parties that he believed he did; that the defendant pointed out voluntarily the place where the shells already produced in evidence were found; and that then he moved about the place pointed out and said, 'I might have stood about here;' that some one of the parties then, in the presence and hearing of all, asked how far the gun would throw empty shells, referring to the gun used by the defendant on the occasion of the homicide, and that O. W. Patterson, in whose custody the defendant then

was, said that the gun is here; that the defendant then went up to the wagon, got out the gun, and brought it down and handed it to M. J. O'Connell, who went down into a canyon, and who discharged a loaded cartridge which was then in the gun, brought the gun back and handed it to the accused, who stood on a bank near the place where the shells were found, above the place where he said he might have stood on the occasion of the homicide; that he then ejected the shells once for the purpose of ascertaining how far the gun would throw an empty shell, and then handed the gun back to the county attorney, who himself ejected the empty shell at least twice for the purpose of ascertaining how far it would throw an empty shell; all of which was done as stated for the purpose of determining where the accused stood when he fired the fatal shot, or the two fatal shots; that everything that was there said and done, was said and done without any promise, threat, inducement, promise of reward or advantage of any kind whatever by this witness or the county attorney, or by any other person in authority except his own counsel as above stated."

To this offer counsel for defendant interposed an objection substantially the same as that above quoted, which was sustained and the offer denied. Some other testimony was offered by the prosecution from other persons who were present and heard the same conversation, all of which was ruled out on objection.

The theory of the trial court seems to have been that the first statement made by the defendant before the coroner's jury, was incompetent, because made under a threat and promise made and held out by the father of the accused; that the statement made by accused to the jailer in the home of the latter, and the statements and actions of the defendant about a week before the trial as already mentioned, were all incompetent, to the same extent; upon the presumption that if the defendant made an involuntary confession before the coroner's jury, any conversation which he had or statements by him made at any other time,

when any member of the coroner's jury or any person who heard the first confession was present, would undoubtedly be a repetition of the first confession, and therefore tainted with the same infirmities. In this we are of opinion that the trial court was in error. It is shown that nearly six months had elapsed since defendant had made the alleged confession before the coroner's jury, before he made the statements and pointed out the situation at the scene of the homicide, which was a week before the trial. Although the exact length of time between the coroner's inquest and his alleged statements to the jailer is not disclosed by the record, we are of opinion that the evidence offered by the state as to each of these occasions was admissible. The only theory upon which the evidence given at the coroner's inquest could be excluded was that defendant had been coerced or induced by his father to make the statements, and that he had been called upon by the county attorney or coroner's jury to testify, and had done so, perhaps, without being cautioned as to his rights in the premises. The time, however, elapsing between the confession to the coroner's jury and the statements to the jailer, and the visit to the scene of the homicide is so great as to raise a presumption that he was no longer under the influence of the coercion exercised or inducements held out by his father resulting in the first confession. The authorities draw a clear distinction between confessions of guilt, which are only admitted when made voluntarily, and statements as to facts and circumstances which might tend to establish the guilt of the defendant. *Taylor v. State,* 37 Neb. 788; *People v. Strong,* 30 Cal. 151; *People v. Parton,* 49 Cal. 632.

But whether the statements made by the defendant to the jailer and his statements and actions later at the scene of the homicide are regarded as confessions or not, they were clearly admissible in evidence. The rule seems to be well settled and practically recognized by all the authorities that where the confession offered in evidence was made at a sufficient length of time after the involuntary

confession, to raise a presumption that it was in no way influenced by the involuntary confession, then it is admissible in evidence. *Taylor v. State,* 37 Neb. 788; *State v. Fisher,* 6 Jones, Law (N. C.) 478; *Reeves v. State,* 24 S. W. (Tex.) 518; *State v. Howard,* 17 N. H. 171; *State v. Henry,* 65 Tenn. 539.

From what has been said it follows that the trial court erred in excluding the evidence offered by the prosecution, regarding the statements made by the defendant at the scene of the homicide shortly before the trial, as well as to the statements to the jailer while in custody. The exceptions by the prosecution are well taken, and it is recommended that they be sustained.

HASTINGS, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the exceptions taken by the prosecution in this case to the rulings of the trial court excluding certain evidence are sustained.

EXCEPTIONS SUSTAINED.

BYRON E. INGLEHART V. LYMAN C. LULL ET AL.*

FILED MAY 20, 1903. No. 11,663.

Justice of the Peace: APPEAL: ISSUE: EXTRINSIC EVIDENCE. Extrinsic evidence to show the nature of the case tried before a justice of the peace, upon a motion directed against an alleged change of issues on appeal, should be clear, convincing, and satisfactory, and should be carefully scrutinized.

ERROR to the district court for Douglas county: IRVING F. BAXTER, DISTRICT JUDGE. *Former judgment adhered to.*

* Rehearing of case reported in 64 Neb. 758.

H. C. Brome and *A. H. Burnett,* for plaintiff in error.

Richard S. Horton, contra.

POUND, C.

The question which has been argued upon rehearing is whether upon appeal from the judgment of a justice of the peace, the transcript showing that the defendant appeared at the trial but furnishing no evidence of what defense or defenses he presented, extrinsic evidence may be received in the district court, upon motion to strike out portions of an answer, in order to prove the nature of the defense made below and prevent the defendant from setting up new and additional defenses on the appeal.

Some confusion has arisen from the use of the word "issue" in this connection. As the rule is commonly stated, the cause must be tried in the appellate court upon the same issues that were presented in the court from which the appeal was taken, except as new matter may have arisen after the trial. Relying upon the technical meaning of this word issue, counsel for plaintiff in error contend that, since, except in case of a counter-claim, where a bill of particulars may be required, or in cases where an affidavit is necessary under section 1100*a* of the code, a defendant in justice's court may set up as many defenses as he may have, whether affirmative or by way of denial, without any pleading or written statement whatever, every defense other than those required to be stated in writing in the special cases mentioned is of necessity an issue, and may be set up in the district court on appeal whether presented to or relied upon before the justice's court or not. If the rule were statutory and we were bound absolutely by the exact form in which it is commonly expressed it would probably be true that the use of the word issue in this connection would justify such a contention. But the rule is judicial, not statutory, and an examination of the cases in which it has been an-

nounced shows at once that it has a wider scope than that to which plaintiff in error would confine it, and that it would be deprived of force, and the reason for its existence would be largely impaired if we gave it such a construction. The rule is intended to prevent the proceedings in the tribunal of original jurisdiction from degenerating into a mere farce by requiring the parties to present the controversy fully and in good faith to that tribunal, and to prevent them from making a sham prosecution or defense in the first instance and trying the cause afterwards upon its merits in the higher court. Designed to effect this object, the rule requires parties to present the same case in the district court which they presented to the inferior tribunal. It is not a question of issues solely, in the technical sense of that term, but of the case which was actually presented. In *Holub v. Mitchell,* 42 Neb. 389, the court said:

"A party who duly appeals to the district court from a judgment rendered against him by a justice of the peace, is entitled to a trial *de novo,* in the appellate court, of the facts upon which the judgment or award appealed from was rendered."

In *Lee, Fried & Co. v. Walker,* 35 Neb. 689, it is said:

"It is very clear that the judgment can not be sustained. This court, by an unbroken line of decisions, has held that 'cases are to be tried upon substantially the same issues in the appellate court as in the court of original jurisdiction.' *O'Leary v. Iskey,* 12 Neb. 136; *Courtnay v. Price,* 12 Neb. 188; *Union P. R. Co. v. Ogilvy,* 18 Neb. 638; *Fuller & Johnson v. Schroeder,* 20 Neb. 631. Otherwise the appeal, instead of being a retrial of the cause presented to the court of original jurisdiction where the prevailing party would be entitled to costs, might by presenting new issues in the appellate court make an entirely different case from that tried in the court below and thus in effect be an original action. Thus the prevailing party who had rightfully recovered a judgment in the inferior court and his costs, might be placed in the wrong and lose both his

judgment and costs without a new trial. Where an appeal is taken to an appellate court, the same case substantially is to be tried as in the court below. Any other rule makes the trial in the inferior court a farce."

In *Bishop v. Stevens,* 31 Neb. 786, the court said:

"The design is to encourage trials of cases upon the merits. If a party can withhold his defense in the inferior court, allow judgment to be rendered against him, and make his defense for the first time in the appellate court, the latter courts will be burdened with business, while great injustice will be done to litigants who had brought their actions before the inferior tribunals. A trial in a county court or before a justice of the peace, probably, will result in a correct judgment being rendered; and that this is true in an eminent degree, is shown by the comparatively small number of appeals taken from such judgments. In any event a party must present his defense and if the judgment is not satisfactory to him he may appeal the case submitted to the inferior tribunal to the district court, where he will be confined to the same issues as were presented in the inferior court."

And in *Estate of Fitzgerald v. Union Savings Bank,* 65 Neb. 97, we had occasion to say recently:

"Parties should be required to present their whole case fully and fairly in the court of original jurisdiction. No opportunity should be afforded for mock contests in which neither side develops its case in good faith, followed by a substantial trial for the first time on appeal."

If the rule in question, in the language of MAXWELL, C. J., in *Lee, Fried & Co. v. Walker,* 35 Neb. 689, requires the parties to present the same case substantially as in the court below, it is not a mere matter of what a defendant might have presented in the justice court had he so chosen, but of what he actually did present. Of course, in inferior courts where there are written pleadings it will be sufficient if the defense is presented by the proper pleading. But in cases where no written pleadings are required or permitted, the only manner in which a defense can be

presented is by urging it at the trial, and unless it is so urged, it ought not to be presented upon appeal. We see nothing in conflict with this position in the case of *Baier v. Humpall,* 16 Neb. 127, in which it was held that a defendant who had appeared at the trial might appeal, although he had introduced no evidence. The court said that although he offered no affirmative proof he could cross-examine or contend that the plaintiff's evidence did not make a case. In consequence, a general denial on appeal to the district court would not make a different case from that which was tried in the court below by the defendant's appearing and contesting the right of the plaintiff to recover on the testimony he adduced. That the court took this view of the matter, is indicated by the syllabus in which it announced that the issues in the district court are to be the same as before the justice, and by the use of similar language in the opinion. The court in subsequent cases referred to this decision as establishing the rule that the same case was to be presented in the district court that was submitted to the court below. *Darner v. Daggett,* 35 Neb. 695.

As the defendant in justice's court ordinarily is not required to state his defense in writing, this rule would operate very unequally and one-sidedly if there were no way in which the district court could ascertain, when an answer filed upon appeal was challenged on the ground that it raised new defenses, what defenses were in fact presented at the former trial. If there were not some mode in which the district court could determine this question, the rule would in effect govern the plaintiff only, and while restricting him to the case presented in the first instance, would permit the defendant to try his case below or not as he chose, without any limitation when the case was appealed. In *Fuller & Johnson v. Schroeder,* 20 Neb. 631, this court held that where a change of cause of action on appeal did not appear on the face of the record, the change of cause of action might be set up by answer. That was an appeal from the county court in a cause involving more

than $200, in which written pleadings were required. The court said:

"Where the objection is apparent on the face of the petition, a motion to strike from the files would be the proper remedy; but there are many cases where the objection can be made available only by answer. The petition in the county court may have been inartistically drawn, and did not fully state the cause of action, as in many cases in that court the pleadings are not prepared by attorneys; but in the district court, where greater care is required in pleading, the cause of action is more accurately set forth. If the identity of the cause of action is the same, the rule is not violated. The second count of the answer, however, alleges that said action 'was an action on an account for money had and received.' If that allegation is true, the objection in the second count of the answer to the petition was well taken, and the demurrer should have been overruled."

It is obvious that an answer setting up change of issues on appeal could be sustained in such a case only by extrinsic evidence at the trial as to what the issues were in fact in the lower court. The court evidently considered that the rule which obtains on an issue of *res judicata* was applicable. Under the common law system of pleading, the common counts or a plea of the general issue might afford no indication of the true nature of the contest. A great variety of controversies might be tried consistently with the pleadings which would appear of record. The parties were enabled to set forth their respective contentions in technical language which might give no hint of the true nature of their claims. Hence under a plea of *res judicata* it was necessary either to limit the operation of the rule as to the conclusiveness of a former judgment very materially, or to admit extrinsic evidence for the purpose of showing the actual controversy tried. In *Washington, Alexandria & Georgetown Steam Packet Co. v. Sickles,* 24 How. (U. S.) 333, the court said:

"A system of general pleading has been extensively

adopted in this country, which rendered the application of the principle contended for by the plaintiffs impracticable, unless we were prepared to restrict within narrow bounds the authority of the *res judicata*. It was, consequently, decided that it was not necessary as between parties and privies that the record should show that the question upon which the right of the plaintiff to recover, or the validity of the defense, depended for it to operate conclusively; but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury."

The admissibility of extrinsic evidence in such case is now well settled. Freeman, Judgments (4th ed.), secs. 256-273. The two cases are parallel. In each case the scope and operation of a well settled rule would be greatly restricted and its reason would be largely thwarted if the court could not receive evidence as to the issues upon which the case was in fact heard at the former trial. In each case the record of the former trial fails to disclose the nature of the case actually presented. In our opinion every reason which makes for the admissibility of extrinsic evidence in the one case applies equally in the other. Counsel contend that in the absence of a bill of exceptions the court can not inquire as to the evidence presented in the inferior tribunal. But the purpose of a bill of exceptions, is only to obtain review of some ruling upon a question of law or fact. Nothing of the kind is sought in such cases as the one at bar. The purpose of the evidence in such cases, is to enable the district court to know that it is trying the same case which was tried below, not to enable it to review any of the rulings made at the former trial.

Undoubtedly, the court ought to scrutinize the extrinsic evidence with some care. It ought to require clear and convincing proof, and should not act on doubtful or equivocal testimony. As in other cases where parol evidence is

received with respect to matters which the policy of the law requires to be in writing, the proof should be clear, convincing and satisfactory. *Doane v. Dunham,* 64 Neb. 135. But with proof of that character before it, we see no reason why it should permit a defendant to try a case on appeal, which he did not present to the tribunal of original jurisdiction.

We think the former opinion was right and should be adhered to.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is adhered to.

REAFFIRMED.

SEDGWICK, J., dissented.

L. O. ROBLEE ET AL. V. UNION STOCK YARDS NATIONAL BANK.

FILED MAY 20, 1903. No. 12,802.

1. **Negotiable Instrument.** In order to be negotiable, an instrument must bear on its face entire certainty as to the amount to be paid at maturity; conditions rendering the amount then payable uncertain destroy negotiability.
2. **Promissory Note:** NEGOTIABILITY. Incorporation of a collateral agreement in a promissory note, which requires payment to be made of uncertain sums at uncertain times before maturity, and thus renders it impossible to say how much, if anything, will be due at maturity, renders the note non-negotiable.
3. ———: COLLATERAL SECURITY. A note otherwise negotiable is not rendered non-negotiable merely by a provision for or reference to collateral security.
4. ———: ———: NEGOTIABILITY. But, when executed together and as part of one transaction, a note and mortgage securing it are to be construed together and as one instrument. Hence, provisions as to the terms and manner of payment contained in the mortgage may be such as to make the note non-negotiable as to all persons chargeable with notice thereof.

5. ———: NOTICE. Although the note does not refer to the mortgage, indorsees who take with notice of its provisions are bound thereby.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, DISTRICT JUDGE. *Reversed.*

Adolphus R. Talbot, Thomas S. Allen and *Julius S. Dittmar,* for plaintiffs in error.

Frank M. Hall and *C. C. Marlay, contra.*

POUND, C.

The bank brings this action to recover upon a promissory note executed by Roblee to the Beatrice Creamery Company, his co-defendant, indorsed by said company to a bank at Broken Bow, and sold and indorsed to the plaintiff by the latter. At the time the note was executed and delivered, and as a part of the same transaction, Roblee executed and delivered a mortgage to the company, securing said note, which contained, among other things, this provision:

"Said L. O. Roblee agrees to deliver all the milk from said cows to the separator station run by the said Beatrice Creamery Co., located in Broken Bow, and said Creamery Company agrees to credit said Roblee with proceeds of sale of butter-fat from said milk, said Roblee agreeing to regularly milk and deliver same, and properly feed said cows to hold up the flow of milk."

It appears that the creamery company from time to time remitted considerable sums to the bank at Broken Bow, at which the note was payable, to be credited upon the note under this provision. But said bank, having sold the note to plaintiff, failed to transmit the money so sent, and afterwards became insolvent. These facts being pleaded, the plaintiff claimed that it was a *bona fide* holder for value, in the usual course of business, and that the payments made to the bank at Broken Bow should not be credited for the reason that said bank did not have posses-

sion of the note at the time, nor any title thereto, and had no authority to make the collections. The trial court held that the note was negotiable, and found for the plaintiff.

It will be seen that the case must turn upon the question whether the note was negotiable in view of the provision in the mortgage. The plaintiff contends that the provision quoted does not amount to an agreement that the maker might pay the note in the proceeds of butter-fat, and that, even if it does, the agreement to that effect is not incorporated in the note and the plaintiff is not bound nor the negotiability of the note affected thereby. We do not think either position well taken. Upon the first point, counsel say:

"The provisions of the mortgage did not give Roblee the right to pay the note in butter-fat, but simply made the creamery company the agent of Roblee, the creamery company agreeing to credit him with the proceeds of the sale of butter-fat."

But the agreement is that Roblee will feed the cows so as to "hold up the flow of milk," will regularly milk them, and will deliver all the milk to the company. So far from the contract not giving him the right to pay in that manner, it compels him to pay in the proceeds of butter-fat so far as sufficient might be produced before maturity of the note. It can hardly be said that the creditor was agent of the debtor to pay himself out of the debtor's property delivered to him under the agreement. The arrangement was for the benefit of the company, to enable it to apply the proceeds of the fat yielded by the milk of the mortgaged cows, upon which otherwise it had no claim, and it was acting as its own agent in so doing.

We think the provision quoted, if to be taken as part of the note, necessarily destroys its negotiability. The substance of the agreement is that from time to time prior to maturity Roblee shall deliver milk to the company and that the latter shall credit the proceeds of the butter-fat derived therefrom upon the note. Roblee is bound to deliver the milk, and to feed and care for his cows in such a

way as to make proper provision therefor. In other words, he is bound to make payments of uncertain sums at unspecified and uncertain times prior to maturity. There is no way of telling either from the papers themselves, or in any other way with more than a vague approximation to accuracy, how much would be payable on the instrument at maturity. The cows might yield enough milk so that the whole sum would be wiped out in the year which the note was to run. Or, by death of the cows, failure to yield the expected quantities, or deterioration in the quality, little or nothing might be realized to be credited. As the event proved, there were eleven several payments, aggregating a little less than one-third of the principal. In order to be negotiable, an instrument must bear on its face entire certainty as to the amount to be paid at maturity, without regard to extrinsic evidence. As Parsons puts it:

"There should be entire certainty and precision as to the amount to be paid. The reason of this is especially obvious; for if the note is to represent money effectually, there must be no chance of mistake as to the amount of money of which it thus takes the place and performs the office. On this point, therefore, the cases are quite stringent." 2 Parsons, Notes & Bills, 37.

In consequence, the incorporation of a collateral agreement in a promissory note, which requires or may cause payment to be made of uncertain sums at uncertain times before maturity, and thus renders it impossible to say how much, if anything, will be due at maturity, renders the note non-negotiable. *Lincoln Nat. Bank v. Perry,* 66 Fed. 887; *Commercial Nat. Bank of Chicago v. Consumers' Brewing Co.,* 16 App. Cas. (D. C.) 186; *Continental Nat. Bank of Chicago v. Wells,* 73 Wis. 332; *Smith v. Marland,* 59 Ia. 645; *South Bend Iron Works v. Paddock,* 37 Kan. 510; *Commercial Nat. Bank of Selma v. Crenshaw,* 103 Ala. 497. In *Lincoln Nat. Bank v. Perry,* the note contained an agreement that if the collateral security deposited to secure its payment should depreciate at any time prior to maturity, the payee or holder might call for further se-

curity, and, if such further security was not furnished in two days, might sell the collateral at once. It was held non-negotiable. The court said:

"One of the chief requisites of a negotiable note or bill is that it shall show with certainty the amount payable thereon at maturity and that it shall not be cumbered with conditions which render the amount then payable uncertain. * * * It frequently happens that notes discounted by banks contain a statement that certain securities have been deposited as collateral to secure their payment, together with a stipulation authorizing a sale of such securities, in a certain manner, at the maturity of the paper, if it is not then paid. Such recitals and stipulations do not render the time or fact of payment, nor the amount to be paid at maturity, in the least degree uncertain; and for that reason it is generally held that they do not impair the negotiability of a note that is, in other respects, so drawn as to satisfy the requirements of the law merchant. * * * It is manifest, however, that an important element of certainty is destroyed by a collateral agreement appended to a note which may cause a payment to be made thereon of an uncertain sum at an uncertain time before maturity, and thus render the amount payable at maturity somewhat less than the amount specified on the face of the paper. A note of that description, which carries with it the probability, or even the possibility, that it may be partially or wholly extinguished before maturity, differs essentially from bank bills and other forms of currency which negotiable paper is supposed to resemble, and whose functions it is intended to perform. It has accordingly been held in several well-considered cases that stipulations of that nature embodied in a promissory note will impair its negotiability."

In *Commercial Nat. Bank of Chicago v. Consumers' Brewing Company,* the provision was that the principal should be "curtailed monthly," but without specifying in what amount. There was also a provision for sale of collateral in case it depreciated before maturity and further

security was not given, but it was not stipulated that the principal should become due in event of such default. The note was held non-negotiable. The court distinguished cases where the principal is made payable at the makers' option before maturity, where the maker has the privilege of paying a certain proportion upon recurring interest periods, and where the note is payable in fixed instalments. In all these cases, the stipulations in question merely fix different periods of maturity for all or part of the principal. But it has long been settled that the time when the instalments are severally payable must be fixed in some way. *Moffat v. Edwards,* Car. & Mar. (Eng.) 16. Where a note is payable "on or before" a day certain, there is a privilege of maturing the whole which does not affect negotiability. On the other hand, stipulations of the kind under consideration do not provide for maturing any part of an instrument, but simply for payment thereon of uncertain sums at uncertain times. The case at bar is clearer even than those cited, and must be governed by the principle they establish.

The other point has been disposed of in a number of recent decisions. *Lantry v. French,* 33 Neb. 524; *Grand Island Savings & Loan Ass'n v. Moore,* 40 Neb. 686; *Seieroe v. First Nat. Bank,* 50 Neb. 612; *Bradbury v. Kinney,* 63 Neb. 754; *Consterdine v. Moore,* 65 Neb. 291; *Garnett v. Meyers,* 65 Neb. 280; *Kendall v. Selby,* 66 Neb. 60.

In *Garnett v. Meyers,* this court said it was "well settled in this state that, although a note is absolute in form, every provision affecting the same, the amount, or manner of payment—that is, the contract, in regard to the indebtedness itself, contained in a mortgage given to secure it, and made contemporaneously—affects the note in precisely the same manner, and to the same extent, as though included with it on the same piece of paper, as to all persons chargeable with notice."

As a rehearing has been ordered in *Garnett v. Meyers,* upon other grounds, however, and as *Kendall v. Selby* follows that case, counsel have questioned the soundness of

the rule announced, claiming that it is contrary to prior decisions of this court and at variance with the authorities. It is undoubtedly true that a note otherwise negotiable is not rendered non-negotiable merely by a provision for or reference to collateral security. *Fleckner v. United States Bank,* 8 Wheat. (U. S.) 338; *Towne v. Rice,* 122 Mass. 67; *Blumenthal v. Jassoy,* 29 Minn. 177; *Knipper v. Chase,* 7 Ia. 145. The statements in prior decisions of this court, cited by counsel, are to be referred to this rule. *Heard v. Dubuque County Bank,* 8 Neb. 10; *Dobbins v. Overman,* 17 Neb. 163; *Stark v. Olsen,* 44 Neb. 646. But in cases of this sort, there is nothing in the provision of the note, or the agreement as to security referred to therein, affecting the terms of the note as to the indebtedness thereby created. If there were, it would be another matter. In such cases, where the agreement is in the note itself, negotiability is destroyed. *Continental Nat. Bank v. Wells,* 73 Wis. 332; *Lincoln Nat. Bank v. Perry, supra; American Exchange Bank v. Blanchard,* 7 Allen (Mass.), 333; *Goodenow v. Curtis,* 18 Mich. 298. Hence it is clear that the decisions in question are in no way counter to the doctrine that, when executed together and as a part of one transaction, a note and mortgage securing it are to be construed together and as one instrument. Such is the general rule with respect to other contracts. *Edling v. Bradford,* 30 Neb. 593. And it has been applied to notes and mortgages securing them, when executed at the same time, repeatedly. *Phelps v. Mayers,* 126 Cal. 549; *Brownlee v. Arnold,* 60 Mo. 79; *Muzzy v. Knight,* 8 Kan. 456; *Cabbell v. Knote,* 2 Kan. App. 68. Also to notes and other contemporaneous agreements as to the mode or conditions of payment. *Hill v. Huntress,* 43 N. H. 480; *Berry v. Wisdom,* 3 Ohio St. 241; *Wood v. Ridgeville College,* 114 Ind. 320. Applying this rule, it is obvious that the provisions as to the terms and manner of payment contained in the mortgage may be such as to make the note non-negotiable as to all persons chargeable with notice thereof.

It is suggested that in the case at bar the note contains

no reference to the mortgage. In *Garnett v. Meyers* and *Kendall v. Selby* the note contained an express reference to the mortgage, and that fact was regarded as sufficient to notify all holders that it did not contain the whole contract of the parties. But the reference in the note is only one mode of charging the holder with notice. Any other circumstance which serves to inform him of the agreement of the original parties, at the time of his purchase or before he parts with value in good faith, is equally efficacious. In the case at bar, it appears that the plaintiff obtained the mortgage at the same time that it acquired the note, and as part of the same purchase. In consequence it took with notice of the provisions of the mortgage as to the manner in which the note was to be paid, and was bound thereby.

We therefore recommend that the judgment be reversed and the cause remanded for a new trial.

DUFFIE 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 is remanded for a new trial.

REVERSED.

ALVIN H. ARMSTRONG ET AL. V. SIMON D. MAYER ET AL.

FILED MAY 20, 1903. No. 12,820.

1. **Cross-Petition.** A defendant in an action is not restricted to the counter-claim provided for in sections 100 and 101 of the code, but, in a proper case, may seek affirmative relief, either against the plaintiff or against codefendants, by cross-petition.

2. ———. In such case, the cross-petition gives rise to a cross-suit, auxiliary to and dependent upon the original suit, but for many purposes distinct.

3. **Cross-Suit: BASIS OF RIGHT.** The basis of the right to bring such a cross-suit is to be found in sections 1 and 429 of the code, and in the consideration that in cases where the code is silent, remedies furnished by the old common law or equity practice, not

inconsistent with its provisions, may be resorted to in order to prevent failure of justice.

4. ———: WHEN MAINTAINABLE. A cross-petition is maintainable either to aid in the defense of the original suit, where affirmative equitable relief is required to make such defense effective, or to obtain a complete adjudication of the controversies between the original complainant and the cross-complainant over the subject matter of the original suit.

5. **Cross-Bill:** CHANCERY PRACTICE. Under the chancery practice, where the purpose of a cross-bill is defensive merely, it need not be based on equitable grounds nor seek equitable relief; but when its purpose is more than defensive, and it seeks relief affirmatively, its scope must be limited to matters which are cognizable in a court of equity, if not to matters cognizable upon equitable grounds.

6. ———: ———. It is also required under the chancery practice, that the cross-suit be germane to the original suit. The new issues which a defendant may introduce by cross-bill are limited to such as it is necessary for the court to have before it in deciding the questions raised in the original suit in order to do complete justice to all parties with respect to the cause of action on which the plaintiff bases his claim for relief.

7. **Chancery Practice Enlarged by Code.** It seems that the rules of chancery practice are so far enlarged by the code that, although a cross-petition is more than merely defensive and seeks affirmative relief beyond the purposes of defense, such relief need not be equitable, nor need the cross-petition be based on equitable grounds.

8. **Cross-Petition:** SCOPE. But the matters set up in the cross-petition must be germane to the original suit. The cross-petition is not maintainable for purposes of affirmative relief as a cross-suit beyond the requirements of a complete adjudication upon the subject mater of the original suit.

9. **Cross-Petition Not Maintainable.** Pending proceedings to obtain possession of defendant's building, then occupied by plaintiffs, plaintiffs sued to enjoin defendants from procuring or executing a writ of restitution until they could obtain review upon error of a judgment in forcible detention, and to enjoin interference with their possession or prosecution of further proceedings until the pending cause was determined. After judgment on the petition in error adverse to plaintiffs, but before hearing of the injunction suit, defendants filed a cross-petition therein, claiming damages for abuse of process in the taking of unfounded and vexatious appeals and proceedings in error in state and federal courts, for attorneys' fees and expenses therein, and in securing vacation of a restraining order in said injunction suit, for in-

juries to the building while occupied by the plaintiffs, and for loss of the use of an adjacent building rented to be used in connection with the one in controversy. *Held*, that such cross-petition was not maintainable.

10. Supersedeas Bond: EFFECT. The giving of a supersedeas bond for the purpose of an appeal, under section 677 of the code, will not prevent the district court from ruling upon a motion for a new trial, theretofore filed, in order to enable the party giving such bond to prosecute error, should he so elect.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, DISTRICT JUDGE. *Reversed. Petition and cross-petition dismissed.*

Lionel C. Burr, Elmer Ellsworth Spencer and *Charles O. Whedon,* for plaintiffs in error.

Walter J. Lamb and *Robert Ryan, contra.*

POUND, C.

In July, 1899, Mayer Brothers, hereinafter called the defendants, became the owners of the building in controversy. At the time of the conveyance, said building was occupied by the Armstrong Clothing Company, a partnership, hereinafter referred to as the plaintiffs, under an assignment to one of the partners of a lease made to another firm by the former owners. The lease expired on February 1, 1900. At its expiration, the plaintiffs refused to surrender possession, and proceedings in forcible detainer were brought by the defendants, which resulted in a finding of guilty and a judgment accordingly. From this judgment, the plaintiffs took an appeal to the district court, and, upon judgment going against them in that court, prosecuted error in the supreme court. In the latter tribunal, however, it was determined that there was no right of appeal from the justice's to the district court in such cases, as the statutes then stood. *Armstrong v. Mayer,* 60 Neb. 423. Thereupon the plaintiffs procured a bill of exceptions from the justice before whom the cause was first tried and filed it with a transcript and petition

in error in the district court, in order to obtain a review of the judgment. While this petition in error was pending, they brought the present suit. The petition sets forth the proceedings in the justice's court, the pendency of the petition in error, and the execution, filing and approval of a proper supersedeas bond. It alleges further that summons in justice's court was served upon Alvin H. Armstrong only, that the Armstrong Clothing Company was not a party, and that Samuel G. Armstrong was not served; that the plaintiffs and defendants are competitors in business, and that the defendants, for the purpose of injuring plaintiffs in their business and of preventing competition, were threatening and about to procure the issuance of a writ of restitution and cause such writ to be executed, and to forcibly and unlawfully put the plaintiffs out; that plaintiffs had a large stock of goods and merchandise in said building, of the value of $40,000 and upwards, that there was no other place available in the city of Lincoln for their business, and that irreparable injury would result. They prayed for an injunction restraining the defendants from instituting any proceedings at law or in equity to obtain posession of the building, from interfering in any way with plaintiffs' possession, and from taking or attempting to take possession of the building or any part of it. Before this cause could be heard, the petition in error was disposed of in the district court, adversely to the plaintiffs, and proceedings in error were taken in the supreme court to review the judgment of affirmance. These proceedings also resulted adversely to the plaintiffs. A writ of error was then obtained from the supreme court of the United States, but the cause was dismissed in that court for want of jurisdiction. *Armstrong v. Mayer,* 183 U. S. 693.

After the district court had affirmed the judgment of the justice of the peace, but before the present suit came on for hearing, the defendants, by leave of court, filed a cross-petition, in which they set up a conspiracy on the part of the plaintiffs to withhold possession of the prem-

ises wrongfully and to extort money from defendants as a condition of surrendering possession, and alleged that pursuant to such conspiracy the plaintiffs had been guilty of wrongful and malicious abuse of process in the prosecution of unfounded and groundless appeals and proceedings in error, without any probable cause. They alleged further that by reason of plaintiffs' wrongful withholding of possession and of such malicious abuse of process, they had been deprived of the use of a room adjacent to the building in controversy, which they had rented solely for use in connection therewith, and were not able to make use of otherwise; that the plaintiffs, on vacating the premises, wrongfully removed certain fixtures; that they committed certain acts of waste, and in particular failed to keep the roof in repair and to care properly for the heating plant. By a supplemental cross-petition, they set up certain further items of damage along the same lines. They prayed, among other things, for an accounting of their damages by reason of the several matters alleged, and for judgment against the plaintiffs therefor. Upon trial of these issues, the court found for the defendants, dismissed the petition, found the sum of $12,192.76 due the defendants as damages upon their cross-petition, and rendered judgment against the plaintiffs accordingly.

Although the plaintiffs contend that the district court erred in dismissing their petition, we do not think there is any serious question that the decree is correct in this particular. As we see it, the sole question to be decided is whether the defendants were entitled to maintain their cross-petition or should have been remitted to a separate and independent action at law. The right of the defendants to litigate their several claims for damages in this cause was contested below by demurrers, by motions at the trial, by requests for trial by jury, by protestations in the answers and by motion for a new trial, and we are of opinion that it has been challenged sufficiently and is before us for determination.

A considerable portion of the plaintiffs' argument in

this court is devoted to the proposition that the claims for damages set up by the defendants are not available as counter-claims under sections 100 and 101 of the code, and were not maintainable in the present cause for that reason. But we think a defendant in an action is not restricted to the counter-claim provided for in said sections, but, in a proper case, may seek affirmative relief, either against the plaintiff or against codefendants, by cross-petition. The code of this state contains no provisions with reference to cross-petitions. Nevertheless the practice of filing them has long obtained in this jurisdiction, and the right to bring a cross-suit auxiliary to and dependent upon the original suit, yet distinct for many purposes, has been recognized, at least, repeatedly. *Hapgood & Co. v. Ellis,* 11 Neb. 131; *Carlow v. Aultman & Co.,* 28 Neb. 672; *Arnold v. Badger Lumber Co.,* 36 Neb. 841; *Patten v. Lane,* 45 Neb. 333; *Havemeyer v. Paul,* 45 Neb. 373. In several jurisdictions where there are no provisions on this subject in the codes, the equity practice which allows affirmative relief upon cross-bill has been adopted even to the extent of allowing new parties to be brought in. *Sims v. Burk,* 109 Ind. 214; *Killian v. Andrews,* 130 Ind. 579; *Hopkins v. Gilman,* 47 Wis., 581. Even where the codes expressly provide for cross-petitions against codefendants, cross-petitions for relief against the plaintiff, not provided for in the codes, are recognized by the courts. *Radcliffe v. Scruggs,* 46 Ark. 96; *Russell & Co. v. Lamb,* 82 Ia. 558; *Cramer v. Clow,* 81 Ia. 255. We think this long established and well recognized practice has a sufficient basis in sections 1 and 429 of the code, and in the consideration that in cases where the code is silent, remedies furnished by the old common law or equity practice, not inconsistent with its provisions, may be resorted to in order to prevent failure of justice. Section 429 provides that the court, in rendering judgment, "may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be en-

titled." In construing a similar provision in the code of Indiana, the supreme court of that state said:

"The statute expressly confers power to determine the rights of the parties on each side of the case, as between themselves, when the justice of the case requires it. * * * The mode of procedure, however, is not pointed out by the statute, and, as the authority given is one previously possessed only by courts of chancery, we suppose the rules of pleading and practice of those courts, modified by the spirit of the code, must be resorted to." *Fletcher v. Holmes,* 25 Ind. 458.

It may be admitted that the code of Indiana has a provision expressly authorizing such resort to the old practice. But, in the language of a well known text-writer, "this provision must be understood everywhere. No court would deny one's right, or invent an original mode of proceeding for protecting it, because of an omission in the code, so long as the common law or equity practice furnished a remedy." Bliss, Code Pleading (3d ed.), sec. 390. Hence, we are of opinion that a cross-petition is maintainable under the code, as a cross-bill would be in the chancery practice, either to aid in the defense of the original suit, where affirmative equitable relief is required to make such defense effective, or to obtain a complete adjudication of the controversies between the original complaint and the cross-complaint over the subject matter of the original suit. Otherwise, the doctrine that a court of equity, having obtained jurisdiction, will retain the cause for complete determination, and the jurisdiction of equity to prevent a multiplicity of suits would be seriously impaired.

Assuming therefore, that the right of the defendants to maintain their cross-action is not concluded by the rules of the code as to counter-claims and the decisions of this court construing them, we must determine the cause in accordance with the rules of chancery practice governing cross-bills, so far as consistent with the provisions of the code, and subject to such modifications as the letter or

spirit of the code may have introduced or may require. In that practice, it is well settled that the "issues raised by a cross-bill must be so closely connected with the cause of action in the original suit that the cross-suit is a mere auxiliary or dependency upon the original suit." *Springfield Milling Co. v. Barnard & Leas Mfg. Co.*, 26 C. C. A. 389, 81 Fed. 261; *Cross v. De Valle*, 1 Wall. (U. S.) 1; *Stuart v. Hayden*, 18 C. C. A. 618, 72 Fed. 402; *Stonemetz Printers' Machinery Co. v. Brown Folding Machine Co.*, 46 Fed. 851; *Mathiason v. City of St. Louis*, 156 Mo. 196; *May v. Armstrong*, 3 J. J. Marsh. (Ky.) 260; *Krueger v. Ferry*, 41 N. J. Eq. 432. Where the ultimate purpose of the cross-bill is defensive only, the cross-suit is so completely dependent upon the original suit, that the dismissal of the latter carries with it the former. *Cross v. De Valle, supra.* But in case the cross-bill goes further, and seeks affirmative relief with respect to the subject matter of the original bill for more than strictly defensive purposes, the cross-suit is for many purposes distinct, so that, for example, it does not fall with the original suit upon voluntary dismissal or dismissal for want of equity. *Lowenstein v. Glidewell*, 5 Dill. (U. S.) 325; *Markell v. Kasson*, 31 Fed. 104; *Wilkinson v. Roper*, 74 Ala. 140; *Clark v. City of Des Moines*, 20 Ia. 454; *Wetmore v. Fiske*, 15 R. I. 354; *Coogan v. McCarren*, 50 N. J. Eq. 611. It does not follow, however, that the cross-suit may be wholly independent of or unconnected with the original suit. The chancery practice limits its scope, both with respect to the relief obtainable and with respect to subject matter, in several important particulars.

Under the chancery practice, where the purpose of a cross-bill is defensive merely, it need not be based on equitable grounds nor seek equitable relief. *Lambert v. Lambert*, 52 Me. 544; *Nelson & Hatch v. Dunn*, 15 Ala. 501; *Gilmer v. Felhour*, 45 Miss. 627; Story, Equity Pleading (10th ed.), sec. 628; 2 Daniell, Chancery Pleading & Practice, 1549. But this is limited, as stated in *Lambert v. Lambert, supra*, to cross-bills "brought forward by way

of defense." When the purpose of the cross-bill is more than defensive and it seeks relief affirmatively, its scope must be limited to matters which are cognizable in a court of equity, if not to matters cognizable upon equitable grounds. *Jackson v. Simmons,* 39 C. C. A. 514, 98 Fed. 768; *Wright v. Frank,* 61 Miss. 32; *Griffin v. Fries,* 23 Fla. 173; *Beal v. Smithpeter,* 65 Tenn. 356; *Lautz v. Gordon,* 28 Fed. 264; *Crisman v. Heiderer,* 5 Colo. 589; *Gage v. Mayer,* 117 Ill. 632; *Trapnall v. Hill,* 31 Ark. 345. It is also required under the chancery practice that the cross-suit be germane to the original suit. The new issues which a defendant may introduce by cross-bill are limited to such as it is necessary for the court to have before it in deciding the questions raised in the original suit in order to do complete justice to all parties with respect to the cause of action on which the plaintiff bases his claim for relief. *Krueger v. Ferry,* 41 N. J. Eq. 432; *Ferry v. Krueger,* 43 N. J. Eq. 295; *Brownlee v. Warmack,* 90 Ga. 775; *Mathiason v. City of St. Louis,* 156 Mo. 196; *Cross v. De Valle,* 1 Wall. (U. S.) 1; *Rowan v. Sharps' Rifle Mfg. Co.,* 33 Conn. 1; Cooper, Equity Pleading, 85.

In *Stuart v. Hayden,* 18 C. C. A. 618, 72 Fed. 402, the court say:

"A cross-bill is brought either to aid in the defence of the original suit or to obtain a complete determination of the controversies between the original complainant and the cross-complainant over the subject matter of the original bill. If its purpose is different from this, it is not a cross-bill, although it may have a connection with the general subject of the original bill."

In *Krueger v. Ferry, supra,* the court said:

"The new facts which it is proper for a defendant to introduce into a pending litigation by means of a cross-bill, are such, and such only, as it is necessary for the court to have before it in deciding the questions raised in the original suit, to enable it to do full and complete justice to all the parties before it in respect to the cause

of action on which the complainant rests his right to aid or relief. If a defendant, in filing a cross-bill, attempts to go beyond this, and to introduce new and distinct matter, not essential to the proper determination of the matter put in litigation by the original bill, although he may show a perfect case against either the complainant, or one or more of his codefendants, his pleading will not be a cross-bill."

If we are to be guided entirely by the rules of chancery practice, we must hold that the cross-petition in this case is not maintainable for the reason that its purpose is more than defensive and the relief which it prays is not sought upon equitable grounds, but by reason of matters cognizable only at law, and with respect to which the law furnishes an adequate and complete remedy. Abuse of process, damages to the building, damages for waste and removal of fixtures, and deprivation of the use of the adjoining store room, are matters for a jury, not for a court of equity. So long as these matters are not set up merely by way of defense, if the chancery practice were to be adhered to, we should be obliged to recommend dismissal of the cross-petition on this ground alone. We are inclined to the opinion, however, that the rules of the chancery practice, in this respect, are so far enlarged, under the code, that, although a cross-petition is more than merely defensive, and seeks affirmative relief beyond the purposes of defense, such relief need not be equitable nor need the cross-petition be based on equitable grounds. It is true some courts, in code states, have adhered to the rule in its entirety. *Crisman v. Heiderer,* 5 Colo. 589; *Trapnall v. Hill,* 31 Ark. 345. But there seems to be sound reason and good authority for relaxing it. The doctrine that a court of equity, having obtained jurisdiction of a controversy for some purpose clearly equitable, will administer complete relief in the one proceeding, was hampered somewhat, in its application, by the distinction between law and equity and the necessity that courts of equity keep within the limits appointed by that distinc-

tion. Where that distinction and its consequences no longer stand in the way, there is every reason to hold that the power of courts of equity to dispose of the whole controversy is enlarged so as to permit the legal as well as equitable incidents involved in a full determination of the subject matter of the original suit to be adjudicated.

"Wherever the true spirit of the reformed procedure has been accepted and followed, the courts not only permit legal and equitable causes of action to be joined, and legal and equitable remedies to be prayed for and obtained, but will grant purely legal reliefs of possession, compensatory damages, pecuniary recoveries, and the like, in addition to or in place of the specific equitable reliefs demanded, in a great variety of cases which would not have come within the scope of the general principle as it was regarded and acted upon by the original equity jurisdiction, and in which, therefore, a court of equity would have refrained from exercising such a jurisdiction." 1 Pomeroy, Equity Jurisprudence (2d ed.), sec. 242.

Conceding that the nature of the relief sought by the cross-petition and the grounds upon which it is sought do not of necessity prevent the defendants from demanding it by way of cross-suit in an equitable action, we have still to consider whether the subject matter of the cross-petition is germane to the original petition in the case at bar and so far essential to the proper determination thereof as to be properly the subject of a cross-suit. We see no reason to doubt that the matters set up in the cross-petition must be germane to the original suit under the code, quite as much as under the chancery practice. This has been assumed generally, without much discussion. 5 Ency. Pl. & Pr. 678. The only relaxation of the rule that there can not be two original bills in one cause, so far as we know, has been with respect to cross-bills between codefendants to foreclose second mortgages or other junior liens. The practice of filing cross-petitions for this purpose has always obtained here and has been recognized repeatedly, although not allowed in strictness

under the old practice. But in such cases the cross-petition is in substance germane to the original controversy. The subject matter thereof is the determination of the priorities of liens, the ascertainment of the amounts thereof, and the subjection of the property to plaintiff's claim. The defendants who hold subsequent liens are given complete relief, as against their codefendants, along these same lines. That this practice has not impaired the general rule is made clear by the refusal of the courts to allow controversies over the title, claims for partition, and the like, to be tried in suits for foreclosure. *Shellenbarger v. Biser,* 5 Neb. 195; *Hurley v. Cox,* 9 Neb. 230. We think, therefore, that a cross-petition is not maintainable for purposes of affirmative relief as a cross-suit beyond the requirements of a complete adjudication upon the subject matter of the original suit. New and distinct matter, not maintainable under the provisions of the code as to counter-claims, and not involved in a proper determination of the subject matter of the original suit, must be litigated in a separate action. When it is said that a court of equity will administer complete relief and adjudicate all controversies between the parties, the meaning is that a complete decree will be rendered with reference to the immediate subject matter of the original suit. The subject matter of that suit will not be dealt with piecemeal. It is not meant that all causes of action between the parties, or some of them, will be disposed of in the one cause where they are not involved in a complete disposition of the subject matter of the bill. *Stonemetz Printers' Machinery Co. v. Brown Folding Machine Co.,* 46 Fed. 851; *May v. Armstrong,* 3 J. J. Marsh. (Ky.) 260; *Lautz v. Gordon,* 28 Fed. 264; *Brownlee v. Warmack,* 90 Ga. 775; *Mathiason v. City of St. Louis,* 156 Mo. 196; *Allen v. Fury,* 53 N. J. Eq. 35. *Brownlee v. Warmack, supra,* is especially in point. Plaintiff alleged that he was owner of a mill and obtained the water to operate it from a spring on defendant's land, under a deed from defendant's predecessor, whereby he had the right to obtain water

from the spring by a mill race. He alleged that defendant was threatening to make ditches in and around the spring which would destroy or injure his water supply, and prayed for an injunction to prevent this. The defendant filed an answer in the nature of a cross-bill, alleging that the plaintiff had negligently failed to repair his mill race and had allowed breaches in the banks, whereby the water escaped on the defendant's land and damaged it. He prayed for a decree awarding him damages therefor. It was held that this was not germane to the original petition and, moreover, was a cause of action in tort which, not being set up by way of defense but as a ground for affirmative relief, was not the subject of a cross-bill.

We think the authorities relied upon by the defendants are in entire accord with the principles announced above and afford no justification for the cross-petition in the case at bar. In *Shaughnessy v. St. Andrew's Church,* 63 Neb. 798, an equity suit was pending involving possession of a church. Afterwards one of the parties brought an action in ejectment to recover possession of the same church. The court held that a plea of another action pending should be sustained. That case, however, does not go to the extent of holding that collateral questions arising out of the wrongful possession of the appellants therein, such, for example, as claims for damages for waste committed, or for damages resulting from the wrongful exclusion of the appellee from the church, should or could have been adjudicated in the equity suit. *Haynes v. Union Investment Co.,* 35 Neb. 766, was a suit to enjoin a landlord from dispossessing a tenant without paying for certain furniture, fixtures and improvements, in accordance with the provisions of a lease. Here the subject matter of the action was more than the question of possession. The petition itself raised the whole question of the rights of the parties with reference to the furniture, fixtures and improvements. *Disher v. Disher,* 45 Neb. 100, merely involved the joinder of a legal and an equitable cause of action, both arising out of the same subject matter, in one petition. In *Tulleys v.*

Keller, 45 Neb. 220, the original petition put in issue the right of one of the parties to do business under a certain name and the transactions done under that name were the subject matter of the litigation. The relief awarded the defendants was with reference to this very subject matter. *Pittsburgh & C. R. Co. v. Mt. Pleasant & B. F. R. Co.,* 76 Pa. St. 481, is very similar to *Shaughnessy v. St. Andrew's Church, supra.* The subject matter of the equity suit being possession, it was held that full relief so far as possession was concerned could be given in that proceeding. In *Kaegebin v. Higgie,* 51 Ill. App. 538, suit was brought in equity to enforce an alleged parol agreement to lease for one year. There was also a prayer for an injunction restraining the defendant from interfering with complainant's possession. The cross-bill prayed that plaintiff's be enjoined from going upon or occupying the premises or interfering with the defendant's possession of the same or exercising any rights or control over the same, and for general relief. Upon hearing, the trial court found for the defendant, dismissed the original bill and put the cross-complainant in possession. This was held proper. *Grignon v. Black,* 76 Wis. 674, was an action to enjoin waste. The defendant claimed adverse title under certain tax deeds and prayed that the petition be dismissed and title decreed in him. The court said that as the plaintiffs had brought the defendant into a court of equity and called upon that court to give them relief, because they were the owners in fee and in actual possession of certain lands to which the defendant laid claim, the latter was clearly authorized to come into the same court and defeat their right to relief, by showing they had no title and no possession; and having shown that such possession and title were in himself he could obtain the affirmative relief to which his title and possession entitled him, as against the plaintiff.

Under these authorities the defendants could undoubtedly have maintained a cross-petition to obtain possession, although that would have been legal relief,

because possession was the subject matter of the controversy disclosed by the original petition. But possession and the right of possession was all that the original petition covered; and by no stretch can the subject matter of the original suit be extended further. Claims of damages for abuse of process, for attorneys' fees and other expenses in the several legal proceedings between the parties, damages for deprivation of possession pending such proceedings, injuries done to the property while it was in the wrongful possession of the plaintiffs, and the claim for deprivation of the use of the adjoining building, are in no sense a part of the subject matter of the original suit. In some sense they are connected with that subject matter; but the connection is not a necessary one so as to make it proper that the court pass upon them in order to render a complete adjudication with reference to possession and the right of possession, which alone are the subject matter of the original controversy.

One further point of practice remains to be noticed. Within three days after the rendition of the judgment, the plaintiffs filed a motion for a new trial. Afterwards, and within the twenty days fixed by section 677 of the code, they executed and filed the supersedeas bond provided for by that section, for the purpose of an appeal. Their motion for a new trial was not acted on by the court for some time thereafter. It is now urged, on behalf of the defendants, that the district court lost all power to deal with the cause after filing of the supersedeas bond, for the period of six months allowed for the taking of an appeal, and was without jurisdiction to rule upon the motion for a new trial. It is contended also that the judgment can not be reviewed upon error in the absence of a ruling on that motion. We do not think this point is well taken. In the first place, it is doubtful whether a motion for a new trial was required. The substance of plaintiffs' case is that the pleadings will not sustain the judgment rendered; that, on the face of the pleadings, defendants' cross-petition, upon which the judgment in

their favor proceeds, was not maintainable. That question may be looked into on petition in error, although there has been no motion for a new trial below. *Farris v. State,* 46 Neb. 857; *Ames v. Parrott,* 61 Neb. 847. Moreover, we see no reason why the giving of a supersedeas bond for the purpose of an appeal under section 677 of the code, should prevent the district court from ruling upon a motion for a new trial, theretofore filed, so as to enable the party giving such bond to prosecute error, should he so elect. It is well settled that an abortive appeal will not bar proceedings in error. *Cahill v. Cantwell,* 31 Neb. 158. The moving party may elect whether to proceed by appeal or by petition in error, even after the transcript is filed and at any time before final submission. *Burke v. Cunningham,* 42 Neb. 645; *Beatrice Paper Co. v. Beloit Iron Works,* 46 Neb. 900. Hence, the mere filing of a supersedeas bond for an appeal can not operate as an election, nor can the district court, by delaying to rule upon the motion for a new trial till after the expiration of the twenty days fixed by section 677 of the code for giving a supersedeas bond, limit a party to one of two remedies of which he is entitled to choose either. It is true the supersedeas bond operates from the time it is filed for the period of six months allowed for taking the appeal. *Kountze v. Erck,* 45 Neb. 288; *State Bank of Nebraska v. Green,* 10 Neb. 130; *State Bank of Nebraska v. Green,* 8 Neb. 297. Its effect, however, is not to deprive the trial court of all power, but only to stay execution and prevent enforcement of the decree. *Heizer v. Pawsey,* 47 Kan. 33; *New Brighton & N. C. R. Co. v. Pittsburgh, Y. & C. R. Co.,* 105 Pa. St. 13.

We therefore recommend that the decree be reversed and the petition and cross-petition dismissed.

DUFFIE 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 petition and cross-petition are dismissed.

REVERSED.

STATE OF NEBRASKA V. WILLIAM F. PORTER ET AL.

FILED JUNE 3, 1903. No. 12,700.

1. **Constitutional Law.** Chapter 50, laws of 1899, entitled "An act creating a state registry of brands and marks, a state brand and mark committee, providing for brands and marks upon live stock, and repealing chapter fifty-one (51) of the Compiled Statutes of 1897," is in conflict with the constitution and wholly void.

2. ———: BRAND AND MARK COMMITTEE. It was not the intention of the legislature by section 2 of chapter 50, aforesaid, to create a new office to be filled by the secretary of state; but the provision in said section, authorizing the governor to appoint three persons to act as members of a brand and mark committee, was an abortive attempt to add to the number of executive state offices created by the constitution.

3. **Legislative Intent.** The legislature intended that the secretary of state should retain for his services, as a member of the brand and mark committee, twenty per cent. of all the fees received for recording brands and marks.

4. **Money Received Under Color of Office.** Money received by the secretary of state for recording brands and marks, under the provisions of the act of 1899, was not received by virtue of his office, but under color of his office.

5. **Official Bond:** SURETIES. The sureties on official bonds do not undertake to answer for acts done by their principal under color of his office, but only for acts done by virtue of his office.

6. **Fees:** ESTOPPEL. The state has no legal title to any part of the fees received by the secretary of state for recording brands and marks under the provisions of the act of 1899; but that officer having, in collecting such fees, assumed to act in an official capacity, the law does not permit him, when called to account by the state, to deny that he so acted.

7. **Demurrer:** CONCLUSIONS OF LAW. A general demurrer admits the truth of all material facts well pleaded, but does not admit conclusions of law.

8. **Official Misconduct Not Established.** Official misconduct is not established by showing that trust funds have been used by a public officer for the very purpose the legislature and the owners of the funds intended they should be used.

ERROR to the district court for Lancaster county: LINCOLN FROST, DISTRICT JUDGE. *Reversed in part.*

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

Benjamin F. Johnson, Paul F. Clark and *Charles S. Allen, contra.*

SULLIVAN, C. J.

This was an action on the official bond of ex-secretary of state, William F. Porter. The petition charges that the money claimed by the state was received by Porter under the provisions of chapter 50, laws of 1899, since repealed, and that part of it was applied to his own use and the remainder paid out to S. E. Starrett, a clerk in his office, for services rendered in keeping the records of the brand and mark committee. The trial court was of opinion that the facts pleaded did not constitute a cause of action, and rendered judgment on the merits in favor of all the defendants. The case was submitted in this court upon the theory that the act of 1899 was a valid law, but this theory we can not accept. It was not valid; in whatever light it is viewed, it clashed with the constitution; there was not an enforceable provision in it; from the beginning to the end it was absolutely and utterly null. We are aware that a like act was sustained by the supreme court of South Dakota in *State v. Roddle,* 12 S. Dak. 433, on the assumption that it was the intention of the legislature to create a new office to be filled by the secretary of state, but the South Dakota constitution is different from ours. If we were to follow *State v. Roddle,* we would have to affirm the judgment of the district court, not however on the ground that the act was valid, but on the

ground that the money in question was not received under color of the office of secretary of state. By adopting the theory upon which *State v. Roddle* was decided, we would avoid one constitutional objection to the act, but in doing so would encounter three others, namely: (1) that the legislature has no power to create a new executive state office; (2) that no officer of the executive department is eligible to any other state office during the term for which he was elected; and (3) that the power to fill an office by election or appointment does not in any case belong to the legislature.

While it is entirely certain that the legislature did attempt by the act of 1899 to add to the number of executive state offices created by the constitution, there is, we think, in the act itself clear and unmistakable evidence that the legislative purpose was to impose new duties on the secretary of state and not to create for him a new office. To hold that the intention was to create a new office, would be to hold that the law could not, in any event, be executed if the secretary of state should refuse to qualify. Thus far it has not been found necessary in this state to provide for the filling of remunerative offices by conscription. When it is thought that the services of a particular individual are indispensable to the public, his friends may appeal to his patriotism, but the state can not, under existing laws, coerce him. Acceptance of office by taking the constitutional oath is and in its very nature must be a voluntary act. The fact that there is no provision for a bond to be given by the secretary of state as a member of the brand and mark committee is also evidence against the contention of defendants that the act should be interpreted as creating a new office to be filled by legislative appointment; but, perhaps stronger evidence of the legislative purpose is to be found in the provisions which, in effect, authorize the deputy secretary of state to receive fees and file and record papers. The act of 1899 provided that the secretary of state should receive as compensation for his services twenty per cent.

of the fees received for recording brands and marks. *State v. Roddle, supra.* This provision was clearly unconstitutional (*Moore v. State,* 53 Neb. 831), but it was not an essential part of the act. The provision that vitiated the entire statute was the one authorizing the governor to appoint three members of the brand and mark committee. By section 1, article V of the constitution, it is declared that:

"The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney general, and commissioner of public lands and buildings."

And by section 26 of the same article it is further declared:

"No other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this constitution shall be performed by the officers herein created."

The act of 1899 assumed to vest the brand and mark committee with executive powers and jurisdiction throughout the state. This being so, the members of the committee would, if the act were valid, be executive state officers. But as there can be no executive state offices other than those mentioned in section 1, article V of the constitution, the legislation we are considering was, of course, abortive and void. *In re Railroad Commissioners,* 15 Neb. 679; *Pacific Express Co. v. Cornell,* 59 Neb. 364; *Nebraska Telephone Co. v. Cornell,* 59 Neb. 737.

Porter having no authority, in any case, to receive fees paid to him for services rendered as secretary of state, and the fees in question having been paid and received for the use and benefit of the brand and mark committee and not for the use or benefit of the state, it is entirely clear under the previous decisions of this court that the defendant sureties are not liable, and that the judgment in their favor is right. *Huffman v. Koppelkom,* 8 Neb. 344; *Ottenstein v. Alpaugh,* 9 Neb. 237; *State v. Holcomb,* 46

Neb. 612; *State v. Moore,* 56 Neb. 82. The money in question did not come into Porter's hands by virtue of his office, but under color of his office; he had no legal right to receive it as secretary of state and consequently it was not within the terms of his official bond. Besides the sureties have done nothing to preclude them from asserting the truth, and the truth is that the state has no legal title to any part of the fees received under the provisions of the act of 1899. Those fees were not paid for official services; they were not earned by the performance of any official act. They were paid and received in accordance with the legislative intent that eighty per cent. of them should go to the members of the brand and mark committee, and that the remainder should be used in defraying expenses. But, while the state is not entitled to a judgment against the sureties, its claim against Porter is on a different footing. In receiving the money which the state is now seeking to recover, Porter assumed to act in an official capacity; by his conduct he asserted that he was exercising a power derived from the state, and this assertion he can not now repudiate. The admission which his conduct implied is, for the purposes of this case, indisputable. Having claimed to act under the authority of the state in collecting the fees paid for recording brands and marks, he can not now, consistently with good faith and righteous conduct, deny that he so acted. *Blaco v. State,* 58 Neb. 557; *People v. Swineford,* 77 Mich. 573; *People v. Van Ness,* 79 Cal. 84.

If then the fees retained by Porter be considered as having been received for services rendered by him as secretary of state, the conclusion is inevitable that he must account for them. Before leaving this branch of the case, it may be well to notice the suggestion of the attorney general that the validity of chapter 50, laws of 1899, is affirmed by the petition and admitted by the demurrer. It is, to be sure, an elementary rule of pleading that a general demurrer admits the truth of every material fact well pleaded; but the assertion that a domestic statute is

valid is not an allegation of fact, it is a conclusion of law, and in this case an obviously erroneous one.

The claim that the state is entitled to recover the sum of $595.05 paid to S. E. Starrett for keeping the records of the brand and mark committee, is grounded on the fact that Starrett was a clerk in the office of the secretary of state, and was receiving from the state for his services as such clerk a salary of $100 a month. It is undoubtedly true that a person in the public service must discharge all the duties pertaining to his office or employment, for the compensation fixed by law. As a clerk in the office of the secretary of state, Starrett was not entitled to extra compensation for any services which, in contemplation of the legislature, were within the scope of his employment. But, very clearly, it was no part of his duty to keep the records of the brand and mark committee. The legislature not only intended that those records should be kept by whomsoever the secretary of state might employ for that purpose, but it also intended that whoever did the work should receive pay for his services out of the expense fund provided for by section 3 of the act of 1899. If Starrett actually kept the records he earned the money which he received, and is entitled to retain it. Whether, while he was keeping those records, he neglected his other duties and failed to earn the salary provided for by the legislative appropriation, is a question not raised by this record. It may, however, be remarked in passing that there is no presumption that he was an unfaithful servant. The $595.05 having been used for the very purpose the legislature and the persons who paid it in—the persons to whom it really belonged—intended it should be used, it would be a perversion of language to say that it was misappropriated. In *Cornell v. Irvine,* 56 Neb. 657, it was held that a contract between the regents of the university and a commissioner of this court, by the terms of which the latter was to receive compensation from the state for lectures delivered to the law class was valid and enforceable, in spite of the fact that all of such lectures were delivered

during usual business hours and some of them, at least, at a time when presumably court was in session. Unless this decision is wrong, the payment to Starrett was manifestly right. Indeed we are fully persuaded that the payment was not a misappropriation of the money whether the decision is right or wrong. *Shepard v. Easterling,* 61 Neb. 882. The judgment in favor of the sureties is affirmed, but the judgment in favor of Porter is reversed.

REVERSED IN PART.

SEDGWICK, J., concurring.

When money had been paid into the office of the secretary of state for these fees, to whom did it belong? In *Blaco v. State,* 58 Neb. 557, the action was on the bond of the state oil inspector. One defense was that the act providing for the state oil inspector was unconstitutional and void, and it was held that this defense was not available to the sureties on the bond. This must have been upon the theory that the money belonged to the state, because, whatever might be the default of the oil inspector or his sureties, the state could not recover the money from them that did not belong to it. The act being void, the state could not have demanded and enforced the fees for the inspection of oil. And so in this case the act being void, the state could not have demanded the payment of the fees for registering the brands and marks.

It will be noticed from the wording of the statute that all the fees are to be paid, not to Mr. Porter, but into the office of the secretary of state, and, of course, when so paid into the office of the secretary of state would be the property of the state until legally disposed of.

The fact that the statute was invalid, does not affect the ownership of the money when paid to the state. The various parties paid these fees into the office of the secretary of state, to secure rights which they supposed the state was guaranteeing to them in consideration of those fees. The statute being invalid, and no rights in fact be-

ing secured by these parties in consideration of this payment, it does not necessarily follow that the money which they had paid to the state for these rights did not thereby become the property of the state. The payments were voluntary on their part. They are presumed to have known, at the time, that the act was invalid, and paid the money supposing and intending that it was a payment to the state. They are not now complaining nor disputing the right of the state to the money so paid. Even if they had valid claims against the state in amounts equal to the payments they had so made, yet the payments made by them were not in the nature of special deposits, but were general payments to the state, and they had no claim upon the identical money paid in. At most, they could only claim that the state was indebted to them in the amounts they had contributed to its fund. There can be no doubt that the state became entitled to the money when paid into the office of the secretary, and the question is, whether it has been legitimately paid out by the secretary of state, or properly accounted for by him. If not, he is liable to the state therefor. There is no doubt of his liability for the twenty per cent. retained by him for his services.

2. Did the secretary of state properly pay the money to Starrett for his services? If this statute were valid, there can be no doubt that it should be construed that it was intended that twenty per cent. when paid in should be the property of the state. The language is, "twenty per cent. of all of such fees so paid into said office * * * shall constitute a fund *out of* which to defray the expenses," etc. It was not intended that the whole of said twenty per cent. should necessarily be paid to defray the expenses, but such part thereof as should be found necessary for that purpose. The words "out of" will admit of no other construction. If a sum of money is paid into the office of the secretary of state and a part of it is paid out for necessary expenses, the remainder will, of course, be the property of the state, and by like reasoning the whole

would be the property of the state until paid out for the necessary expenses.

Starrett was a clerk in the office of the secretary of state. His compensation was fixed by law at $1,200 a year. The statute contemplated that the twenty per cent. should be used so far as necessary to defray the expenses of the secretary of state incident to the discharge of his duty as a member of the committee. Was this payment to Starrett a necessary expenditure? If the act were valid, the answer would clearly be that the expenditure was not necessary. The state furnished the secretary with a clerk and paid him a prescribed salary. If the clerical force so furnished the secretary was sufficient to perform the necessary work of the office, it clearly was unnecessary to pay out this money for clerk hire. The money being the money of the state, and the clerical work of the secretary's office being increased by the additional duties assumed by that office, it can not be said that the expenditure was necessary, unless it became necessary to employ additional clerical help in the office. The additional work was in the office of the secretary of state and it was done by the clerical force attached by law to that office, and for which the law prescribed the salary to be paid. It was not for the secretary to determine that the extra work in his office, occasioned by the recording of the marks and brands, rendered the duties of the clerk so onerous that the salary provided by law was inadequate. The clerk was able to perform the duties, and if the salary was insufficient the remedy was with the legislature.

The secretary did not necessarily incur any additional expenses on account of the discharge of his supposed duties as a member of this committee, and the appropriation of this money for that purpose was unauthorized by the language of the statute. But the statute was invalid. The money, as we have seen, belonged to the state, and there was no authority for paying it to Starrett. The demurrer should have been overruled, and judgment entered against the defendant Porter for the amount claimed.

MICHAEL LAMB V. STATE OF NEBRASKA.

FILED JUNE 3, 1903. No. 12,827.

1. **Criminal Law: AIDER, ABETTER OR PROCURER.** One by whose incitement or instigation a felony is committed, when he is neither actually nor constructively present, is an aider, abetter or procurer within the meaning of section 1 of the criminal code.

2. ———: ———. Section 1 of the criminal code which was adopted in 1873, is applicable to all acts made felonies by subsequent legislation.

3. **Information: DEMURRER.** An information which, after charging larceny in the usual form, alleges in substance that the defendant did feloniously and purposely aid, abet and procure the thief to commit the crime, is not demurrable on the ground that it states a mere legal conclusion.

4. **Jury.** A person informed against for a felony, after the regular panel has been discharged, may be lawfully tried by a jury summoned under the provisions of section 664 of the code.

5. **Instructions.** An instruction, which informs the jury that the material facts charged in the information must be established by the evidence beyond a reasonable doubt, is unobjectionable, if supplemented by other instructions clearly indicating what facts are material.

6. ———: **CIRCUMSTANTIAL EVIDENCE.** The court in effect charged, (1) that circumstantial evidence, to warrant a conviction, must be of such a character as to exclude every reasonable hypothesis excepting only the one implying defendant's guilt; (2) that every incriminating circumstance which may be considered as evidence of guilt must be proved to a moral certainty or beyond a reasonable doubt. *Held*, To be a correct statement of the law and to include every material feature of the instructions upon that point requested and refused.

7. **Evidence.** The word "evidence," when used in an instruction, is understood to include all the means employed at the trial to ascertain the truth respecting the matters in dispute.

8. **Larceny: EVIDENCE.** On the trial of an information charging larceny of cattle, it is not error to receive in evidence the hides of the animals obtained from a packing house in another state.

9. ———: ———. A photograph, used for the purpose of identifying a person implicated in the theft of cattle, is admissible in evidence without showing when, where or by whom it was taken.

10. **Declarations.** On the trial of a person charged with instigating another to steal cattle, the declarations of the thief while en-

gaged in the perpetration of the crime are admissible in evidence as part of the *res gestae.*

11. ———: CONSPIRACY. When a conspiracy is once shown to exist by the requisite *quantum* of proof, the acts and declarations of each of the conspirators, in furtherance of the common design, are the acts and declarations of all.

12. **Conspiracy.** A conspiracy to steal and sell cattle does not end with the theft, but continues at least until the sale has been made.

13. **Instructions.** Instructions tendered and refused examined and found to contain no correct and pertinent proposition of law, not embraced in the general charge.

14. **Instruction Not Based on Evidence.** There being no evidence tending to prove that defendant was present when the alleged crime was committed, it was not error to refuse to instruct on the assumption that he was present.

15. **Defendant's Failure to Testify.** The prohibition contained in section 473 of the criminal code against referring to, or commenting upon, the failure of an accused person to testify, was intended as a restraint upon the prosecuting attorney and, to some extent, upon the court as well.

16. **Evidence.** Evidence examined, and found sufficient to support the verdict.

ERROR to the district court for Greeley county: JOHN R. THOMPSON, DISTRICT JUDGE. *Affirmed.*

Thomas J. Doyle, George W. Berge, H. C. Vail and *John M. Ragan,* for plaintiff in error.

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

SULLIVAN, C. J.

Michael Lamb, a Greeley county farmer, was informed against under section 1 of the criminal code which is in part as follows:

"If any person shall aid, abet or procure any other person to commit any felony, every person so offending shall, upon conviction thereof, be imprisoned in the penitentiary for any time between the respective periods for which the

principal offenders could be imprisoned for the principal offense."

The trial resulted in a conviction. The sentence imposed is imprisonment in the penitentiary for a term of nine years. On account of the severity of the punishment, and because counsel for defendant seem to be deeply penetrated by the conviction that the jury who found their client guilty was touched and swayed by a hostile public sentiment, we have gone over the entire record with the utmost care.

One's first impression after reading the bill of exceptions is that the conclusion reached by the jury was the only one possible; and this impression is not in the least weakened by reflection or by counsel's analysis of the evidence. If Lamb is not guilty, he is the victim of a most extraordinary combination of circumstances. The errors assigned are too numerous to be separately noticed in this opinion. They are, for the most part, without color or semblance of merit. The main facts which the evidence adduced by the state establishes or tends to prove are briefly these:

On the morning of April 23, 1902, two bunches of fat cattle from Greeley county were moving on converging lines toward Cedar Rapids, a shipping station on the Union Pacific road in Boone county. One bunch, consisting of ten head of steers, was in charge of Harry Hill and Verne Stewart. These cattle belonged to the firm of Rooney & Company and had been stolen the night before. The other bunch, consisting of cows, heifers and steers, was owned by the defendant and under his personal control. Hill and Stewart were first to arrive at Cedar Rapids. They put the stolen cattle in the shipping yard and then rode back in the direction from which the defendant was coming. A short distance from town they found him with his cattle loitering by the roadside. They stopped, dismounted and talked with Lamb for a few minutes and then separated. Stewart went toward the Lamb farm and Hill turned back and helped drive the

cattle to Cedar Rapids where they were put into the shipping yard with the stolen steers. Afterwards, on the same day, the two bunches, making just a car-load, were consigned to a South Omaha commission firm, by whom they were sold. Lamb accompanied the cattle to South Omaha and received from the consignee the entire proceeds of the sale. Hill, on the afternoon of April 23, was seen leaving Cedar Rapids riding his own horse and leading the defendant's. Hill worked for Lamb in 1891, and both he and Stewart were at the Lamb residence less than a week before the Rooney cattle were stolen. One of the witnesses for the state who met Lamb on the road to Cedar Rapids suggested to him that he did not have enough cattle to make a car-load. To this suggestion Lamb replied that he intended to buy a few more after he got to town. The hypothesis of the state was that defendant incited and instigated Hill and Stewart to steal the ten head of steers from Rooney & Company, and that the meeting at Cedar Rapids and the shipment and sale of the cattle came about, not by accident, but in accordance with a carefully prearranged plan. The theory of the defense was that Lamb drove twenty-five head of cattle from his farm to Cedar Rapids on the morning of April 23, and that all the cattle shipped by him to South Omaha on that day were his. He did not himself testify in support of this theory, but he produced several witnesses who gave evidence tending to sustain it. Hill was present at the trial, but did not testify. That Hill and Stewart stole the steers in question and drove them to Cedar Rapids is indisputably established. And in view of the inculpatory circumstances already mentioned, and others of less importance to which no reference has been made, it is, in our opinion, morally certain that what the defendant and Hill and Stewart did on April 23 was preconcerted; that every act, including the theft of the cattle, was an act done in the execution of a common design. The law of the case is very plain. If the cattle were stolen as alleged, and if Lamb was an accessory before the fact, that is, if

by his command, request, advice or suggestion the crime was committed when he was neither actually nor constructively present, he was an aider, abetter or procurer within the meaning of the statute above quoted. *Walrath v. State,* 8 Neb. 80; *Hill v. State,* 42 Neb. 503; *Dixon v. State,* 46 Neb. 298; *Casey v. State,* 49 Neb. 403.

We will now notice specifically the points most strongly urged in support of the claim that the conviction was the result of errors committed by the district court at and before the trial. The demurrer to the information was, in our judgment, rightly overruled. The facts pleaded constitute a crime. Cattle stealing has been a felony since 1895; and section 1 of the criminal code in plain terms declares that any person who procures another to commit a felony shall be punished by imprisonment in the penitentiary. The theory of counsel for defendant, that this section, which was adopted in 1873, has no reference to acts made felonies by subsequent legislation, has no foundation in the language of the section, nor in reason, judicial decisions or legal analogy. The offense is charged in the usual manner; approved forms were closely followed, and it can not be said that the defendant was not fairly apprised of the criminal conduct imputed to him in the information. Maxwell, Criminal Procedure, 497; 9 Ency. Forms, 739; Wharton, Criminal Law (8th ed.), sec. 221; *Commonwealth v. Adams,* 127 Mass. 15.

The motion to quash the special panel because it was not composed of men whose names had been selected by the county board was properly overruled. Before the information was filed, the law cases for the April term had been disposed of and the regular jury had been discharged. It was, therefore, entirely proper for the court to proceed under the authority conferred by section 664 of the code. *Carrall v. State,* 53 Neb. 431; *Dinsmore v. State,* 61 Neb. 418.

In the sixth paragraph of the court's charge, it is said that proof beyond a reasonable doubt of every material fact alleged in the information is essential to a conviction.

This instruction is assailed, but we think it is neither positively nor negatively bad. It embodies a correct proposition of law; it is good as far as it goes; and it is adequately supplemented by other instructions in which there is a clear statement of the facts which the state was required to prove. There seems to be no reason at all for supposing that the jury misconceived the issue.

The action of the court in giving and refusing instructions on the subject of circumstantial evidence is approved. The propositions given were: (1) that circumstantial evidence, to warrant a conviction, must be of such a character as to exclude every reasonable hypothesis excepting only the one implying defendant's guilt; (2) that every incriminating circumstance which the jury are authorized to consider as evidence of guilt must be established to a moral certainty, or beyond a reasonable doubt. These are correct statements of the law (*Davis v. State,* 51 Neb. 301; *Morgan v. State,* 51 Neb. 672; *Johnson v. State,* 53 Neb. 103; *Smith v. State,* 61 Neb. 296), and the difference between them and the instructions refused is merely a difference in phraseology.

Instruction No. 14, dealing with the testimony of impeached witnesses, is criticised on the assumption that it ignores the element of corroboration by circumstances. Evidence includes all the means by which an alleged matter of fact is established or disproved. So when the court told the jury that they were at liberty to disregard the testimony of impeached witnesses, except in so far as they had been corroborated by other trustworthy evidence, he did not exclude from their consideration corroborative circumstances.

We have examined all the instructions tendered by counsel for defendant and refused by the court, and find in them no correct and pertinent proposition of law that is not embraced in the general charge. The accusation against Lamb was that he "did aid, abet and procure" Harry Hill to steal the Rooney cattle. Counsel for defendant, at the trial in the court below and in the argu-

ment here, seem to have overlooked the fact that a conviction was warranted by proof of any act done or word spoken which in legal contemplation amounted to either aiding, abetting or procuring. The jury were justified in finding the defendant guilty, without determining just what he said or did to incite or induce Hill and Stewart to steal the cattle.

The declarations made by Hill, while on the road to Cedar Rapids, were properly submitted to the jury. They were clearly competent as part of the *res gestæ*. They emanated from the criminal transaction and were virtually part of it. Besides the evidence was quite sufficient to establish *prima facie* the existence of a common purpose and design to steal and sell the Rooney cattle. The sale had not yet been made. The conspiracy was still pending, and consequently the acts and declarations of each of the conspirators in the prosecution of the unlawful enterprise, or with reference to it, were the acts and declarations of all. *Stratton v. Oldfield,* 41 Neb. 702; *Seville v. State,* 49 Ohio St. 117; *Spies v. People,* 122 Ill. 1,237; *Baker v. State,* 80 Wis. 416; *State v. Thaden,* 43 Minn. 253; 4 Am. & Eng. Ency. Law (1st ed.), 621; 3 Greenleaf, Evidence (16th ed.), sec. 94.

The hides of two of the stolen steers were brought into court and exhibited to the jury over defendant's objection. In this there was no error. It was evidence tending strongly to prove that the animals were dead, and in connection with other evidence tended to show that they had been stolen and sold by some one on the South Omaha market. Two photographs of Verne Stewart taken after he had been killed and while lying in his coffin were received in evidence, and we are of opinion that they were rightly received. They were used only for purposes of identification, and we can not perceive the necessity of showing, as a foundation for their introduction, when, where, by whom or under what circumstances they were taken.

The complaint that the witness Fonda used a memo-

randum in giving his evidence without showing when or by whom it was made, is not sustained by the record. Neither is there in the record any competent evidence in support of the claim that the opening argument of the county attorney evoked a burst of applause from the bystanders. No such claim seems to have been brought to the attention of the court on the argument of the motion for a new trial.

The refusal of the court to tell the jury that defendant could not be convicted if he was a principal in the second degree was not error. There is, in our opinion, no evidence tending to prove that Lamb was present when the cattle were stolen, or that he was near enough to give aid or encouragement in the perpetration of the crime.

The court was asked to charge that the law did not permit comment on defendant's failure to testify, and that the jury should neither indulge any presumption against him, nor assume that any fact was admitted, by reason of such failure. This request was refused, but the court said in the 13th paragraph of the general charge:

"You are instructed that while the statute of this state provides that a person charged with crime may testify in his own behalf, yet he is under no obligation to do so, and the statute expressly declares that his neglect to do so shall not create any presumption against him."

It may well be doubted whether the beneficent purpose of the statute is not in some measure thwarted by the giving of an instruction which pointedly directs the attention of the jury to the fact that the accused might have been, but was not, a witness in his own behalf. However, it is now settled doctrine in this state that the giving of an instruction like the one above set out is not error. *Metz v. State,* 46 Neb. 547; *Ferguson v. State,* 52 Neb. 432. The jury may be told that the failure of the defendant to testify does not create any presumption against him, but our decisions give no countenance to the claim that the court must, if requested, direct them to refrain from commenting on the fact that he did not avail himself of his

statutory privilege. The prohibition against reference to, or comment upon, the failure of an accused person to testify was evidently intended as a restraint upon the public prosecutor and, with the exception indicated by our previous decisions, upon the court as well. *State v. Robinson,* 117 Mo. 649; *State v. Weems,* 96 Ia. 426; *State v. Pearce,* 56 Minn. 226; *Sullivan v. State,* 9 Ohio C.C. 652; 11 Ency. Pl. & Pr. 352.

No material error appearing in the record the judgment is

AFFIRMED.

STURDEVANT BROTHERS & COMPANY ET AL. V. FARMERS & MERCHANTS BANK OF RUSHVILLE ET AL.*

FILED JUNE 3, 1903. No. 10,060.

1. Corporation: POWERS. The power of a corporation to make valid contracts is measured by its charter; and the scope of the authority of its officers and agents acting for it is limited, and a person dealing with such corporation is chargeable with notice of such limitations.

2. Bank: UNDERTAKING. Where the cashier of a banking corporation has attempted to obligate the bank as a surety on a replevin undertaking, in an action between third parties in a controversy over the right of possession of the property replevied, and there is nothing in the record other than the act of executing the undertaking from which it may be inferred that the corporation was interested in the subject matter of the controversy, or that the undertaking was executed with a view to furthering the interests and business of the corporation for which it was created, the only presumption fairly arising from such a state of facts is that the corporation has no interest in the controversy, and attempted to obligate itself solely as surety for accommodation of the plaintiff in the replevin action.

3. ———: ———. A banking corporation organized to do a business the nature of which "shall be banking in all its branches including the buying and selling of United States bonds and municipal and other securities, the loaning of money on personal and collateral security and also on real estate security on regular banking time, the buying and selling of bills of exchange, promissory

* Rehearing of case reported in 62 Neb. 472.

notes, mortgages, tax certificates, tax titles and all other business usually transacted by a bank or banker," not being authorized or empowered to pledge its credit as a matter of accommodation by executing undertakings in judicial proceedings, a person dealing with such corporation is not warranted in indulging in the presumption that the cashier of the bank is authorized to obligate the corporation as surety on a replevin undertaking in an action between third parties, merely because under some possible circumstances, the corporation would be empowered to execute such undertaking in the furtherance of its own interests and in the accomplishment of the objects, the power to perform which was granted by its charter of incorporation.

4. Cashier: SCOPE OF AUTHORITY. The signing of such an undertaking as surety thereon by the cashier, acting for the corporation, in an action between third parties in which the bank to all outward appearances has no interest, is not an act within the apparent scope of the authority of the cashier in the performance of his duties as such officer.

5. ———: ———. The execution by the cashier of a banking corporation, on behalf of his principal, of a replevin undertaking as surety, in an action between third parties, although it may not be illegal under any and all circumstances, is so much out of and beyond the general scope of the business of such corporation and the authority of the cashier, as to require those dealing with the corporation and accepting and acquiescing in such undertaking as sufficient under the law, to see to it that the bank was empowered and the cashier authorized to execute such an undertaking.

6. **Judgment Reaffirmed.** The judgment heretofore rendered in this cause, *Sturdevant Bros. & Co. v. Farmers & Merchants Bank of Rushville*, 62 Neb. 472, adhered to.

ERROR to the district court for Douglas county: WILLIAM W. KEYSOR, DISTRICT JUDGE. *Judgment of affirmance adhered to.*

W. W. Morsman, Michael F. Harrington, Will H. Thompson and *James M. Kerr,* for plaintiffs in error.

William V. Allen, H. C. Brome and *Willis E. Reed, contra.*

HOLCOMB, J.

In this action a rehearing has been allowed, to the end that further investigation and consideration might be

had regarding the question of *ultra vires,* which is relied on by the defendant, a banking corporation, as a complete defense to the cause of action pleaded in the plaintiffs' petition. The subject was discussed at some length in the former opinion which will be found reported in 62 Neb. 472, under the same title here given. The former opinion expresses our views on the several propositions therein discussed and no useful purpose will be subserved by a reiteration of what is said by the commissioner who prepared the same. We purpose here to confine our further discussion to but one phase of the controversy, which has been earnestly urged upon our attention in the brief filed in support of the motion for a rehearing, also in the briefs of counsel filed subsequent to the allowance of the motion and discussed in the oral arguments made at the time of the second submission. The substance of the plaintiffs' contention is that the execution of the replevin undertaking by the defendant bank, through its cashier, is the contract obligation of a corporation which is not *ultra vires* under all circumstances, but only so because of facts peculiar to the particular case; that the plaintiffs having relied on the legality and sufficiency of the undertaking, and the property having been seized on the writ of replevin and delivered to the adverse party upon the execution of such undertaking, and the plaintiffs' position having been changed to their disadvantage in ignorance of facts which would make the transaction *ultra vires* as to the defendant bank, it can not be heard to assert the want of authority of its cashier to execute the replevin undertaking, when suit is brought for a breach of its conditions. It is said, the court has heretofore treated the obligations of the defendant bank as one that it could not enter into under any circumstances, and that every person was at his peril bound to take notice of the lack of authority and power of the bank to make such a contract. It is insisted that the contract obligation was not on its face *ultra vires* under all circumstances, that is, it was not prohibited by law or the charter of incorporation, nor

was it immoral or contrary to public policy and that the plaintiffs not having any notice that it was executed as an accommodation could rightfully presume that the contract was entered into as being within the authority and power of the bank, in the furtherance of its aims and business as a banking corporation. It is contended by counsel for the plaintiffs and, as we understand, practically conceded by defendants' counsel that under certain circumstances such an undertaking might have been executed by the bank and be perfectly valid. For the purposes of the case, therefore, we will assume that the defendant bank might, under particular circumstances and because of the existence of certain facts, execute a replevin undertaking as surety and be bound thereby, as it might be on any other contract coming indisputably within the scope of its charter powers and the actual authority of its officers and agents to make. A banking corporation, it would seem, is empowered to do any act or make any contract, even though under usual and ordinary circumstances such transaction is beyond the scope of its charter powers, if in the particular case the act was engaged in or contract entered into in furtherance of the business of the corporation or to protect it in its property rights or maintain the integrity of the corporate entity. A bank could doubtless buy real estate on which to conduct a banking business and yet not be authorized to enter into contracts for the buying and selling of real estate generally as speculative ventures. If, in the case at bar, the defendant bank held a note against the plaintiff in the replevin action and a mortage on the goods replevied securing the note, it would scarcely be doubted that it might not, for the purpose of collecting what was due it and thus protect its assets, execute as surety the replevin undertaking which the plaintiff in the replevin action was by statute required to give before regaining possession of the property.

Assuming then as we shall do, that a contract so entered into would not in all cases and under all circum-

stances be beyond the power of the corporation to make, how should the rights of the parties to this litigation be measured and determined?

The defendant is a banking corporation organized to do a business the nature of which, according to the terms of its charter, "shall be banking in all its branches including the buying and selling of United States bonds and municipal and other securities, the loaning of money on personal and collateral security and also on real estate security on regular banking time, the buying and selling of bills of exchange, promissory notes, mortgages, tax certificates, tax titles and all other business usually transacted by a bank or banker." The defendant corporation was, at the time of the transactions out of which the present litigation grows, engaged in the prosecution of a banking business such as is ordinarily conducted in the smaller towns of the state. It possessed a limited capital stock, scarcely more than the amount for which it was obligated by the undertaking in replevin, if valid, executed by its cashier for the benefit of the defendants in the replevin action. The power of the corporation to make valid contracts is measured by its charter, and the scope of the authority of its cashier, like other officers and agents of a corporation, was limited and of these limitations the plaintiffs and all the world were bound to take notice. In the court of appeals of New York, the rule is thus stated:

"Every one knows that corporations are artificial creations existing by virtue of law, and organized for purposes defined in their charters; and he who deals with one of them is chargeable with notice of the purpose for which it was formed; and when he deals with agents or officers of one of them, he is bound to know their powers and the extent of their authority. Corporations, like natural persons, are bound only by the acts and contracts of their agents done and made within the scope of their authority." *Alexander v. Cauldwell*, 83 N. Y. 480. Again:

"A person dealing with a corporation is chargeable with

notice of its powers and the purposes for which it is formed, and when dealing with its agents or officers is bound to know the extent of their power and authority. A corporation necessarily carries its charter wherever it goes, for that is the law of its existence." *Jemison v. Citizens Savings Bank,* 122 N. Y. 140. See also *State v. Atchison & N. R. Co.,* 24 Neb. 143; *McCormick v. Market Bank,* 165 U. S. 538, 41 L. ed. 817; *Pearce v. Madison & I. R. Co.,* 62 U. S. 441, 16 L. ed. 184.

In the former opinion, the liability of the defendant was considered and determined from the standpoint of its being a surety on the replevin undertaking as an accommodation to the plaintiff therein and that it was not otherwise interested in the litigation or the subject matter of the controversy. This position is challenged on the ground that the record does not warrant the inference that the bank executed the undertaking merely as an accommodation. For aught that appears in the record, says counsel, the bank was seeking to get the possession of this property for Ross, the plaintiff in the replevin action, in order that he might convert the property into money for the benefit of and pay the same over to the bank. With all due deference to plaintiffs' counsel, we are constrained to the view that the record warrants the inference that the undertaking was, so far as the defendant bank is concerned, an accommodation entered into by it only for the purpose and with the end in view of meeting the requirement of the statute, which provides that property seized on a writ of replevin shall not be delivered to the plaintiff until an undertaking by one or more sufficient sureties has been executed conditioned as required by law. Section 186 of the code. The pleadings in the case at bar, on the part of the plaintiffs, as well as the evidence in the record, all tend to support the inference that the bank had no actual interest in the property nor in its final disposition. We may fairly assume that if, in fact, such interest existed, the plaintiffs would have sought to establish such fact in order to more certainly show a right of recovery.

In the presentation of their case in this court, the plaintiffs have relied largely on the fact that an indemnity bond was exacted by the bank before executing the undertaking, and this fact of itself is inconsistent with any other view than that the bank was an accommodation obligor on the replevin undertaking. The fact that the bank's liability, which it is sought to establish, is that of a surety only, suggests the idea it is not otherwise interested in or connected with the subject of the controversy. What the bank has attempted to do, according to the record, is to execute an undertaking by which it is made answerable for the performance of a duty primarily resting on the plaintiff in the replevin action, and regarding which it is only responsible because its action was as a surety and for the accommodation of its principal in the transaction. It is true, the record does not disclose positive evidence negativing the idea that the bank had any interest in the property replevied, nor that it executed the undertaking in the furtherance of the business pertaining to its corporate aims and objects. Yet the only reasonable deduction to be drawn from the entire record is that it had no such interest.

The rights of the parties must, we think, be determined from the standpoint, as a matter of fact, of the bank being only an accommodation obligor on the instrument sued on. If in truth and in fact, the bank had such an interest in the property replevied, as to render the execution of the instrument necessary or proper in the furtherance of its corporate interests and business affairs, whether or not the plaintiffs were aware of the fact at the time, would be quite immaterial, and the obligation would be held valid as within the power of the corporation in the proper management and conduct of its business. The execution of the undertaking under such circumstances would not be an *ultra vires* act and a plea to that effect would be unavailing. But in the case at bar, in determining the liability of the defendant, we are not warranted from the record, by inference or otherwise, in saying that the execution of

the undertaking was for any such purpose or with any other object in view than for the use and benefit of the parties to the replevin action, in compliance with the requirements of the statute and for the accommodation of the plaintiff therein. If we were to assume that the defendants in the replevin action had actual notice, at the time, that the bank's suretyship on the replevin undertaking was for the accommodation of the plaintiff, then, we apprehend, it would not be seriously contended that it could be bound thereby or that the cashier was authorized to execute such undertaking on behalf of the corporation. Under such circumstances, no question could arise as to the transaction being *ultra vires,* except it be on the ground that the bank was empowered to lend its credit to an unlimited amount by signing any sort of obligation, concerning matters in which it had no interest direct or remote. That the bank is without authority or power to engage in transactions wholly foreign to its creation and in no wise related to the legitimate business for which it was organized, must be accepted as true upon the mere statement of the proposition. It is, however, earnestly contended by counsel for the plaintiffs that when the property was replevied from them and the replevin undertaking executed by the defendant bank as surety, they had no notice, actual or constructive, that the bank was not empowered to obligate itself on such an instrument or that the cashier was without authority to bind the bank by the transaction in regard to which he assumed to act in its behalf, and that the plaintiffs, under the circumstances then existing, could rightfully assume that the execution of the undertaking was by the authority of the bank and in respect of a matter in which it might lawfully assume the obligation entered into. The defendants in the replevin action, it is said, were not bound to take notice of the want of power on the part of the corporation, to legally bind itself by the execution of such an undertaking. It is further claimed that the cashier of the bank was by the corporation held out to the public as worthy

of credit and confidence and authorized to bind the bank regarding any matter which, under any possible state of facts or circumstances, it might be legally bound in the prosecution of its corporate affairs, and that, relying on such ostensible authority and the power of the bank to make such contract, the plaintiffs changed their position to their disadvantage, and suffered the property involved in the replevin action to be taken from them on the writ of replevin and turned over to the plaintiff, Ross, who has failed to return it although a judgment for a return was rendered against him, thus leaving them without remedy save by recourse to the replevin undertaking, and that for such reasons the defendant bank is now estopped from pleading its want of power or the authority of its cashier to bind it by the execution of the replevin undertaking. The proposition contended for stated concisely amounts to this: That a person in dealing with a corporation may, without inquiry, presume the officer acting for the corporation is within the scope of his authority, if the act performed, or one similar, under any possible circumstances or surroundings, may be legally done and be binding on the corporation, regardless of the circumstances surrounding the particular transaction. If the cashier of the bank, say counsel, may execute a replevin undertaking in any suit in which the bank is not a party, under any circumstances, then the plaintiffs were warranted in presuming that he was authorized to execute the one in controversy. It may be conceded that if the execution of undertakings in court proceedings was a part of the ordinary and usual business of the bank, that it was incorporated for the purpose of furnishing such obligations when requested by litigants, and that to engage in this kind of business was in furtherance of its corporate affairs, then the plaintiffs were justified in presuming that the cashier, as one of the principal executive officers of the bank, was acting within the scope of his authority when he executed the undertaking in question. But the transaction was no part of the usual or ordinary business of the corporation. It was not

a part of the ordinary and usual business pertaining to a corporation created for the purpose of engaging in a general banking business. The act was neither within the express nor implied powers granted, as defined and limited by the corporation charter. It was no part of the duty of the cashier to execute undertakings in court proceedings for the benefit of others in litigation in which the bank was not a party nor legally interested. If, perchance, such an undertaking might have been legally executed by the corporation as incidental to its powers to do all things necessary to preserve its property and carry out the objects of its organization, because interested in the litiga tion, then this was a power so unusual in its character, and so infrequently exercised for the one special purpose mentioned, as to be in itself a circumstance calculated to arouse suspicion on the part of those interested, and calling for inquiry and information as to the right of the corporation to obligate itself in such an undertaking. Regarding the transaction by which the defendant bank's liability is to be determined, two litigants were engaged in a legal controversy over the right of possession of certain property, a stock of merchandise. A writ of replevin was issued and the property seized by the sheriff. Before turning over the property to the plaintiff, the officer was required by law to take and approve an undertaking with at least one sufficient surety, for the benefit of the defendants in the action. The cashier on behalf of the bank, as surety, executed the required replevin undertaking. There was nothing, so far as the record discloses to justify the defendants, who are here suing on the undertaking, in believing that the bank had any connection with the transaction or any interest in the property replevied, or was related to the suit in any other way than as surety merely on the undertaking, just as they appeared to be on the face of the instrument. Because the bank could, possibly, in a special or particular case, and under circumstances of an extraordinary character, be empowered to obligate itself by a similar contract, does not, as it seems to us,

afford sufficient grounds for a belief on the part of the defendants in that action that it was interested in the subject matter of the litigation and executed the undertaking in the furtherance of its own business. The cashier was not, as we view the situation, acting within the scope of his apparent authority. The banking corporation had not held him out to the public as authorized to do those unusual and extraordinary acts, which in a particular case it might be found proper and necessary to perform in carrying on the business for which the corporation was created. The corporation must, we think, be held to have invited the confidence of the public in its cashier regarding all those matters properly and usually belonging to the functions of such officer in the management and discharge of the principal's business, as defined by its charter, and to have invested him with authority to represent and bind the corporation by his actions in respect thereof; but those dealing with the officers of the bank could not, as we have seen, disregard and ignore the articles of incorporation, which tell of the nature of the business to be engaged in and the purposes for which incorporated. The officers can not be presumed to have greater authority than fairly implied by the charter which defines and limits the powers of the corporation itself. If the bank was not empowered to lend its credit in unlimited amounts for the accommodation of litigants on undertakings required in court proceedings, as it certainly was not, then the plaintiffs, when the replevin undertaking was given under the circumstances then existing, were in possession of no information which would warrant them in presuming that the cashier was authorized to obligate the bank by executing the instrument in its name. A party may not with impunity rely, in all cases and under all circumstances, on the authority of an officer who undertakes to obligate the corporation, even though the act may be authoritatively performed in a special and particular case. If he does so, he acts at his peril. It is only where the act done is within the authority, real or apparent, of the

officer, and under such circumstances as not to arouse suspicion as to a lack of it, nor with knowledge of facts which would put a person of ordinary prudence on inquiry which, if pursued, would disclose the true state of affairs as to the actual authority possessed by the agent in the particular transaction.

In discussing the rule invoked by the plaintiffs in error as operating as an estoppel against the bank from now asserting its want of authority, Mr. Morse in his work on Banks and Banking, sec. 735, says:

"The plea of *ultra vires* can never be set up *against* one who has acquired rights under the transaction which would be valid in law but for a *matter of fact* of which he had no reasonable notice. Two facts must coexist in reference to the person against whom the plea is urged, to bring the case within this section; first, he must be in the position of a *bona fide* holder for value, he must have parted with some property or right, or suffered some loss pecuniary, or in some way altered his position (to his disadvantage if the contract is null) in consequence of the transaction; and second, the fact by reason of which the transaction is *ultra vires* must be one which he did not know of, and could not by reasonable diligence have known, *i. e.,* one of which he had, at the time of the transaction, no notice, actual or constructive." And further on it is observed:

"Thus, for example, it is a general rule that a bank has no power to engage as surety for another in a business in which it has no interest and from which it can derive no profit. Therefore it has no right to become an accommodation indorser. If it does so, the indorsement will be utterly void in the hands of any person having notice of the fact that it was made for accommodation. But inasmuch as a bank may become an indorser for divers legal purposes, and the contract can therefore show upon its face no signs of invalidity, it will be treated as valid in the hands of a holder for value without notice of the facts." Sec. 745.

It is to be noted that in illustrating the rule, the author selects transactions peculiarly pertinent to the banking business and such as are ordinarily engaged in by the officers of a bank as a part of its general business. It seems entirely clear that where a person treats with a bank in relation to such transactions, he may properly and rightfully presume that in respect of all business of that character the bank's officers were authorized to act in its behalf, because pertaining to the usual and ordinary business for the accomplishment of which the corporation was organized, and this regardless of the actual facts and circumstances surrounding the particular transaction of which he was ignorant. As to all such transactions, it is, we think, a sound principle in law and morals to hold that, when an officer of a banking corporation had done the very thing which, to all appearances, was a part of the charter powers and within the authority of such officer, although, because of particular facts and circumstances unknown to the other party, he had exceeded his authority and entered into a contract obligation not in the interest of the bank or in the furtherance of its business, the bank could not afterwards be heard to plead a want of authority, when such plea would result in injury to an innocent person who had dealt with the officer on the faith of his apparent authority. Suppose, however, the bank officers had undertaken to pledge the credit of the bank and obligate it to the payment of the purchase price of a large tract of land which it was not authorized to buy and under circumstances disclosing a speculative venture only, could a person seeking to take advantage of such contract successfully urge an estoppel against the bank, on the ground that it might lawfully buy such real estate as was necessary for the conduct of its business? The circumstances surrounding each of the two supposed transactions must, we think, determine the question of whether the party dealing with the corporation may safely rely on the authority of its officers lawfully to bind the corporation in respect of the contract obligation entered into.

"The principle seems to be," says the Connecticut supreme court, "that a person dealing with a corporation is bound to know whether or not the officer or agent who represents it and acts in its name is authorized so to do. If he is, and the act is within the apparent scope of his authority, he is not bound to have knowledge of extrinsic facts making it improper for him to act in that case." *Credit Co. v. Howe Machine Co.*, 54 Conn. 357. In a former decision of this court, where *ultra vires* was pleaded as a defense, the subject was considered and discussed in a case involving the authority of the president to bind the bank on a guaranty of negotiable paper, in which the bank in fact had no interest, the guaranty made by the president being solely for the accommodation of a third party and it was held that a person purchasing the paper was justified in relying on the president's representation that the paper belonged to the bank and that the bank was bound thereby, it appearing that the transaction occurred in the banking house and while the president was apparently engaged in the performance of his duties as such officer. *City Nat. Bank of Hastings v. Thomas*, 46 Neb. 861. In the case cited, it will be seen that not only did the president represent that the bank owned the notes guaranteed, and that the plaintiff in the action bought them relying on such representation and remitted the purchase money to the bank, but also that the transaction was one in its nature pertaining to the usual and ordinary business of a banking institution and, to all outward appearances, was regarding a transaction in which the bank itself was interested. There was nothing in the transaction to excite on the part of the purchaser of the paper any doubt or suspicion as to the transaction being in the interest of the bank and entered into as a part of the ordinary and usual business in which it was engaged. In *Gorder v. Plattsmouth Canning Co.*, 36 Neb. 548, cited by plaintiff's counsel, it is held by this court that the contracts of a corporation, which are not contrary to the express provisions of its charter, are pre-

sumed to be within its powers, and the burden is upon one denying their validity to prove the facts which render them *ultra vires*. The question was disposed of in that case by treating the presumption spoken of as a rule of evidence. The controversy was with respect to the amount of indebtedness which might lawfully be incurred by the corporation, and on this point it was held that the evidence did not show that the indebtedness under the contract in question exceeded the amount authorized by the articles of incorporation. The question decided in that case does not have a material bearing on the present one. An exhaustive and elaborate discussion of the subject of *ultra vires* when invoked as a defense by a corporation seeking to disavow the acts of its officers and agents, is found in *Miners Ditch Co. v. Zellerbach*, 37 Cal. 543. This case is relied on with seeming assurance by the plaintiffs in error as an authority which sustains their contention as to the liability of the bank in the case at bar. We have examined the opinion in the case with much interest, and fail to find in it any substantial conflict between the views therein expressed and those herein indicated, nor do we regard it as affording sufficient grounds for reaching a different conclusion from that announced in our first opinion. In that case, in considering the question of *ultra vires* in its different applications to the acts of officers of a corporation, it is held, among other things, that "in a contract between a corporation and strangers dealing with it when the act in question is one which the corporation has no power to perform under any circumstances, the corporation may avail itself of the defense of *ultra vires;* but when the act may be performed by the corporation for some purposes but not for others, the defense of *ultra vires* may or may not be available. If the stranger dealing with the corporation knew of its intention to perform the act for an unauthorized purpose the defense is available, otherwise, not."

The gist of the discussion in the opinion regarding the plea is found at page 586. In speaking of the plea which

may or may not be admissible according to the circumstances of the particular case it is observed by the court:

"But in the latter case the defense may or may not be available, depending upon the question whether the party dealing with the corporation is aware of the intention to perform the act for an unauthorized purpose, or under circumstances not justifying its performance. And the test as between strangers having no knowledge of an unlawful purpose and the corporation, is to compare the terms of the contract with the provisions of the law from which the corporation derives its powers, and if the court can see that the act to be performed is necessarily beyond the powers of the corporation for any purpose, the contract can not be enforced, otherwise it can."

With reference to the same point Mr. Justice Selden, in a well considered opinion, *Bissell v. Michigan S. and Northern I. R. Cos.*, 22 N. Y. 258, says (p. 290):

"Where the want of power is apparent, upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowlege of the defect, and the defense of *ultra vires* is available against him. But such a defense would not be permitted to prevail against a party who can not be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would, I apprehend, be estopped from denying that which, by assuming to make the contract, it had virtually affirmed."

In an early English case out of which the doctrine as at present applied by the courts has been developed (*Mayor of Norwich v. Norfolk R. Co.*, 30 Eng. L. & Eq. 120), it is said by Mr. Justice Earle:

"The doctrine was introduced at law by the East Anglian Railway Company Case, and the contract there in question, being a contract by one railway company to pay

the costs of another railway company, incurred in applying to parliament, was judicially perceived, from the terms of the contract itself, to be necessarily unconnected with the purpose of the defendants' incorporation, and, therefore, prohibited. This is the point decided in the case. * * * Looking at the report, with the remarks in the argument, I understand the court to have meant, that any application of the funds, and any contract which, in the knowledge of the party, who should sue upon the contract, was intended for a purpose unconnected with the purpose of incorporation, was prohibited; and that, where the contract itself appeared to be necessarily unconnected with the purpose of incorporation, both the parties must have known it to be so, and the court judicially perceive it to be void; and that, if the contract was not necessarily so unconnected, the ground of illegality must be averred and found in the usual way, before it could be a ground of judgment; and that no application of the funds and no contract was prohibited by implication, which the parties intended to be connected with the purpose of incorporation, however distant the connection might be. The question put in the course of the argument: 'Would a contract by a railway company for a theater or chapel be void?' exemplifies the doctrine. It would or would not, according as the purpose of the contracting parties was or was not connected with the railway. It might be a speculation separate from the railway, and prohibited. Or, if the works were wanted in a waste place, and the company found it for their interest to build a town and supply it with all requisites for inhabitancy, and, in order to secure a permanent supply of workmen of skill and responsibility, added a chapel and a theater with religious and secular instruction, it might be for the purpose of the railway, and valid, and, though distantly connected, the outlay might be found eventually to increase the profit from the traffic."

Because of the right of a railway company in the exceptional instance mentioned to buy real estate and

construct buildings for religious and secular instructions, this would be no warrant for third parties to contract with such officers for the sale of such property generally, without inquiry as to the extent of the authority possessed by such officers and the power of the corporation to obligate itself by such contracts. In the execution of contracts in the particular and exceptional cases to which allusion has been made, officers do not act within the apparent scope of their general authority, and the contract sought to be entered into, save in a very exceptional case, is clearly and manifestly beyond the scope of the general powers of the corporation, so much so, that a party treating with its officers acts at his peril and is charged with all knowledge and notice as to lack of authority which, on the face of the transaction and under the circumstances surrounding it, may fairly and reasonably be said to be usually and ordinarily without the express or implied powers granted to the corporation.

A correct determination of the rights of the parties in the case at bar must, we think, be arrived at by an application of the rule and the reason given therefor in *Western Nat. Bank v. Armstrong,* 152 U. S. 346. In the case cited, it is held that the borrowing of money by a bank though not illegal, is so much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money. This authority is commented on in the former opinion by commissioner POUND who prepared the same and we need not further speak of it here. In principle, it is authority directly in point and commends itself as eminently sound and fully sustained by the authorities and text writers. It was, we think, equally incumbent on the defendants in the replevin action, in the case at bar, to see to it that the cashier of the bank executing the replevin undertaking did so under such circumstances as would render the obligation entered into within the scope of the powers of the bank as defined by its charter and that in failing to

do so, they must be held to have acted at their peril and to suffer the consequences arising by reason of a want of authority on the part of the cashier legally to obligate the bank by the execution of such an undertaking in its name.

If the execution of such undertakings were a part of the business of the banking corporation, if it were a part of the general duties of its cashier, if it were apparently within the general scope of his authority, although, in this particular case, the engagement was for accommodation only and in excess of the actual authority of the cashier, a different question would be presented from the one we are now here to deal with. The courts of Illinois have passed directly on the question here being considered and hold that the execution of a bond by a national bank as surety in a replevin suit is beyond its powers and void. *Bailey v. Farmers Nat. Bank,* 97 Ill. App. 66. In that action, as in the present one, property was seized by a writ of replevin, a bond executed and the property delivered to the plaintiff in replevin. Afterwards suit was instituted on the replevin bond and the defense of *ultra vires* interposed by the bank which had executed the same as surety. Because of the fact that the property had been delivered to the plaintiff in the replevin action, it was contended, as it is here, that the bank was estopped from pleading its want of power to execute the undertaking. To this it is said by the court, the rule is that the charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental; that the rule is founded on different considerations, the highest of which is in the interests of the public that the corporation shall not transcend the powers conferred upon it by law. Citing *Central Transportation Co. v. Pullman's Palace Car Co.,* 139 U. S. 24; *Best Brewing Co. v. Klassen,* 185 Ill. 37. It is further said that the statute providing for the organization and incorporation of a national bank does not expressly or impliedly give the bank, sued in the action,

authority to execute the bond sued upon, as the record shows that it was not given to aid or assist the bank in any manner in carrying on any business connected with or in furtherance of its banking business, but was executed by the bank merely as surety for the plaintiff in the replevin action. Regarding the plea of estoppel urged against the bank, because the property had been taken away from the defendant on the writ of replevin and turned over to the plaintiff, this was held unavailing because, say the court:

"Even if defendant in error had duly executed the bond sued upon in this case as surety for the shoe company, and it had been delivered and accepted by plaintiff in error on the faith of such execution, and he had incurred liabilities upon the strength of it by executing the replevin writ as therein stated, yet if defendant in error was without authority to execute the bond, it would not be liable upon it, as expressly held in *Best Brewing Co. v. Klassen, supra; Central Transportation Co. v. Pullman's Palace Car Co., supra;* and the court for that reason, therefore properly sustained the demurrer to it also."

In *Brewing Co. v. Klassen, supra,* it was held that the corporation had no implied or express power to become surety on an appeal bond to a forcible detainer suit, between third parties, where it is not shown that such act was reasonably necessary to accomplish the end for which the corporation was formed. In the opinion it is said:

"The purpose of the corporation, as expressed in its charter, is to manufacture and sell ale, beer and porter and carry on a general brewing business. It would seem no acts could be more unlike than the doing of those authorized by the charter of the company and the signing of appeal bonds as surety. The instrument was executed in a suit not by or against the corporation, but by a third person against another to recover possession of a house. *Prime facie* the signing by the company of an appeal bond in such a suit was an act beyond the purpose for which it was organized, and consequently illegal. If it had

been shown that it was executed clearly for the purpose of promoting or protecting its own business of brewing or selling beer, etc.,—that is to say, if the act had been reasonably necessary to accomplish the end for which the corporation was formed,—it would have been within the scope of the corporate power. But it can not be held that every act in furtherance of the interests of a corporation is *intra vires*. Many acts can be suggested which, though beneficial to the business of a corporation, are too remote from its general purposes to be deemed reasonably within its implied powers. What is and what is not too remote must be determined according to the facts of each case. The rule has been stated to be: In exercising powers conferred by its charter, a corporation may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate, unauthorized business." *Clark v. Farrington*, 11 Wis. 321.

As illustrative of the rule and its application to different cases, by reason of the peculiar circumstances surrounding them, may be cited *Merchants' Bank v. State Bank*, 77 U. S. 604; *North River Bank v. Aymar*, 3 Hill (N. Y.), 262; *Farmers & Merchants Bank v. Butchers & Drovers' Bank*, 16 N. Y. 125; *Credit Co. v. Howe Machine Co.*, 54 Conn. 357.

Some questions having a bearing on the principal propositions advanced are called to our attention especially with reference to the relative situations of the parties, which it is maintained are worthy of consideration in the determination of their respective rights. In the main, we think these matters have been sufficiently adverted to in the former opinion. It is urged by counsel that the plea of *ultra vires* is often urged with a view of escaping from the obligations of a contract, which in justice and good morals should be executed by the corporation seeking to avail itself of the plea; that the courts are not prone to look with any special degree of favor on such a plea, and especially when the allowance of it will work injustice to

an innocent party, who has relied on the authority of the agent of the corporation to make the contract and dealt with it to his disadvantage: This on the principle that "Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequence." It is to be noted that the bank has acquired no valuable thing of advantage by the transaction from which it asks to be relieved of all legal consequences. The considerations urged are not, we think, such as to justify a judgment against the bank on the replevin undertaking because of the action of the cashier and the consequent situation in which the parties find themselves. Both parties to the transaction must, we think, be held to be in *pari delicto.* The bank had no authority to bind itself by such an undertaking, purely as a matter of accommodation, in a judicial proceeding in which it was not a party and had no interest. The cashier was not acting within the scope of his apparent or general authority. When he attempted to bind the bank by the execution of the contract he, so far as the record discloses, made no representations as to his authority to act in the bank's behalf in that regard, nor that the bank was empowered to obligate itself by such an undertaking, nor that it had any interest in the suit such as would render the act proper and *intra vires,* in order to accomplish the end for which the bank was organized. The bank's obligation on the face of the transaction was that of surety only. The defendants in the replevin action under the circumstances of the case must have known, or at least should have known, that the bank could not obligate itself on the undertaking or pledge its credit for such purpose. The interests of the public and the rights of the stockholders render it imperative that such obvious overreaching of authority by an agent of the corporation should be taken notice of by those dealing with it through such agent. The defendants in replevin, knowing, as they must have known, under the circumstances, that the cashier in attempting to obligate the

bank as surety on the undertaking was exceeding his authority and transcending the powers of the corporation, acquiesced in its acceptance as in compliance with the law at their peril. Had they desired to avail themselves of the manifest illegality of the act of the cashier and the defective execution of the instrument, they should have objected to its sufficiency as is by statute provided they may do. By not doing so, and contenting themselves with the acceptance of the undertaking by the officer serving the writ, as sufficient, without objection, they must, under the law as we interpret it, bear the consequences. They stand in no more favorable light as to the illegality of the action of the cashier in urging an estoppel against the bank's right to assert want of authority, than the bank does in invoking the doctrine of *ultra vires* as a complete defense to the action of its cashier in attempting to bind it by the execution of the undertaking. The judgment heretofore rendered is, we are satisfied, right and, for the reasons herein given as well as those stated in the former opinion, is adhered to.

REAFFIRMED.

D. D. DAVIS V. GEORGE W. LAMBERT.

FILED JUNE 3, 1903. No. 12,879.

Instruction: WEIGHT OF EVIDENCE: QUESTION FOR JURY. The weight and credibility of testimony are to be exclusively determined by the jury; and an instruction that "evidence as to the genuineness of handwriting is generally regarded as of a weak and unsatisfactory character" is erroneous; and it is not less so because of the fact that there is such evidence on both sides of the issue.

ERROR to the district court for Nemaha county: JOHN S. STULL, DISTRICT JUDGE. *Reversed.*

George W. Cornell and *Fred G. Hawxby,* for plaintiff in error.

H. A. Lambert, contra.

AMES, C.

This is an action upon a promissory note. The defense is a denial that the purported signature of the defendant, who is admittedly bound, if at all, only as surety, is genuine. On the trial a great many witnesses on both sides testified as experts concerning the genuineness of the disputed signature, a large numerical majority of them favoring the contention of the defendant. At the instance of the plaintiff the court gave to the jury the following instruction which was excepted to.

"You are instructed that the evidence as to the genuineness of handwriting is generally regarded as of a weak and unsatisfactory character, not only from the exactness with which handwriting may be imitated, but also on account of the dissimilarity to be found in different specimens of the handwriting of the same person, executed at different times and under different circumstances. The evidence as to handwriting should be considered by you in connection with all the other facts and circumstances surrounding the case, which are in evidence before you. You should give the evidence of each witness such credit as you deem it entitled to, taking into consideration the sources of his knowledge and the fact as to how well acquainted he is with the handwriting of the defendant and the frequency of the times at which he has seen the defendant write, and the different circumstances under which he has observed his writing or his signature."

We think the giving of this instruction was error prejudicial to the defendant, who was defeated below and who prosecutes this proceeding. The instruction does not differ essentially from one that suffered unanimous disapproval at the hands of this court in *Hayden v. Frederickson,* 59 Neb. 141.

The defendant in error seeks a discrimination between the two cases in the respect, that in the case cited the expert testimony referred to appears to have all been introduced in behalf of one party, while in the present in-

stance, both parties offered evidence of that character; hence, he says, neither can be supposed to have been regarded by the jury as falling under the greater condemnation. This reasoning seems to us to be fallacious. Counsel for defendant in error will hardly contend that the court by expressly withdrawing from the jury the consideration of all expert testimony would not have committed reversible error. The jury had an undoubted right to consider it and to determine its credibility and preponderance in like manner as, and in connection with, all the other evidence before them. But, if this is so, then a partial withdrawal of this testimony or, what amounts to the same thing, a partial discrediting of it would work at least a proportional injustice. It is conceivable that it might do a much more grievous wrong. If, in the absence of such an instruction, the jury would have looked upon the expert testimony as preponderating largely on either side, they might not unreasonably have considered such a criticism of it by the court as an admonition to them to disregard such preponderance, or at any rate to treat it as of little or no significance. We are of opinion, therefore, that the fact that there was such testimony on both sides does not purge the instruction of its vice. But the depreciatory language of the instruction is not confined to expert testimony, but applies equally to all "the evidence as to the genuineness of handwriting," and includes within its condemnation the sworn denial of the truthfulness of his reputed signature by the defendant himself. In its literal significance it comes as nearly as possible to telling the jury that the defense is one which is to be considered as discredited in advance, and that something more than a preponderance of the evidence is required to maintain it.

There are other errors assigned which, in our opinion, are sufficient to require a reversal of the judgment, but they are of such a nature and happened under such circumstances that they are not likely to recur upon a new trial, and we deem it not necessary to discuss them here.

It is recommended that the judgment of the district court be reversed and that a new trial be granted.

HASTINGS and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, it is ordered that the judgment of the district court be reversed and that a new trial be granted.

REVERSED.

HARRY SEAY ET AL. V. CHARLES E. SHRADER, SHERIFF OF OTOE COUNTY.

FILED JUNE 3, 1903. No. 12,896.

1. **Criminal Law:** COMPLAINT: VENUE. In a criminal prosecution the office of the venue in a complaint is to name the place where the alleged offense was committed, and to show that the court before whom the information is laid, has jurisdiction to proceed. It is not an error fatal to the jurisdiction of the court to recite these matters in the English language, and no particular form of words is indispensably requisite for that purpose.
2. ———: DISQUALIFICATION OF POLICE JUDGE: APPOINTMENT OF JUSTICE OF THE PEACE. When, in a criminal prosecution before a police judge in a city of the first class, governed by chapter 18 of the laws of 1901, it is shown that the judge is disqualified to act by reason of interest, bias or prejudice, it is not erroneous for the mayor to appoint a justice of the peace of the city to act in place of the judge, as provided by section 117 of that chapter.
3. **Playing Baseball on Sunday.** Playing at the game of baseball in this state on Sunday is forbidden by the statute. *State v. O'Rourk*, 35 Neb. 614, reaffirmed.

ERROR to the district court for Otoe county: PAUL JESSEN, DISTRICT JUDGE. *Affirmed.*

Alvin T. Timblin and *Clinton P. Logan*, for plaintiffs in error.

W. W. Wilson, *D. W. Livingston* and *Andrew G. Wolfenbarger*, *contra.*

AMES, C.

In July, 1902, one William H. Hill, who was at that time

police judge of Nebraska City in this state, issued a criminal warrant upon which the plaintiffs in error, Seay and Meyers, were taken into custody by the sheriff of the county. The following is a copy of the complaint sworn to and filed before the judge and pursuant to which the warrant was issued:

"Before William H. Hill, Police Judge in and for Nebraska City, Otoe County, Nebraska.

"THE STATE OF NEBRASKA vs. RALPH GLAZIER, FRANK MAYES, HARRY SEAY, LAUD A. MILLER, GUST KURTH, FRED GUY, FRANK HAMER, EDWARD DELAY, and BEN MEYERS, Defendants.	Complaint for Unlawful Sporting and Unlawfully Playing Baseball on Sunday."

"The complaint and information of Charles M. Shepherd, of the county aforesaid, made in the name of the State of Nebraska, before me, William H. Hill, police judge, in and for Nebraska City, Otoe county, Nebraska, this 14th day of July, A. D. 1902, who being duly sworn on his oath, says that Ralph Glazier, Frank Mays, Harry Seay, Laud A. Miller, Gust Kurth, Fred Guy, Frank Hamer, Edward Delay, and Ben Meyers, late of said county, each of said persons being of the age of fourteen years and upwards, on the 13th day of July, A. D. 1902, said day being the first day of the week commonly called "Sunday," in the county aforesaid, then and there being, were and each of them was then and there found unlawfully sporting and unlawfully engaged in the game commonly called "baseball," contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of Nebraska.

"CHARLES M. SHEPHERD.

"Subscribed in my presence and sworn to before me this 14th day of July, A. D. 1902.

"WM. H. HILL, *Police Judge.*"

Upon the arrest of the parties and the return of the warrant, the defendants therein filed applications for a change of venue to the nearest justice of the peace, upon the ground that they could not obtain a fair and impartial hearing before the judge on account of his interest, bias and prejudice. A change of venue was not granted, but due notification of the application therefor having been made to the mayor of the city, that official appointed one H. G. Leigh, a justice of the peace within said city, to act as police judge in the conduct of subsequent proceedings under the warrant. Thereafter such proceedings were had before the said justice that the defendants were required to and did enter into recognizances with sureties for their appearance at the next term of the district court for the county, to answer to the charge named in the complaint. Later, the sureties surrendered Seay and Meyers to the sheriff and they obtained from the district judge of the county a writ of *habeas corpus* by means of which to inquire into the legality of their detention. A return was made to the writ disclosing, in substance, the foregoing facts, and thereupon on the 5th day of August, 1902, the applicants were remanded to the custody of the sheriff where, so far as the record discloses, they still remain.

This proceeding is a petition in error to review the judgment of the district judge. But three grounds for its reversal are urged upon our attention. *First,* it is contended that the complaint was insufficient to confer jurisdiction upon the police judge to cause the arrest, because of the absence of a venue. That is, as we understand counsel, because the charging part of the document is not preceded by the words: State of Nebraska, Otoe County, ss. We think this objection is not well taken. There is no peculiar virtue in the cabalistic characters "SS," which are presumed to have been anciently symbolical of something, but nobody knows precisely what. The complaint appears upon its face to have been sworn to before a peace officer of Otoe county, whom it explicitly informs of the commission, by the persons therein named, of an alleged criminal

act within that county. This is the sole purpose of a venue, and we think it may as well be expressed in "ordinary and concise" English, as in a supposed abbreviation of long disused and perhaps not strictly correct Latin.

Second, it is urged that not the police judge, only, but the police court, lost jurisdiction of the case upon the filing of the application for a change of venue, and that the subsequent proceedings by the justice, as acting police judge, were *coram non judice* and void. The course adopted seems, however, to have been in strict compliance with the statute governing the city and, there being no express provision of law for obtaining a change of venue from a police judge, it may well be doubted if, under the authority of *McCarthy v. State,* 10 Neb. 438, any other procedure could have been followed. Besides this, it is not disputed that Leigh was a duly qualified and acting justice of the peace, free from disqualification and with ample jurisdiction to entertain the complaint and require the defendants to enter into recognizances.

Third, finally it is contended that playing at baseball is not "sporting" within the meaning of our statute concerning the observance of Sunday, and is therefore not prohibited thereby. This question we regard as foreclosed by the decision of this court in *State v. O'Rourk,* 35 Neb. 614, and we are not disposed to reopen its discussion. The regulation is one exclusively within legislative discretion. Since that decision was rendered the legislature has been in regular session no less than six times. It is fair to presume that if the law as there announced had been offensive to public sentiment, or the interpretation there put upon it had been generally regarded as erroneous, it would long since have been changed.

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

HASTINGS and OLDHAM, 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.

WHITFIELD SANFORD, APPELLEE, V. JOHN ANDERSON, APPELLANT, ET AL.

FILED JUNE 3, 1903. No. 12,156.

1. **Foreclosure**: RECEIVER: HOMESTEAD. A mortgagee of a farm, worth from $6,000 to $8,000, which is resided upon by the mortgagor and embraces his homestead exemptions, is entitled, on an appeal from an order confirming a sale which did not realize the full amount of the mortgage, and where the taxes are in arrears and are accumulating, to a receivership to take charge of that portion of the premises not embraced in the homestead exemptions, the property being readily divisible and no objection being made to the admeasurement of the homestead made by the trial court.

2. **Decree Rendered.** Former judgment in this case vacated and the order of the district court appointing a receiver affirmed.

APPEAL from the district court for Saunders county: BENJAMIN F. GOOD, DISTRICT JUDGE. *Former judgment of reversal vacated and judgment of district court affirmed.*

B. E. Hendricks, for appellant.

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

HASTINGS, C.

This is a rehearing of the case which appears in 3 Neb. (Unof.) 561. The question, clearly stated in the opinion, is whether or not a receiver will be appointed pending proceedings to foreclose a mortgage where the premises consist of a single farm worth $6,000 to $8,000, which is occupied as the mortgagor's family residence and embraces his homestead exemptions. No complaint is made at the present time as to the statement of the case which appears

in the former opinion. It is, however, insisted that the conclusion there reached is wrong, because protecting from application upon the plaintiff's mortgage the income from property which is not exempt as a homestead and can not be held by such a right from the mortgagor's creditors, including the mortgagee.

It is conceded by the plaintiff that the decisions of this court in *Chadron Loan & Building Ass'n v. Smith,* 58 Neb. 469; *Laune v. Hauser,* 58 Neb. 663; *Baker v. Grand Island Banking Co.,* 4 Neb. (Unof.) 100, and *Joslin v. Williams,* 3 Neb. (Unof.) 192, establish the rule in this state and under our statute, that the homestead right itself can be invaded only by an order of sale. It is, however, insisted, that the order appointing the receiver in this case, which left to the mortgagor possession of a portion of the mortgaged premises, selected by himself, of value considerably in excess of $2,000 does not invade any homestead right of the mortgagor; that it simply applies to the payment of this mortgage debt, for satisfaction of which he had pledged all the property, that portion of the premises which the homestead law does not enable him to claim. It is energetically urged that the line of cases, commencing with *Hoy v. Anderson,* 39 Neb. 386; cited in the former opinion, which hold that where the property resided upon by the mortgagor is incumbered, the result is that the homestead right attaches to the mortgagor's remaining interest in the entire tract, have no application in this case. It is claimed that here there is no question of a general creditor attacking the incumbered homestead, but merely an application of mortgaged property, outside of any possible homestead exemption, to the payment of the mortgage indebtedness, an application expressly allowed by statute in the state of Nebraska. Section 266 of the code.

The argument derived from *Hoy v. Anderson,* in the former opinion, to show that the homestead right must, as against the plaintiff, be held to attach to the entire tract, since it is incumbered by plaintiff's mortgage, seems

to us by no means conclusive. Of course, an execution creditor proceeding against this land in the absence of plaintiff's mortgage, could force a homestead claimant to select $2,000 worth of the land and could sell the remainder. To say that, because he has a mortgage, plaintiff can not force such a selection, where it clearly appears that the rents and profits of the premises are necessary to satisfy his claim, would seem to be reasoning in a circle, and holding that the existence of the plaintiff's lien, instead of insuring its satisfaction out of the land could be used to prevent such payment. It would seem much more consistent to hold plaintiff's mortgage might be enforced by receivership proceedings, and the homestead right be required to be set off, unless the statute clearly entitled the mortgagor to be relieved from the ordinary incidents of a mortgage as to the entire tract. The general provisions of the code certainly give plaintiff, in the absence of the homestead claim, a right to a receivership. *Buck v. Stuben,* 61 Neb. 70. The homestead statute seems, as clearly, to give no right to more than $2,000 worth of these premises. Consistency would seem to require that only $2,000 worth be set off for a homestead, if they are, as in this case, readily separable. Both statute and general principles of equity require that a court of equity apply the income from the remainder to the payment of the mortgage indebtedness where, as in this case, it is clearly necessary to the satisfaction of the mortgage.

It is quite true that the homestead statute, chapter 36, Compiled Statutes (Annotated Statutes, 6200), makes no provision for any setting off of the homestead, except when it is sought to be taken on execution. Section 5. If, however, the right to appropriate the income from the excess belongs to the mortgagee, the powers of a court of equity are ample to secure a just and efficient method of ascertaining that excess.

"The boast of those who have administered equity jurisprudence, that its remedies may be so employed as to give complete relief to each complainant, would be palpably

vainglorious, had they not devised modes of enforcing their decrees, sufficiently stringent to compel obedience and sufficiently varied to answer every conceivable emergency." Freeman, Executions (2d ed.), sec. 8*a*.

In fact, the essential question in this case seems to be whether or not the legislature, in providing only for final process against premises which include the homestead, has impliedly forbidden the use of a provisional remedy against such premises. The express limiting of the homestead right to $2,000 worth of property, would seem to sufficiently prevent its attaching to more. The cases following *Hoy v. Anderson* do not, by any means, attach it to more than $2,000 of property. They simply say that the lienholder must satisfy his claim out of the excess so far as he can, and this being so, any remainder must be deemed proceeds of the homestead right. Full force seems to be given to this statute when it is held to prevent the seizing of the homestead interest, itself, by means of anything short of the final process mentioned in section 3 of the act.

In the present case no objection is made that the quantity of land left is not worth $2,000. Defendant, himself, was permitted to select it. The failure of the law to provide any means for setting off homesteads in receivership proceedings, may be fairly attributed to the fact of these proceedings being always under the control and in the discretion of the court. The lawmaker may have remembered that equity jurisdiction had its original in providing remedies. Why should we not hold that he simply left the court's hands free in this matter?

If, as this court has held, the appointment of a receiver is in the nature of an equitable execution, designed to reach the interest which the creditor might take on execution (*Longfellow v. Barnard,* 58 Neb. 612), why should not a mortgagee, who is entitled to a receiver, be allowed to seize the same property to the same extent as could a levying creditor. In *Huston v. Canfield,* 57 Neb. 345, it is held, that the only way in which the rents and profits of

real estate, pending a foreclosure, can be reached, is by means of a receiver. It is there said that the practical effect of a receivership is the dispossession of the defendant. This is true and is ordinarily a sufficient reason for not disturbing homestead occupation by such an order; but where, as in this case, the homestead right does not attach to the entire property, and there is no objection on the ground of difficulty in separating it, we see no reason for not applying this "equitable execution" to the excess.

In the case of *Chadron Loan & Building Ass'n v. Smith,* 58 Neb. 469, a receiver was appointed for the property embraced in the mortgage which was not occupied by defendant as a homestead. It is true that there was in that case another house and lot. In the present case, if the plaintiff's mortgage only covered the property embraced in the receivership order, there would be very little question as to the plaintiff's right to it. Is it reasonable to give him less rights because his lien extends over the entire quarter section, so long as the whole is insufficient to pay him? This court had no difficulty in supplementing the statute with the doctrine that the mortgagee must sell first the premises outside of the homestead covered by his lien. It did this notwithstanding a provision that there should be no exemptions as against a mortgage. Should not the same equitable consideration for the other party, provide a means of setting off the homestead so as to leave the rest subject to a receiver's possession, although the statute has made no provision for it? The method provided in case of legal executions would work just as well in case of "equitable executions."

Defendant does not claim that a receivership was not needed for the satisfaction of the mortgage, but claims that no receiver can be had in this case, in any event, because the plaintiff would not be entitled to any deficiency judgment, and is, therefore, not entitled to any assistance from a court of equity to secure the satisfaction of his debt. It appears, however, that this mortgage is wholly unaffected by the change in the method of foreclosure

introduced by the act of 1897, and the plaintiff is entitled to a deficiency judgment in the present case. *Thompson v. West,* 59 Neb. 677.

We have examined, somewhat carefully, the several cases cited by the defendant, and, particularly, the recent ones of *Brown v. Campbell,* 68 Neb. 103; *Baker v. Grand Island Banking Co.,* 4 Neb. (Unof.) 100, and *Joslin v. Williams,* 3 Neb. (Unof.) 192, each containing different applications of the doctrine of *Hoy v. Anderson,* that as against a general creditor, who is seeking to subject a mortgaged homestead to payment of his claim, the homestead right attaches to the mortgagor's interest in the entire estate and can not be restricted to any specific portion, unless that interest is more than $2,000. None of them deal with the mortgagee's rights in the excess over $2,000.

To hold that the amount of plaintiff's lien in the present case must be deducted from the value of these premises, and that the homestead interest would only attach to the remainder, would be to apply the existence of this lien as a protection against its own provisional enforcement. Here is a clear equitable right secured by a distinct statute of the state, to the sequestration of the rents and profits of the entire 160 acres. On the other hand, there is a homestead right to the extent of $2,000, as to which this court holds that it is not to be destroyed by anything short of an order of sale. We see nothing in the homestead law in any way protecting more than the $2,000 worth of exemptions provided by that law. That much is left undisturbed by the receivership order in this case.

Of course, the result of this is that in all cases in which the mortgages are sufficient in amount to render the premises probably insufficient to pay them, and the premises are divisible, the mortgagor could be forced to select his homestead and to surrender to a receiver all of the premises in excess of such homestead right. What would be the result, if the premises were practically indivisible under the holdings of *Chadron Loan & Building Ass'n v. Smith*

and the cases following it, need not now be determined. Courts of equity are dealing with the rights both of the mortgagee to satisfaction and of the homestead tenant, mortgagor, to a protection for his family. Both should be vindicated as far as all the resources of the court will suffice to do so. The cases last mentioned show clearly that this court intends, where one or the other of these statutory rights must give way, that it shall be the mortgagee's. Whether in the case of an indivisible homestead property, largely in excess of the $2,000 limit in value, but insufficient to discharge the mortgage, which property was earning a large income and upon which taxes were accumulating or waste was taking place, a remedy could be found which would adequately guard the rights of both parties, is not our present concern. There is in this case no complaint as to indivisibility of the property or as to the trial court's division of it. Where, as in this case, the premises are readily divisible, and the homestead can be set off, we see no objection to doing so, when it is necessary for the satisfaction of the lien.

Of course, where there is a surplus above the mortgages, there could be no receivership necessary in order to protect the mortgagees. The mortgagor's homestead right would attach to whatever excess there was and would be protected as against the general creditors, but we do not feel disposed to say that the existence of plaintiff's mortgage on the homestead can be applied to protect the excess over the homestead right against its equitable appropriation in satisfaction of that mortgage.

It is recommended that the judgment of reversal heretofore entered in this cause be vacated and the judgment of the district court affirmed.

By the Court: For the reasons given in the foregoing opinion, the former judgment in this cause is vacated and the judgment of the district court is

AFFIRMED.

FRANK J. BOEVINK, APPELLEE, V. CATHARINE CHRISTIAANSE ET AL., APPELLANTS.

FILED JUNE 3, 1903. No. 12,857.

1. **Subrogation:** LIMITATION OF ACTION. Where the circumstances of the advancement of money to pay a prior mortgage are such as to entitle the loaner to a subrogation, and are such as to give him no legal right aside from such subrogation, the statute of limitations does not run against his claim for such subrogation and the enforcement of the prior mortgage until ten years from the latter's maturity.

2. ———: NECESSARY PARTY. While ordinarily the original creditor is a necessary party to any suit for subrogation to his rights, where he has satisfied his claim by a formal instrument, duly recorded, and sufficient for that purpose, he is not a necessary party.

3. ———: MORTGAGE BY EXECUTRIX. One who has advanced money to pay a valid mortgage against the property of a decedent, at the request of his executrix, and upon the county judge's assurance that she was authorized to execute a mortgage for that purpose, and has taken her note and mortgage upon the same property, is, upon its subsequently appearing that she had no authority and that the mortgage given by her is void, entitled to subrogation to the rights of the original mortgagee to the extent that his money has gone to discharge that mortgage.

APPEAL from the district court for Lancaster county: LINCOLN FROST, DISTRICT JUDGE. *Affirmed.*

George A. Adams, for appellants.

Lorenzo W. Billingsley, Robert J. Greene and *Richard H. Hagelin, contra.*

HASTINGS, C.

This is a suit in equity brought by plaintiff and appellee to establish his right to be subrogated to the ownership of a mortgage executed February 5, 1887, by Abraham Christiaanse to the Connecticut Mutual Life Insurance Company upon 80 acres of land in Lancaster county. The original mortgage was for $700. Before its maturity the mortgagor died. At its maturity application was

made to plaintiff for a loan with which to pay off the amount remaining due, $500. The executrix and plaintiff applied to the county judge for instructions in the matter, and were told by him and by attorney Philpott that she had been authorized to renew the mortgage. Plaintiff advanced the $500. The widow executed to him a note and mortgage, dated May 12, 1892, payable in five years with seven per cent. annual interest. By some mistake it was drawn for $525, and $25 was indorsed upon it the day of its date, leaving the amount $500. The note and mortgage were signed by the widow, as executrix, and purported to be made by such authority. The widow kept the interest paid until some time in 1895. Afterward default was made in the payments of interest and this action was instituted.

The petition alleges that the 80 acres of land covered by the insurance company's mortgage was the homestead of the mortgagor and of his widow, and was worth less than $2,000 in excess of the incumbrances against it. The petition sets out the making of the note and mortgage by the widow, as executrix, and the obtaining of money upon it from plaintiff; that the loan was made in good faith and under the supposition of both parties that the executrix was authorized to make it.

Demurrer was filed to the petition on the ground that it did not furnish facts sufficient to constitute a cause of action, and that the cause of action sued on did not accrue within four years before the commencement of the suit. Leave was taken by plaintiff to amend his petition by interlineation, with leave to defendants to plead by the following Monday. At that time a motion was filed to require the plaintiff to separately state and number the causes of action, and a demurrer to the petition, also, on the ground that it did not state facts sufficient to constitute a cause of action; that there was defect of parties defendant, in that the administrator and the executrix, the person alleged to have executed the mortgage, and the insurance company, the original mortgagee, were not

named parties defendant. The motion and demurrer were severally overruled. Subsequently, permission seems to have been obtained to renew the demurrer, and it was again overruled. The defendants excepted.

Catharine Christiaanse answered, setting up a life interest in this land by a devise from the mortgagor. She denied the execution of plaintiff's note and mortgage by the executrix and denied each allegation of the petition; alleged that plaintiff's cause of action did not accrue within four years, within five years nor within ten years of the commencement of the action; alleged that no authority was ever given executrix to mortgage the land; that the cause of action did not accrue against the defendant alone but jointly with the personal representative of the mortgagor, his executrix, or her successor; that there was a defect of parties defendant; that the mortgagor's estate, the mortgagor's executrix, the person executing the plaintiff's mortgage, and the Connecticut Mutual Life Insurance Company, were not made parties; that no attempt was made by plaintiff from May 12, 1892, when he advanced the money, until November 5, 1900, to obtain subrogation to the mortgagee's right in the Connecticut Mutual Life Insurance Company's mortgage; that no attempt has been made to collect the money from the mortgagor's estate though it was amply sufficient to meet the claim; that the estate had been distributed during the eight years plaintiff had failed to assert his rights and that such rights had been waived, and asked judgment for costs. The other defendants answered alleging their descent from the mortgagor and claiming title in fee to the lands. Their answers, in other respects, are substantially in the same terms as the executrix's. Plaintiff replied by a general denial.

The court at the trial found, that Abraham Christiaanse died seized of the 80 acres of land, and owed the Connecticut Mutual Life Insurance Company $500 on a mortgage covering it, and that defendants were related to him as alleged in plaintiff's petition; that his personal

property was all consumed in the payment of liabilities other than the mortgage; that at the time of his death, the land was not worth $2,000 above the mortgage; that his wife was appointed and qualified as executrix; that, when the mortgage came due in 1892, there was nothing on hand with which to pay except the land; that she, to prevent foreclosure, borrowed from plaintiff $500 which were paid on the mortgage; that plaintiff furnished this money under the advice and direction of the county judge of Lancaster county and J. E. Philpott, attorney, with the express understanding and agreement that he was to have a lien upon the land, and that the land would be charged with the repayment of the money and interest; that he furnished the money to the executrix to prevent sale of the land and save her possession of it, relying upon the statements of the county judge, of the executrix and of Philpott, that he was safe in so doing, and that the mortgage of the executrix to him was valid and authorized; that no order of the county court of Lancaster county was ever made authorizing the executrix to borrow money or execute a mortgage; that the executrix ever since obtaining the money had continued to live upon and enjoy the possession of and the income from the land; that she subsequently resigned as executrix, and at the time of this action there was neither executor nor administrator, and the estate had been fully administered; that no suit at law was ever brought for the money, and that the note and mortgage by the executrix to the plaintiff were void; that the money obtained by that means from the plaintiff was paid to the Connecticut Mutual Life Insurance Company, and thereupon the insurance company released its mortgage of record; that the interest was paid to plaintiff up to March 12, 1895, and there was due at the date of the decree in this action $739.

The court finds, as conclusions of law, that plaintiff was entitled to be subrogated to the insurance company's mortgage; to have the release of that mortgage set aside and have the same foreclosed for the sum of $739, and

to recover costs. Such a decree was entered. Supersedeas bond was given and an appeal taken, and the question now is as to plaintiff's right, upon this record, to such relief.

Counsel for defendants say not: *First,* because plaintiff's claim of subrogation was barred by the statute of limitations at the time of the commencement of this action, namely, November 5, 1900; *Second,* because the Connecticut Mutual Life Insurance Company was not made a party defendant; and *finally,* because the facts do not warrant any such subrogation. As to the first point they cite 24 Am. & Eng. Ency. Law, 322:

"The general rule is, that the claimant must take steps to enforce his right of subrogation within the period prescribed as a limitation to the enforcement of simple contracts, for this merely equitable right will not be enforced at the expense of a legal one."

This doctrine seems to relate wholly to cases of subrogation on behalf of a surety or one occupying the position and having rights of a surety to equitable relief, as subsidiary to a legal claim. It rests upon the fact that payment by the surety does not, *ipso facto,* create in him any title to the securities. His primary claim is against his principal for repayment of the money. Until he has obtained through equity an ownership in the securities, they are not his and he has no right to enforce them merely by reason of the payment.

As pointed out by Mr. Pomeroy, the right of others than sureties in mortgages, by reason of having paid them off, is in the nature of an equitable assignment rather than than subrogation. 3 Pomeroy, Equity Jurisprudence (2d ed.), sec. 1211. Where the payment, *ipso facto,* only entitles the payor to be indemnified, and gives him an immediate action at law to recover such indemnity, and his right to the possession and control of any of the securities held by the creditor is merely secondary and for the purpose of insuring such indemnity; whenever the statute of limitations has run against the recovery of such indemnity, it would also run against any equitable remedy

for the obtaining of it. If the transaction, however, as is claimed in the case at bar, results, *ipso facto,* in an equitable assignment of a mortgage, then rights under it would seem to pass to the assignee and to be enforceable during the life of such mortgage.

In the present instance, if the transaction between the plaintiff and the executrix resulted, as the trial court found, in the passing of a void note and mortgage from the executrix to the plaintiff, and the result of the transaction was that the rights of the Connecticut Mutual Life Insurance Company against this land were equitably transferred to plaintiff, then it would seem that at any time during the life of such mortgage plaintiff could assert such equitable ownership. We have not examined all the cases cited by defendants. They are cited, however, as cases of subrogation on behalf of a surety who has paid his principal's debt. None of them are claimed to be cases of equitable transfer of ownership in a mortgage, independent of a legal claim. As above suggested, the subrogation in such cases, being a mere incident to the recovery of indemnity, would be lost whenever the action for indemnity became barred. In the case of *Betts v. Sims,* 35 Neb. 840, the court enforced mortgages much more than four years after their equitable transfer to Sims by reason of their payment by him to protect his supposed title in the land. It is true that in that case Sims was in possession and asserting the mortgages as equitably entitling him to their payment, before he should be ousted. The ordinary rule that limitation statutes do not apply where equity has sole jurisdiction (33 Century Digest, col. 345), would seem applicable only where there is a distinct equity jurisdiction. The Nebraska statute of limitations seems clearly to have been intended to apply to all the forms of the "civil action" provided for in section 2 of our code. The numerous cases, therefore, gathered in the Century Digest do not seem to furnish us a precedent, but there seems no doubt of the propriety of extending the limit of time within which plaintiff may assert his rights

in this land, if he has any, to ten years from the maturity of the original mortgage, and he is amply within such time.

It is also urged that the original mortgagee is an essential party to this action, without whose presence it can not be maintained. It is alleged in the petition, not only that the insurance company was paid in full, but that a formal release of its mortgage was placed of record, and a part of the relief asked is the cancelation of this record. Doubtless, under ordinary circumstances, when one asks subrogation in reference to a chose in action, he must bring the party, whose position he seeks, into the action. In *Aultman, Miller & Co. v. Bishop,* 53 Neb. 551, a judgment creditor, whose judgment plaintiff claimed to have paid off, was held to be properly joined. It has been held, however, that it is not necessary to make a judgment creditor a party to any action for subrogation where he has satisfied his claim of record. *Rosenthal v. Sutton,* 31 Ohio St. 406; *Fridenburg v. Wilson,* 20 Fla. 359.

We see no greater or better reason for requiring a mortgagee who has satisfied his claim of record to be brought into the litigation. In this case, no relief is asked against the original mortgagee. Its release of record is a complete estoppel against any claim it could assert against the plaintiff in this case, and a complete protection to defendants if they pay the claim of plaintiff. There seems no good reason why the insurance company should have been included.

A more serious question has been whether the facts of this case entitle the plaintiff to any subrogation. Counsel for appellee cite *Meeker v. Larsen,* 65 Neb. 158, and seek to distinguish that case from the present one, on the ground of an agreement in the present case that plaintiff should have a lien upon the land. In *Meeker v. Larsen,* however, as in this case, a mortgage upon the land was given by the widow. In the present case, the mortgage is signed by the holder of the life estate as "executrix," and it was supposed by the parties at the time that she was

authorized to execute it on behalf of the estate to take up the insurance company's mortgage. How the mortgage was signed in the case of *Meeker v. Larsen* does not appear, but it does appear that it was intended to give to the plaintiff a lien upon the land covered by the original mortgage. There is in this case no agreement, any more than in that, for the maintenance of the lien of the original mortgage. There seems to have been no agreement in either case for a "first lien." The plaintiff in each case, doubtless, supposed he was getting, by reason of the newly executed mortgage, a valid lien upon the premises. In *Meeker v. Larsen,* however, so far as the opinion indicates, there was nothing from which the court could find an intention of the parties to convey, in the newly executed mortgage, anything more than a lien upon the widow's life estate. In the present case the court finds that it was intended to mortgage the entire property on behalf of the estate. The mortgage by the widow recited that she had obtained authority for making it. The question, then, in this case, is: Does the furnishing of money to discharge a valid lien, under the supposition of the loaner that he is getting a valid lien, entitle him to subrogation, he supposing, and having a right to suppose, that the executrix was authorized to make to him a valid mortgage?

The Nebraska cases bearing on this question do not seem directly to determine it. In *Betts v. Sims,* 35 Neb. 840, a defendant who had taken possession of land under a deed from a possessor whose own deed was void, because not signed by the wife of a homestead tenant, and who, while in possession, without knowledge of the defect had paid mortgages, was held entitled to recover on them as an equitable condition of plaintiff's recovery of the premises.

In *Bohn Sash & Door Co. v. Case,* 42 Neb. 281, plaintiff, in entire ignorance of an inchoate mechanic's lien, had furnished money to pay off an old mortgage, and taken a new one under an express agreement with the owner of the property that the new mortgage was a first

lien. The new mortgagee was held to have no right as against the lienholder to subrogation.

In *Rice v. Winters,* 45 Neb. 517, the grantee in a third mortgage, given expressly to raise money to take up a first one, took his security on the faith of an unauthorized release of the second one and upon an express agreement that he was to have a first lien, and was allowed no subrogation as against the second mortgage.

These cases, together with *Mecker v. Larsen,* seem to establish, so far as this state is concerned, that the furnishing of money to pay off a former mortgage and the taking of a new one, furnish no ground for subrogation on the part of the taker of the new security, although it was taken under the supposition that it conveyed a first lien.

It is to be observed, however, that in each of these cases the claimant got something. In each of them he was chargeable with negligence in not ascertaining the facts or with ignorance of the law. In the present case, the plaintiff was assured by the county judge that the executrix had authority to make this mortgage. If a proper order had been entered by the county judge, she could have made a valid mortgage to take up that of the insurance company. Compiled Statutes, chapter 23, section 344 (Annotated Statutes, 5183). In *Wilkins v. Wilkins,* 35 Neb. 212, a *dictum* says that a father, who on the strength of a void bill of sale has paid mortgages on his son's property, can, probably, be subrogated to the mortgagee's right, though unable to recover in replevin on his bill of sale.

The present facts offer at least as strong a case. The executrix and the plaintiff were certainly not chargeable with negligence in taking the county judge's assurance as to her authority. The executrix having paid the mortgage and note solely on behalf of the estate, and so made the new one, and not in any manner with intention to bind herself on her own estate, it can not be held to be her own obligation. The plaintiff is remediless, unless he shall be held equitably entitled to the ownership of this mortgage, which he furnished the money to pay.

In these circumstances, does subrogation, "that creature of equity courts, not owing its existence to statute or to custom and not depending upon contract, invented and applied to do justice, or to prevent injustice," furnish a remedy? There is good authority for holding that it does. In the recent case of *Cumberland Building & Loan Ass'n v. Sparks,* 49 C. C. A. 510, a loaner who had furnished money to pay off a prior mortgage, under an agreement that it should have a first lien, and had taken an invalid mortgage for its security, was held entitled to subrogation, not only against the mortgagor, but against another lienholder who had notice of the facts. The opinion is by circuit judge Thayer. The plaintiff's own mortgage was unenforceable because of a defective acknowledgment.

The supreme court of Illinois, in *Home Savings Bank v. Bierstadt,* 168 Ill. 618, 61 Am. St. Rep. 146, gave subrogation to one who had advanced money to discharge prior trust deeds, upon the strength of an abstract which failed to show a subsequent trust deed to another person, whose security was not impaired by the change. The Illinois court say that "conventional subrogation" will always be decreed, where it is in accordance with the understanding of the parties, and there is no gross negligence and no injurious result to third parties. Both of these cases are abundantly fortified by other decisions.

It would, probably, serve no good purpose to discuss the various other cases. They will be found gathered in *Straman v. Rechtine,* 58 Ohio St. 443, 51 N. E. 44. Perhaps it should be remarked that where money has been loaned to discharge a prior mortgage, and for any reason the money can not be made on the new mortgage, three reasons for refusing subrogation are found in the cases denying it. These are negligence of the loaner, as in *Bohn Sash & Door Co. v. Case* and *Rice v. Winters, supra;* mistake of law which gives no ground of relief, as in *Mecker v. Larsen, supra,* and in *Brown v. Rouse,* 125 Cal. 645, 58 Pac. 267; and intervening rights of innocent third parties. None of these appear in this case.

Defendants contend that the trial court's finding as to the county judge's assurances to plaintiff are unauthorized by the evidence. The testimony, however, shows that the executrix and plaintiff both went to the county judge, explained to him the situation, and he called in Mr. Philpott and assured both of the parties that Mr. Philpott's advice was trustworthy, and that they acted on the assurance of the county judge. Both seem to have been ignorant. The trial court's finding that they acted on the judge's assurance is clearly supported by evidence. Whether or not counsel's complaint of there being no evidence to sustain the finding that the personal estate was exhausted at the time of the mortgage's maturity is well founded, we have made no effort to ascertain. It seems unimportant. There is no showing of any injurious change in the devisees' position because of plaintiff's paying the mortgage.

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

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

BENJAMIN T. SNYDER v. JAMES W. JOHNSON.

FILED JUNE 3, 1903. No. 12,885.

1. Pleading: REPLY. It is not error to strike from a reply matter setting out a new cause of action, held by plaintiff against the defendant, different from and in addition to the one contained in the petition, even though such matter might constitute a valid and proper counter-claim as against the counter-claim in the answer, provided the latter had been pleaded as the foundation of an original action.

2. ———: ———. Where the warranty of property sold is indorsed as a condition upon the notes given for it, and plaintiff brings

suit on the notes and sets forth the condition in his petition, without objection, explanation or request for reformation, it is not error to strike from his reply matter impeaching the original consideration for the condition, when the reply states that the indorsement was a condition for signing the notes.

3. ———: ANSWER: WARRANTY. Although it appears from defendant's answer, that the warranty, on which he bases his counterclaim, was made upon property sold to him jointly with another, where he had given his separate notes for his part and alleges that they were in consideration of a personal warranty to himself of the property, it is for the other party to negative this, if he can, and show that there was no separate personal warranty to the defendant, and that such agreement which might have been made was a general one in favor of both vendees.

4. **Trial to Court:** GENERAL FINDING. On a general finding for the defendant in a trial to the court, where the evidence is not preserved and there is no special finding inconsistent with such general finding, if the answer sets forth a defense, the judgment of the trial court must, in the absence of error in making up the pleadings, be upheld.

5. **Warranty:** Where a warranty, accompanying a sale of property, was indorsed as a memorandum on each of two notes given for the property, and on the first was added to the warranty that a breach should avoid the note, but on the second no such condition was added, the fact of the condition being on only the first note does not, of itself, limit the liability on the warranty to avoidance of that note.

ERROR to the district court for Sherman county: HOMER M. SULLIVAN, DISTRICT JUDGE. *Affirmed.*

Richard J. Nightingale, for plaintiff in error.

Elliott J. Clements, Thomas S. Nightingale and *J. S. Pedler, contra.*

HASTINGS, C.

This action is upon two promissory notes each originally drawn for $75, upon one of which was indorsed at the date of its making $15, and upon the other $10. On the back of the first note appeared the following memorandum:

"I, B. T. Snyder, guarantee the stallion Lord Belton to be all right every way and a good average foal getter, if

not, this note is void, if the horse is properly fed and cared for."

On the back of the other note was this memorandum:

"I, B. T. Snyder, guarantee the stallion Lord Belton to be all right every way, a good average foal getter, if properly fed and cared for."

These memoranda appear in the copies of the notes attached to the petition without explanation or reference, except the statement that they are copies of the notes with all indorsements.

The defendant Johnson answered, admitting the execution of the notes; admitting indorsements of $15 and $10, respectively; alleged the presence of the above memoranda; alleged that the notes were given in part payment for a stallion bought by the defendant, together with one Grant Henry, from the plaintiff, at the date of the notes; that the notes had been originally written for an amount in excess of what was due, and the indorsements were not because of a payment, but made in order to correct the amount; that property to the value of $120, in addition to these notes, was given by defendant to plaintiff for a half interest in the horse; that, at the time of the purchase of the horse, he was warranted by the plaintiff to the defendant in the terms of the memoranda; that he was not sound and all right and not a good average foal getter, though properly fed and cared for, and was worth not to exceed $50, though, if he had been as guaranteed, he would have been worth $490; that defendant was damaged by the failure of such warranty in the amount of $245.

Plaintiff denied all of this answer, excepting admissions; admitted the memoranda on the note; admitted the sale of the horse and the receipt of property from Henry for one-half of his price, and property from the defendant to the agreed value of $120. Plaintiff further replied with a long allegation that he took from the defendant two colts at the valuation of $80, that he had not seen the colts and relied entirely upon defendant's representations, and that they failed to comply with such representations, and were not

worth more than $40 instead of the $80 at which they were taken; that he took a $40 note against one Huckleberry from the defendant on the defendant's representation of Huckleberry's solvency, which proved to be false and the note worthless, to plaintiff's damage in the sum of $40. It was further alleged that the memoranda on the notes were placed there without consideration and subsequent to the sale of the guaranteed horse, and because the defendant refused to sign the notes or to deliver up the property which he had agreed to turn over to plaintiff for the horse, until such memoranda were placed there; that they were placed there without consideration and were of no binding effect. These allegations of damage, by reason of the failure in value of the property received by plaintiff from defendant, and of the duress and want of consideration in the making of the memoranda of the guaranty upon the notes, were on motion of the defendant stricken from the reply, and the first error alleged is the striking out of this matter from the reply by the trial court.

That portion relating to the failure of the property received by the plaintiff to comply with defendant's representation, was evidently stricken out on the theory that no new ground of recovery should be injected into the action by way of reply. This was evidently in accordance with sound principles and decisions of this court. *Wigton & Whitham v. Smith*, 46 Neb. 461, and cases cited.

The same principles seem to be sufficient to dispose of the allegation with reference to the memoranda; the memoranda appear in the copies attached to the plaintiff's petition; they are there set out as a part of the original notes; if they were not properly a part of the notes and were not representative of the agreement between the parties, it would seem that the facts should have been set up. The matter also is clearly insufficient, because, while it alleges that the memoranda indorsed on the note were placed there against plaintiff's will, and at the demand and by the requirement of the defendant, and as an additional and unwarranted condition before he would turn over the plain-

tiff's property then in his possession, there is no allegation that the contract of warranty contained in the memoranda was not made by the plaintiff to the defendant. The facts set out are entirely insufficient to avoid these memoranda, after the notes had been accepted with them indorsed and sued upon without objection, while still bearing that indorsement. There seems to have been no error in sustaining the motion.

The next error complained of is the overruling of a motion for judgment in favor of plaintiff on the allegations of the pleadings. The answer clearly discloses on its face a defense to these notes, and there was no error in overruling this motion for judgment. Counsel seem to have made it under the supposition that the warranty, alleged in the defendant's answer, is alleged as being one made to himself jointly with the other purchaser, Grant Henry, This is not the allegation in the answer. It alleges a warranty made to the defendant personally.

The next error complained of is that the special findings made by the court are outside of the issues. These findings are that the notes were given in part payment for a horse; that defendant turned over property in part payment for his one-half interest in the horse to more than the horse's value, and that the other purchaser, Henry, turned over property of about $200 value, and that together they paid a good deal more than the value of the horse purchased; that the latter was without value for breeding purposes, and of very little as a work horse; that there was no consideration for the notes. In addition to these special findings, the court found generally for the defendant. A jury was waived at the trial, the evidence has not been preserved, and these special findings are not open to the objections that they are not within the issues. If they were outside of the issues, the general finding for defendant must be presumed to be in accordance with the evidence. These general findings would support the judgment, so long as a good defense is pleaded and the evidence not in the record.

The complaint that the warranty set out was to both defendant and Henry, jointly, and could not, properly, be pleaded as a counter-claim by defendant, alone, is not well founded; the warranty alleged in the answer is the one indorsed in the memoranda on the notes, and is alleged as having been made to the defendant personally. As before stated, in the absence of the evidence we must assume that it supported the plea.

The complaint that the court erred in finding that there was a failure of consideration is apparently based on the proposition, that the allegations of the answer could only be construed as setting up damages by reason of a breach of warranty. It does not seem worth while to consider the proposition. The finding of the court is ample to sustain the judgment on the basis of a counter-claim for damages by breach of warranty. The pleadings show that the horse was purchased for $490; they show that it was purchased for use as a stallion; the finding is that he was of no value for that purpose and of very little for any other. The obtaining of the two colts and the Huckleberry promissory note of $40 from the defendant, for his one-half interest in the horse, in addition to the two notes sued upon, is also established by the pleadings. In the absence of any contrary showing, we are bound to assume that there is evidence to support the court's finding that this warranty was to the defendant personally. If that were true, and this finding represents the facts, as in the absence of any showing to the contrary it must be held to do, then there was no possible ground for any recovery on plaintiff's part against the defendant in this action.

Several of the allegations of error are evidently based on the proposition that, because the memorandum upon the first note stipulated that that note should be void in case the horse did not prove a valuable foal getter, no recovery could be had on the warranty, and this would be the sole penalty in case it failed. The memoranda themselves do not import any such limitation. If there were any such showing in the evidence, the evidence should have been preserved in order to make it available here.

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

AMES and OLDHAM, CC., concur.

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

AFFIRMED.

WESTERN UNION TELEGRAPH COMPANY V. VILLAGE OF WAKEFIELD, NEBRASKA.

FILED JUNE 3, 1903. No. 12,590.

1. **Villages: OCCUPATION TAX: TELEGRAPH COMPANIES.** A village may impose a reasonable occupation tax upon telegraph companies, doing business within the village, which have complied with the telegraph law adopted by congress in 1866.
2. **Occupation Tax: INTERSTATE BUSINESS.** Such tax should be so restricted as to not include any interstate business or business of the government of the United States transacted by such company.
3. **Constitutional Law: VILLAGE ORDINANCE.** Where such ordinance imposes a tax on the business of such company transacted for the government of the United States, it is in violation of the provisions of the constitution of the United States, and, therefore, void.
4. **Case Distinguished.** *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 692, examined, approved and distinguished.

ERROR to the district court for Dixon county: GUY T. GRAVES, DISTRICT JUDGE. *Reversed.*

Robert E. Evans and *Wright, Call & Hubbard*, for plaintiff in error.

John H. Brown, contra.

OLDHAM, C.

This was an action instituted by the village of Wakefield, Nebraska, for the purpose of collecting an occupation tax imposed by an ordinance of said village on the

Western Union Telegraph Company. The section of the ordinance on which this cause of action is founded is as follows:

"Every person, copartnership or corporation who shall engage in the business or occupation of receiving, delivering or transmitting messages by electricity between points within the state of Nebraska, and the village of Wakefield, and every person or corporation owning or operating lines for the transmission of messages by wire between such points and who shall maintain in the said village an office for the receiving, transmission and delivery of such messages either by telegraph or telephone, shall pay to the treasurer of the village of Wakefield a license tax of $20 at such times as are provided in section two of this ordinance for the payment of license taxes."

The petition alleges the incorporation of the village; the passage and publication of the ordinance; the levy of a tax under its provisions, and the failure and refusal of the telegraph company to pay the same for the years 1900 and 1901, after proper demand made.

Defendant answered this petition, admitting the incorporation of the village; the passage and publication of the ordinance; the levy of the tax; the refusal of defendant to pay the same after a demand properly made, and that defendant was conducting a telegraph office in the village. The answer further alleged in substance that the ordinance is wholly void and of no effect, as being a tax levied upon interstate commerce; it then sets out the nature and extent of the business in which defendant is engaged; its compliance with the telegraph law enacted by congress July 24, 1866; and alleges that in compliance with this act "it has constructed its lines of telegraph over the public highways and post roads, including generally the railroads in the United States, and that all of said railroads, including the line of the Chicago, St. Paul, Minneapolis & Omaha Railway Company running through said village of Wakefield, are post roads of the United States"; that it is engaged in sending and receiving tele-

grams over its whole system between its office in Wakefield and other places of the United States, and also between the several departments of the government of the United States and their officers and agents, and that the ordinance operates as a tax upon the use of the post roads established by the authority of the United States.

It is also alleged that the amount of the tax imposed by the ordinance upon telegraph companies is unreasonable and prohibitive in its nature.

There is no question raised as to the regularity of the passage of the ordinance; it being admitted that villages in this state have the authority to pass ordinances to impose and collect a reasonable occupation tax.

Every question involved in this controversy has been determined by this court in the case of *Western Union Telegraph Co. v. City of Fremont,* 39 Neb. 692, except the question as to the reasonableness of the tax imposed and the question as to whether this ordinance imposes a tax on the business of the government of the United States.

The ordinance of the city of Fremont, which was upheld in the case just cited, provided specifically that the tax should not be levied "upon any business or occupation which is interstate or which is done or conducted by any department of the government of the United States or of this state, or any officer of the United States," etc. The opinion in this case was carefully prepared and the various decisions of the United States supreme court on the validity of ordinances and statutes taxing intrastate business of telegraph and other companies engaged in interstate commerce are closely examined and the conclusion is reached that "while the state can not tax either the interstate or government business of a telegraph company, it possesses the power to impose a tax upon such business of such company as is carried on wholly within the state, provided such tax is not levied in gross upon state as well as interstate business, but is restricted to intrastate business solely." While a motion for a new trial was pending in this case, the supreme court of the

United States, in the case of *Postal Telegraph Cable Co. v. Charleston,* 153 U. S. 692, announced a decision on the validity of an ordinance imposing an occupation tax similar in nature to that imposed by the city of Fremont, which fully sustained the conclusion reached by this court as to the validity of such an ordinance.

If the ordinance in controversy had contained a clause specifically excluding from its operation interstate business and business transacted for the government of the United States by the telegraph company, we would then only need to examine the question of the reasonableness of the tax imposed by the ordinance, which we would not regard as a very serious question. Unfortunately, no such clause is in the ordinance now before us; the provision being that "every person, copartnership or corporation who shall engage in the business or occupation of receiving, delivering or transmitting messages by electricity between points within the state of Nebraska and the village of Wakefield, and every person or corporation owning or operating lines for the transmission of messages by wire between such points and who shall maintain in the said village an office * * * shall pay," etc.

While we think this ordinance would by its terms fairly exclude all interstate business of the company, yet we can not say that it does exclude business of the government of the United States transacted by the company through its officers within the state. This being true, it takes the instant case without both the letter and the reason of the rule announced in *Western Union Telegraph Co. v. City of Fremont, supra,* and *Postal Telegraph Cable Co. v. Charleston, supra.*

As we are thus confronted with a federal question that this court has not as yet passed upon, we must look for its correct solution to the decisions of the supreme court of the United States, where the rule seems to be well settled.

In the first place, it is settled that where a statute of a state or an ordinance of a city properly enacted, imposes a tax on the receipts of a telegraph company which has

complied with the provisions of the act of congress of 1866, and such tax can be separated between the receipts of the company for interstate and government business and the receipts from business transacted within the state, the tax will be upheld on intrastate business alone, and the right to impose the tax will be denied as to United States and interstate business. *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411; *Telegraph Co. v. Texas*, 105 U. S. 460.

With reference to an occupation tax laid in general terms upon a telegraph company, acting under the telegraph law passed by congress in 1866, it is held that such tax is unconstitutional and void. *Leloup v. Port of Mobile*, 127 U. S. 640. This case, however, was examined and distinguished by Shiras, J., in *Postal Telegraph Cable Co. v. Charleston, supra*, and held not to apply to an ordinance imposing an occupation tax upon a telegraph company engaged in interstate business, which contained a specific provision not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers or agents.

As already indicated, we think the ordinance now before us fairly excludes from its operation taxes imposed on interstate business, and so far as that objection is concerned it can be sustained under the rule announced in *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, and in *Pacific Express Co. v. Seibert*, 142 U. S. 339.

If this ordinance had specifically excluded from its provisions all business of the United States, we would not hesitate to proclaim its validity, but for failing to do so we think it fatally defective. Being an occupation tax which is not susceptible of division, it operates as a regulation on all business within the scope of its provisions, and, so far as it includes government messages, it is a tax by the municipality "on the means employed by the government of the United States to execute its constitutional powers and therefore void. It was so decided in

McCulloch v. Maryland, 4 Wheat. (U. S.) 316, and has never been doubted since." *Telegraph Co. v. Texas, supra.*

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

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.

REVERSED.

SULLIVAN, C. J., dissenting.

The village undertook to tax persons or corporations engaged in the "business or occupation of receiving, delivering or transmitting" messages between Wakefield and other points in this state. It does not appear that the handling of government messages constituted any part of such business for the year ending May 1, 1901. The tax in question was, therefore, in truth and in fact, a burden upon private intrastate business and upon that only. The tax being laid upon the business of "receiving, delivering or transmitting," and not upon the business of standing ready to receive, deliver and transmit, I can not understand how the bare fact of having accepted the provisions of the act of congress can constitute a defense. Had the tax been imposed upon the business of maintaining an office at Wakefield, the position taken by the commissioners and approved by the court would doubtless be tenable. But in the absence of any showing that the sending or receiving of government messages constituted a part of the defendant's busines at Wakefield, I can not agree to the conclusion that it has been taxed on account of being engaged in a business in which it was to some extent acting as a government agency.

MARGARET CLASEN V. AUGUSTA PRUHS, BY HENRY PRUHS, HER NEXT FRIEND.

FILED JUNE 3, 1903. No. 12,848.

1. **Tort:** ACTION BY GUARDIAN OR NEXT FRIEND. Infants have a right to sue by guardian or next friend, to recover damages for injuries done to the person by the tortious acts of another.
2. ———: EVIDENCE. A preponderance of the evidence is sufficient to prove an issue in civil actions for assault and battery.
3. **Parent and Child:** CORRECTION. A parent, or one standing in the relation of parent, is not liable either civilly or criminally for moderately and reasonably correcting a child, but it is otherwise if the correction is immoderate and unreasonable.
4. ———: ———: QUESTION FOR JURY. It is a question of fact to be determined by the jury whether or not the punishment inflicted was, under all the circumstances and surroundings, reasonable or excessive.
5. **Instruction:** WORD "GIVEN" OMITTED. *Held*, That the omission to write the word "given" on an instruction, signed by the judge, read by him to the jury and delivered with the other instructions for consideration in the jury box, does not constitute reversible error.
6. **Instructions.** Instructions examined, and *held*, not prejudicial.
7. **Rulings on Evidence.** Action of the trial court in the admission and exclusion of evidence, examined, and *held*, not prejudicial.
8. **Evidence of Ability of Parent to Support Child.** Where it is averred that the parent had necessary means to provide food and clothing for a child and failed to do so, such allegation not being admitted, it is proper to admit proof of the financial ability of the parent to so provide, when such evidence is restricted by instruction to this purpose alone.
9. **Evidence.** Evidence examined, and *held* sufficient to sustain the verdict.

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, DISTRICT JUDGE. *Affirmed.*

Thomas J. Doyle and *George W. Berge*, for plaintiff in error.

Jesse B. Strode and *Edmund C. Strode, contra.*

OLDHAM, C.

This suit was prosecuted by the plaintiff below, a minor, by her next friend, to recover damages for alleged inhuman and cruel treatment suffered while in the care and custody of the defendant. It appears from the record that when plaintiff was about six years of age, she came with her brother from her home in Germany, with the consent of her parents, to make her home with the defendant, who was her maternal aunt, and resided near Hallam, Nebraska; that she remained under the care and protection of the defendant for six or seven years, when the defendant took her back to her parents in Germany and left her there. The following year the plaintiff returned with her parents to America and located near Hallam, and shortly after her return this cause of action was instituted. The allegations of inhuman treatment are that plaintiff was cruelly and unnecessarily tortured, beaten and whipped on numerous occasions and improperly clothed and fed by defendant while under her care and custody, and that such treatment resulted in permanent injuries to her health and growth; all of which was denied by the defendant. It is admitted that during the time the plaintiff lived with the defendant the relationship and authority of defendant over the plaintiff was that of parent over a child. So that the only question at issue in the case was as to whether the plaintiff was subjected to inhuman and brutal treatment in excess of the authority properly reposed in defendant during the time the defendant stood *in loco parentis* to the child. The testimony in the case is exceedingly voluminous and on many points is sharply conflicting. The trial resulted in a verdict and judgment for plaintiff in the sum of $2,000, and defendant brings error to this court.

The first allegation of error to which our attention is called, is as to the right of plaintiff to prosecute this cause by her next friend; the contention being that the parents and not the next friend should have maintained the ac-

tion. This was a suit for injuries to the person, and suits by next friend when brought for the benefit of an infant are provided for by section 36 of our code. It seems to be well established that infants have a right to sue by guardian or next friend, to recover damages done to their person or property by the tortious acts of another. Schouler, Domestic Relations (4th ed.), sec. 427; *Kleffel v. Bullock*, 8 Neb. 336.

The next contention is that as the defendant was charged with matters which, if true, would constitute an offense under the criminal code, it was necessary to prove the averments of the petition beyond a reasonable doubt, and that the court erred in telling the jury that it was incumbent on the plaintiff to prove the allegations of her petition by a preponderance of the evidence, instead of telling it that she must prove them beyond a reasonable doubt. This is asking for a rule not in force in this state, it having been uniformly held by this court, that a preponderance of the evidence proves an issue in any civil case. *First Nat. Bank of Omaha v. Goodman*, 55 Neb. 409. In *Nebraska Nat. Bank v. Johnson*, 51 Neb. 546, it is said:

"A plaintiff in order to recover the proceeds of property stolen by the defendant, is not required to prove the guilt of the latter beyond a reasonable doubt. It is sufficient if he establish the allegations of his petition by a preponderance of the evidence."

This instruction is also criticised because it is alleged that it assumes that plaintiff has sustained some injury and some damage. This is not a fair interpretation of the instruction. The injuries claimed by plaintiff are set out, and then the jury are told that it was incumbent upon plaintiff to establish these injuries and the damages resulting from them, by a preponderance of the evidence.

Paragraph 3, of the instructions given, is objected to because it tells the jury, in substance, that the relationship of plaintiff and defendant, being that of parent to child so far as the issues in this case are concerned, and the defendant having the care, custody and control of the

child, it became the duty of defendant to exercise reasonable care over plaintiff and to so care and provide for her that she might and would, if possible, grow up to womanhood in good health and good character, and do this without treating her cruelly.

It is claimed that this puts an unreasonable and impossible burden upon a parent or one standing *in loco parentis* to a child, and that it would permit an action and recovery for damages at a suit of the child, if it should grow up without a good character, although the parent had used the utmost effort in that direction. We think this a very strained and unreasonable criticism of the instruction, and that no such possible interpretation could have been given it by a jury of sensible men, in a suit in which no damages were alleged because of the want of proper moral instruction to the child, and in which the only injuries complained of were physical torture resulting from cruel punishment and improper food and clothing.

Paragraph 4 is assailed because it tells the jury that cruelty would take place where one, charged with the duty of providing for and protecting another, would abuse her by whipping or punishing her unnecessarily or to excess, or either carelessly or purposely neglect to provide for her those necessaries of life consisting of food, clothing and shelter which her helpless condition would require. This instruction is followed by the 5th, which tells the jury that a discretion is given to a parent or custodian in respect to the character and quality of the food and clothing furnished children, and that it is only when a person, having the custody of a child, fails to provide that food and clothing which is necessary to the child's life or health, or proper growth and development, that such failure would constitute a wrong which the law recognizes. In the 6th paragraph the jury are told:

"One possessed of the duty of rearing a child has a right to give it moderate correction and punishment in a reasonable manner for the child's benefit, for its educa-

tion and discipline. This would be for offenses on the child's part, such as disobedience, or where the child is guilty of something bad or immoral in its nature. Whipping or punishment, however, when administered to an extent greater than is reasonably necessary under the circumstances, would amount to assault, and when so administered one would be responsible for any damages arising therefrom as its proximate result."

All objections urged to these instructions will be considered in one body. It is conceded by counsel for plaintiff in error that the rule laid down in these instructions, as to the duty of a parent to provide suitable food and clothing for the child, is unobjectionable, but the contention is that there was no evidence in this case warranting an instruction on this question, and that it was prejudicial to the defendant to have this matter referred to in the instructions. We have examined the record, and we find that there is testimony offered by plaintiff which, if believed by the jury, would fully warrant a finding that at many times plaintiff was improperly clothed and insufficiently fed, while in the custody of defendant. A cause of action for this neglect of duty was not only alleged in the petition, but it was also supported by the testimony of four witnesses as found in the bill of exceptions. The objection, however, which is seriously and forcibly urged against these instructions is that they take a too much restricted view of the right of a parent, or one *in loco parentis,* to administer corporal punishment to a child. It is said in the brief that these instructions substitute the judgment of the jury for the judgment of the parent, in determining the necessity and extent of the punishment that may be administered for the good of the child. It is further urged that a parent ought to be considered as acting in a judicial capacity when he corrects his child, and should not be held liable, even if the punishment should appear to the triers of fact to be unreasonably severe and in no measure proportionate to the offense; that the only instance in which a parent should be held

liable for the punishment of a child is when he acts in bad faith and from wicked impulses, and when the punishment is of such a nature as to seriously injure the life, limbs or health of the child. An instruction embodying this view of the law was requested by defendant and refused by the court, and the 4th, 5th and 6th instructions, above set out, were given in its stead. In addition to what is said in the brief, we have been urged in a most skillful and persuasive oral argument to withhold our commendation from the doctrine set forth in these instructions of the learned trial judge, which, counsel urge, place an unwarranted and unreasonable restriction upon parental authority in the matter of administering punishment for the welfare of a child.

That much of the welfare of society rests on the proper exercise of parental authority is self-assertive, but that there is and should be a reasonable limitation on the right of parents to punish their offspring, is an elemental principle of modern civilization. The question then is, what is the right, and what the proper limitation of the right, and who shall judge when the right has been exceeded? A parent, teacher or master is not liable either civilly or criminally for moderately correcting a child, pupil or apprentice, but it is otherwise if the correction is immoderate and unreasonable. 1 Clark & Marshall, Law of Crimes, 433; 1 McClain, Criminal Law, sec. 242; 3 Greenleaf, Evidence (16th ed.), sec. 63; 1 Wharton, Criminal Law (10th ed.), sec. 631. In fact, this rule seems to be universally recognized by the courts of this country. If the authority to punish be limited by reason and moderation, who, then, on sound principles, should determine whether such authority has been used in excess of its proper limits, the parent administering the punishment, or the triers of fact in a court where complaint has been made? While some authority is cited tending to support the theory that, where the punishment falls short of maiming or disfiguring the body or seriously injuring or endangering life and health, the judgment of the parent is final and he can

not be held to answer, unless it is proved that the punishment was maliciously inflicted—the leading case in support of this doctrine being *State v. Jones,* 95 N. Car. 588, 59 Am. Rep. 282—yet the great weight of American authority seems to be that whether or not the parent, guardian or schoolmaster has administered unreasonable, unnecessary and cruel punishment to a child under his care, is a question of fact to be determined by the jury. 21 Am. & Eng. Ency. Law (1st ed.), 771; *Lander v. Seaver,* 32 Vt. 114, 76 Am. Dec. 156; *Hinkle v. State,* 127 Ind. 490, 26 N. E. 777; *Fletcher v. People,* 52 Ill. 396; *Johnson v. State,* 21 Tenn. 283, 36 Am. Dec. 322; *State v. Washington,* 104 La. 443, 81 Am. St. 141; *Patterson v. Nutter,* 78 Me. 509, 57 Am. Rep. 818; *Commonwealth v. Randall,* 70 Mass. 36. It would, therefore, seem that the learned trial court followed the trend of a long line of well considered cases when he submitted to the jury the question of the reasonableness of the punishment inflicted, and predicated plaintiff's right of recovery on proof of the fact that the punishment administered was unreasonable and unnecessary under all the circumstances.

Complaint is made that the force of an instruction, given at defendant's request, was weakened by reason of the fact that the trial judge through inadvertence failed to mark the instruction as "given." The instruction was read to the jury by the court, it bore the signature of the judge, and was given with all others to the jury for their consideration in the jury box. We can not see how the defendant could have been prejudiced by the mere oversight of the judge in not endorsing the word "given" upon this instruction. *Home Fire Ins. Co. v. Decker,* 55 Neb. 346.

We have examined all the other instructions complained of, and find no prejudicial error in any of them, and do not think we would be justified in unnecessarily extending this opinion by a further discussion of them, since as a whole the instructions seem to have fairly submitted the case to the consideration of the jury.

Numerous objections are urged against the rulings of the trial court on the admission and exclusion of evidence. The trial of this case lasted several days in the lower court, and appears to have been a combat royal from start to finish; each side was represented by learned, able and skilled counsel, who seem to have imbibed the spirit of resentment that was manifested between the parties to the suit. Each witness was carefully examined in chief, and rigidly cross-examined by opposing counsel, but through it all the learned trial judge, with commendable vigilance, seems to have succeeded in preventing anything prejudicial from being injected into the record, by the over zeal of counsel on either side. So that in the matter of exclusion of evidence, we find no prejudicial error in the rulings of the trial court.

It is contended that the court erred in permitting the plaintiff to show by the defendant, that she was possessed of a considerable amount of property. This testimony was admitted, as stated by the court, solely for the purpose of showing that the defendant was financially able to furnish necessary food and clothing for the plaintiff while in her custody. The evidence was restricted to this purpose, and to this purpose alone, by proper instructions given by the court. It was alleged in the petition that defendant was able to furnish proper food and clothing; this allegation was denied in the answer, and defendant did not offer to make this admission before the evidence was admitted. Under these conditions, we think there was no error in the ruling of the trial court.

Complaint is made of the action of the trial court in permitting one of plaintiff's witnesses, Mrs. Axthelm, to testify that she, the witness, had told the defendant what the plaintiff had said to the witness concerning her alleged mistreatment by the defendant. It is urged that this evidence was purely hearsay and of a character exceedingly prejudicial to the defendant, and that it should have been excluded. If this evidence had been admitted in the first instance, we would be inclined to sustain the

contention of defendant's counsel, but an examination of the record shows that when the witness first testified, her evidence was confined within proper limits, and that on the cross-examination of the witness, defendant's counsel went to considerable length into a conversation between defendant and the witness, which conversation was as to the alleged mistreatment of the plaintiff, and then on the reexamination plaintiff was permitted to inquire into the entire conversation. In view of the fact that defendant voluntarily went into this conversation, we do not think she is in a position to complain, because it was all admitted. When one deliberately pulls the lid off of a Pandora's box, he must not complain if plagues stalk forth to harass him.

It is finally urged that the verdict is clearly against the weight of the evidence, and for that reason should be set aside. With reference to this objection, we are constrained to apply the language used by the learned Justice REESE in *Nelson v. Johansen,* 18 Neb. 180, a case similar in nature to the one at bar, when he says:

"It is next alleged that the verdict was against the weight of evidence, and was not supported by sufficient evidence.

"Upon this branch of the case it is sufficient to say that we have carefully read over and examined all the testimony introduced upon the trial, and find it conflicting and quite difficult to harmonize. In fact there was a sharp conflict between the testimony introduced on the part of defendant in error and that presented by plaintiff in error. If the jury believed the testimony of the witnesses produced by the defendant in error, there was sufficient to sustain the verdict. As to the weight of the testimony they were the judges, and the verdict would not be set aside unless clearly and manifestly wrong."

Finding no reversible error in the record, we recommend that the judgment of the district court be affirmed.

AMES and HASTINGS, CC., concur.

SEDGWICK, J.

Two of the questions discussed by the commissioner seem to be of sufficient importance to justify further suggestions.

1. Can a minor child, by his next friend, maintain an action to recover damages against one who formerly stood in the relation of parent, for injuries claimed to have been received as a result of excessive and unnecessary punishment administered to the child while the relation of parent and child existed, and while the child was a member of the defendant's family, and in her care and custody?

Judge Cooley in the first edition of his work on Torts, page 171, in speaking of the right of a child to bring a personal action against his own parent, said:

"If he (the parent) plainly exceeds all bounds, he is liable to criminal prosecution, but it seems never to have been held that the child might maintain a personal action for his injury. In principle, there seems to be no reason why such an action should not be sustained; but the policy of permitting actions that thus invite the child to contest the parent's authority is so questionable, that we may well doubt if the right will ever be sanctioned."

The reason for this conclusion is stated by the supreme court of Mississippi in *Hewlett v. George,* 68 Miss. 703, 13 L. R. A. 682:

"So long as the parent is under obligation to care for, guide and control, and the child is under reciprocal obligation to aid, comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand."

Brutal and inhuman treatment of children is not tolerated by the law. The state will prevent this, and will change the custody and control of the child if necessary to that end. Whether, after the state has so intervened in the interest of the child, and the child has been placed under guardianship for the purpose of protection, an action might be maintained against an inhuman parent for damages in behalf of the child, is a different question. In such case the reason for the rule would seem to fail. But, in a case like the one at bar where the child has been taken from the custody of the defendant, its foster-mother, no good reason could be given for refusing to entertain an action in its behalf for damages, and if the right of action exists, the form is prescribed by statute:

"The action of an infant must be brought by his guardian or next friend. When the action is brought by his next friend, the court has power to dismiss it, if it is not for the benefit of the infant; or to substitute the guardian of the infant; or any person, as the next friend." Code, section 36.

2. The plaintiff's allegation of cruelty and inhuman punishment on the part of the defendant is denied in the answer. The issue was sharply contested. The little girl was the principal witness in her own behalf, and the facts relied upon in defense are supported, if at all, mainly by the evidence of the defendant herself. The evidence of both of these witnesses necessarily takes a wide range. They contradict each other at many points. It was the duty of the jury to discover the trustworthy evidence, and cull the facts from the mass of testimony, much of which must be regarded as untrustworthy. The defendant admitted that she inflicted punishment upon the child, but alleged that it was necessary for the correction of faults, and was reasonable, and not excessive or cruel. The question is discussed in the briefs, as to how far courts and juries should interfere with parental discretion and inquire into motives, and the necessity and propriety of punishment inflicted. It seems to be held in North Caro-

lina that if a parent acts in good faith, and without malice, and does not inflict permanent injury, the law will not interfere however unmerited and severe the punishment may be. This doctrine does not seem to be supported by precedents from other jurisdictions. In later times it is not thought, as it once was, that so large a latitude of parental authority is necessary. It is generally held that punishment may be excessive and cruel, and therefore unlawful, although it falls short of inflicting permanent injury. On the other hand, some courts seem to have ignored the right and duty of exercising parental discretion, and to have disregarded the consideration of good faith and the absence of passion or malice, as of no importance.

Mr. Bishop, in the earlier editions of his work on criminal law, seems to have regarded this latter view as established by the authorities, although he doubted the soundness of the reasons upon which it was based. 1 Bishop, Criminal Law (5th ed.), sec. 882.

In the later edition, after referring to the conflicting views upon the question, more recent authorities are cited, notably, *Vanvactor v. State*, 113 Ind. 276, 3 Am. St. Rep. 645, and it is said that the "just doctrine" is "that the parental judgment, if honest and without passion or malice, should be taken as *prima facie* establishing the right, and should be overcome only by evidence of passion, of malice, of the use of an improper weapon, or of such excessive severity of punishment as implies the absence of true parental love, or of a due appreciation of parental duty." This statement of the law is well supported by authority. In *Hinkle v. State*, 127 Ind. 490, 26 N. E. 777, the court said:

"The father has the right to administer proper and reasonable chastisement to his child without being guilty of an assault and battery, but he has no right to administer unreasonable chastisement, or to be guilty of cruel and inhuman treatment of his child, and if he does administer unreasonable chastisement, and treats the child

cruelly and inhumanly, his acts become unlawful, and if they are such as to constitute an assault and battery, he may be prosecuted and convicted. The law has very wisely left it for the court or jury trying the case to determine whether the chastisement is reasonable and lawful, or unreasonable and unlawful, and when they have passed upon the acts, and found them to be unwarranted, unreasonable, and unlawful, this court will not disturb the verdict or finding, if there be evidence to sustain it."

And in another case, the same court said:

"The law is well settled that a parent has the right to administer proper and reasonable chastisement to his child without being guilty of an assault and battery; but he has no right to administer unreasonable or cruel and inhuman punishment. If the punishment is excessive, unreasonable, or cruel it is unlawful. The mere fact that the punishment was administered by the appellant upon the person of his own child will not screen him from criminal liability. Whether or not the punishment inflicted in this case was excessive or cruel was a question for the jury." *Hornbeck v. State,* 16 Ind. App. 484, 45 N. E. 620.

The supreme court of Tennessee said:

"In chastising a child, the parent must be careful that he does not exceed the bounds of moderation and inflict cruel and merciless punishment; if he do, he is a trespasser, and liable to be punished by indictment. It is not, then, the infliction of punishment, but the excess which constitutes the offense, and what this excess shall be is not a conclusion of law, but a question of fact for the determination of the jury." *Johnson v. State,* 21 Tenn. 283, 36 Am. Dec. 322.

These authorities are not in conflict with the rule suggested by Mr. Bishop. Manifestly the jury must determine whether the punishment inflicted was of such an excessive severity as to imply malice, or the absence of true parental love, but to attempt to put the jury in the place of the parent, and ignore all latitude of discretion,

does violence to the plainest principles underlying the relation of parent and child.

"The little one is placed, helpless and untaught, in the parental hands. The helplessness is alike physical, mental and moral. Parental discipline, rightly understood, is to assist the strivings and aspirations of the child's better nature. And the child, needing this assistance, is therefore, entitled to it. The question of what help of this sort shall be given is better left to the parent than to any other person; because parental affection prompts more strongly than any other to a merciful judgment." Bishop, Criminal Law (8th ed.), sec. 880.

It is not possible to exhibit to the jury the character and disposition of the child, its needs and dangers, its susceptibility to ordinary influences and methods of correction and discipline, or its want of such qualities, as these matters are known to the parent. Instructions which omit to present these considerations to the jury are faulty; if they are so framed as to necessarily convey to the jury the idea that no regard is to be paid to the parental discretion and judgment, and that the whole question is to be determined by the jury upon their general notion of parental duty, without regard to the motive of the parent, or his judgment as to the enormity of the fault of the child, or the degree of punishment necessary to correct it, they are erroneous. The trial court instructed the jury that the relation between plaintiff and defendant "so far as the issues of this cause are concerned, would be like those which exist between parent and child, and the duties that each owe to the other would be the same." And also that:

"Cruelty would take place where one charged with the duty of providing for and protecting another would abuse her by whipping or punishing her unnecessarily or to excess, or either carelessly or purposely neglect to provide for her those necessaries of life, consisting of food, clothing and shelter, which her helpless condition would require."

Possibly, in some respects, the language of these in-

structions might be more elegant, but, so far as they go, the statement of the law is substantially correct. The principal complaint is of the following language contained in another instruction:

"Having the care, custody and control of the child, it became her duty to exercise reasonable care, to so care and provide for her that she might and would, if possible, grow up to womanhood in good health and good character, and do this without treating her cruelly"; and of refusing to give an instruction requested by defendant.

The language last above quoted from the instruction given is, perhaps, indefinite, and standing by itself might have been misleading. To exercise perfect care so that everything possible is done for the good of the child, is perhaps more than can be demanded of human parents. To exercise reasonable effort with the purpose in view, "to so care and provide for her that she might and would, if possible, grow up to womanhood in good health and good character," is a reasonable requirement of one who assumes the relation of parent to a helpless child. In the light of the whole charge of the court to the jury, the latter seems to be the fair construction of the language used. The instruction requested and refused was as follows:

"The jury is instructed that the defendant in this case, having the same dominion over the plaintiff that a parent has over a child, had the legal right to restrain the plaintiff from doing wrong, to chastise her for wrong doing, when acting in good faith, and the facts fairly weighed in the judgment of the defendant, honestly and intelligently exercised, demanded the use of a switch or other similar instrument in punishing her."

There is no doubt that, in the condition of the record, the defendant was entitled to have the jury plainly instructed as to the right and duty of the parent to exercise a reasonable and just discretion in correcting the faults of a child, and that the law will not hold the parent liable for an honest mistake of judgment in estimating the

character of the fault corrected, or in determining the quality and degree of punishment necessary to correct the fault. This discretion of the parent must be confined within reasonable limits. Unnatural and inhuman punishment furnishes conclusive evidence of a malicious motive in the parent administering it. Punishment may be so plainly excessive, although not causing permanent injury, as to overcome the presumption that the parent had solely in view the welfare of the child. So that, after all, the question is whether under all the circumstances of the case, after allowing due latitude for the exercise of parental authority and discretion, the punishment was in fact excessive and unnecessary, and this question must necessarily be determined by the jury. Is the defendant now in a position to complain of the court's refusal to give the requested instruction as reversible error?

In the sixth instruction given, the court told the jury:

"One possessed of the duty of rearing a child has a right to give it moderate correction and punishment, in a reasonable manner for the child's benefit, for its education and discipline. This would be for offenses on the child's part, such as disobedience, or where the child is guilty of something bad or immoral in its nature."

The remainder of the requested instruction, not embraced in the instruction given by the court, is not very clear and definite. It does not directly tell the jury that under some circumstances it might be proper and reasonable to use a switch in correcting a child, and that the parent is allowed discretion in that regard. There was evidence in this case which, if believed by the jury, showed that the child was whipped beyond all reason with a knotted rope, and otherwise excessively punished, and that, too, at times when there was no fault of the child to be corrected. It is not clear that the indefinite and unsatisfactory language of the latter part of the requested instruction, without the explanation that unnatural and inhuman beating would be conclusive evidence of a bad motive, might not mislead the jury. Further instruc-

tion of the character apparently aimed at in the request was desirable; but it is not so clear that the defendant was entitled to have the instruction given, as framed and as requested, as to require a reversal of the judgment because of its refusal.

The conclusion of the commissioner appears to be right, and is approved, and the judgment of the district court

The other judges concur. AFFIRMED.

PHILIP H. ZWEIBEL V. FANNIE PIATT MYERS.

FILED JUNE 3, 1903. No. 12,882.

1. **Trial:** RIGHT TO OPEN AND CLOSE. In the trial of a case the party first required to produce evidence is entitled to open and close the argument.
2. **Adverse Claimants:** PRIVITY: TACKING. A privity must be shown between adverse claimants before the possession of one can be tacked to the possession of the other for the purpose of completing title by prescription.
3. ———: RECOGNITION OF SUPERIOR TITLE. One claiming title to lands by adverse possession may, before the statute has finally run in his favor, purchase a tax deed to the premises without acknowledging the superior title of the record owner. But if he purchases a tax certificate and accepts payment of the same from the record owner through the county treasurer, such act is a recognition of the superior title.
4. **Evidence.** Evidence examined, and *held*, sufficient to sustain the judgment.

ERROR to the district court for Sarpy county: GUY R. C. READ, DISTRICT JUDGE. *Affirmed.*

G. M. Mullins, Howard H. Baldrige and *William A. De Bord*, for plaintiff in error.

Isaac Congdon, contra.

OLDHAM, C.

This was an action in ejectment to recover possession of a tract of land containing about 85 acres situated in

Sarpy county, Nebraska. The petition was in the statutory form; the answer a general denial; there was judgment in the court below for plaintiff and defendant brings error to this court.

When the taking of testimony began, plaintiff's counsel stated that he did not care to insist on a judgment for damages for the unlawful holding of the premises, but would be satisfied with a judgment for possession. Defendant thereupon offered to admit, that the plaintiff held the record title to the premises, and claimed the right to open and close the case, saying that he would rely upon a title by adverse possession. The court, however, permitted the plaintiff to introduce her deeds and open and close the argument to the jury, and its action in this matter is the first alleged error called to our attention.

The right to open and close the argument in the trial of a cause, is properly determined by an inspection of the pleadings, and section 283 of the code says: "In the argument, the party required first to produce his evidence shall have the opening and conclusion." In the case at bar if no evidence had been introduced, under the pleadings defendant would have been entitled to a judgment; hence plaintiff, in order to recover, would have been compelled to have shown not only that she held the record title to the premises, but also that defendant was wrongfully in possession of the same. Each of these allegations were denied by defendant's answer. It is therefore apparent that the action of the trial court was fully warranted.

Two other objections are called to our attention in defendant's brief; one is as to the action of the trial court in giving paragraph 8 of instructions, on its own motion; and the other, that the judgment is not sustained by sufficient evidence. As a review of the testimony contained in the bill of exceptions is necessary to an intelligent discussion of each of these objections, we will consider them together. The material facts in the record are, that the land in controversy was patented by the United States, in

1864; that it is bounded on the south by the Platte river, is rough in its character, covered to some extent with scrubby timber, and adapted only to pasturage or stone quarrying purposes; that the patentee dwelt upon and remained in possession of the land until about 1868 or 1869, when he conveyed it to plaintiff's husband; that plaintiff's husband subsequently conveyed the premises through a third party to plaintiff, who holds the record title to the land; that defendant's father, George Zweibel, owned lands adjacent to this land on both the north and the east; that at a very early day he fenced his cultivated lands lying east of the land in dispute; that in 1871 he also fenced the lands lying north; that in 1875 he extended a fence from the south boundary of his lands practically to the river, thereby enclosing the lands in dispute with another tract of land called the Hamilton land, lying immediately west of it; that in 1878 defendant's father died, intestate; that defendant, his mother and brothers lived together on his estate until 1884. The only evidence of an attempted adverse holding of this land by defendant's father, was the fact of its being practically enclosed by the fences which he constructed for the purpose of surrounding other lands and also some evidence that the lands when enclosed were used by him for pasturing his stock; there is also some claim of adverse user from the fact that he took rocks from a stone quarry on the land, before it was enclosed. The latter claim, however, is not established because of the fact that at the time he took this stone, the patentee of the land was in the actual possession of it, which negatives the idea that such holding was adverse. *Smith v. Hitchcock*, 38 Neb. 104. The evidence of pasturing only tends to show that the land was used as a commons for that purpose up to the time of its enclosure, and that after the death of defendant's father, the mother and children occupied the homestead and used this with other lands enclosed for pasturage, until a division of the estate was made among them by partition deeds, in the year 1884.

When the estate was voluntarily partitioned between the the heirs, defendant received a deed to the lands adjacent to the tract in dispute, but this deed did not purport to convey any of the lands in controversy. In connection with the voluntary partition of this land among the heirs of the deceased ancestor, the defendant filed an affidavit in which he described the lands owned by his father at the time of his demise, and did not include in this description any claim to the lands in controversy. After the division of the land in 1884, defendant remained in possession of what was called the old home place, and continued to pasture the disputed lands. Up to this time neither defendant nor his ancestor had ever paid any of the taxes on the land, but the taxes had been paid by plaintiff's grantor regularly until the year 1883, at which time the taxes became delinquent, and the lands were sold for the taxes of that year together with the taxes for 1860, 1861 and 1862. Defendant purchased this tax certificate. The year following, plaintiff's grantor redeemed from this tax sale. Defendant surrendered his certificate and received from the county treasurer the money paid by plaintiff's grantor. In view of this state of the record, the court gave the instruction objected to, which is as follows:

"If you find from a preponderance of the evidence that the defendant, on or about the 8th day of December, 1884, purchased said premises at a sale for taxes, and that the plaintiff on or about the 6th day of January, 1885, redeemed said premises from said sale and paid money to redeem the same to the treasurer of Sarpy county, and that the defendant received said money, so paid to redeem said premises from said tax sale, from said treasurer of Sarpy county, then you must find that the defendant thereby recognized the plaintiff as the owner of said premises and he can not claim or assert any prior acquired interest in or to said premises; and the adverse possession of the defendant, if any, must date from and begin at a time subsequent to the date on which he took and received said money."

The first objection urged to this instruction is that the court should have qualified the instruction by telling the jury that the defendant would not be estopped by receiving the money from plaintiff or her grantor for the tax certificate, if he had actually perfected his title by ten years' adverse possession before doing so. If the evidence in the record was sufficient to establish an affirmative title in the defendant at the time he received this money, this contention would no doubt be well founded, but by reference to the testimony already reviewed it is plain that the adverse holding even of defendant's ancestor could not date from an earlier period than the year 1875, the time at which the lands were practically enclosed by the fence along the west line of the Hamilton tract, and if we should regard this fact as sufficient to prove a claim of ownership, we would then date the beginning of the adverse holding of the ancestor from 1875. The record shows that the ancestor died in 1878, before the title was quieted in him. We next find that the widow and heirs occupied the estate of the ancestor, jointly, until 1884, at which time it was divided among themselves by partition deeds without any attempt to convey this land. Consequently there is no privity of possession of the disputed land, either by contract, deed or devise between the ancestor and the heirs, and the rule seems to be firmly established that the possession of one adverse claimant can only be tacked to the possession of another for the purpose of completing title by prescription when there is a privity of grant between them. *Pohlman v. Evangelical Lutheran Trinity Church,* 60 Neb. 364; *Bullen v. Arnold,* 31 Me. 583; *Hobbs v. Ballard,* 5 Sneed (Tenn.), 395; *Crispen v. Hannavan,* 50 Mo. 536; *Doswell v. De La Lanza,* 61 U. S. 29, 15 L. ed. 824. No privity being established, defendant's possession can not be tacked to that of the ancestor and would at most date from the year 1878, or less than ten years before the acceptance of the money from plaintiff's grantor in payment of the tax certificate. Consequently, under the testimony in the

case, the instruction of the court was not prejudicial for failing to make this qualification.

It is further urged that the court in the instruction should have told the jury that the defendant would only be estopped by this act, if he actually knew that the money he got from the treasurer was paid by plaintiff or her grantor. We do not think this objection tenable under the evidence in the case. When the defendant was notified of the redemption from the tax certificate, he went to the office of the county treasurer, took the money and receipted the redemption book, which showed plainly who the owner was that had redeemed. He made no effort to explain his conduct in this matter at the trial of the case, and the supposition that he might have imagined that some one else was redeeming, is but an afterthought of his skillful counsel. The question then to be determined is, does the instruction fairly state a correct proposition of law applicable to the facts proved in this case? We think it does. Defendant had an unquestionable right to purchase this tax certificate, without recognizing any outstanding title in the plaintiff, and he had a right, if he chose, to procure a tax deed on this certificate and hold the same, without recognizing any other outstanding title than the lien of the state government for its taxes, and if he had done this the instruction would have been wholly unwarranted and highly prejudicial, but when he purchased the tax certificate and was informed of the redemption, it was his duty before accepting the money to inquire and see who was claiming the right to redeem, and when he went to the treasurer's office and receipted the redemption book, with the name of the owner who was claiming to redeem before his eyes, his act was tantamount to an acknowledgment of plaintiff's ownership of the land. *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb. 371.

With reference to the testimony of the adverse holding of the defendant from the year 1885 (the time of the redemption of the tax certificate), the evidence shows that from 1890 to 1893 he made efforts to purchase this land

from plaintiff's agent; that he made no effort to pay any taxes on it until 1896, and that the taxes were paid each year by the plaintiff until that time. True, the evidence does show that from 1885 to the filing of this suit in July, 1900, the defendant pastured this land, and that some time in the year 1890 he sold stone from the quarry on the land and did other acts that might show an adverse possession; on the other hand the evidence of the different attempts to purchase the lands of plaintiff within the statutory period, was a strong circumstance tending to show that defendant's holding was servient rather than adverse in its nature, and this, in connection with other testimony in the record, we think sufficient to sustain the verdict of the jury. *Knight v. Denman,* 64 Neb. 814; *Roggencamp v. Converse,* 15 Neb. 105.

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

AMES and HASTINGS, CC., concur.

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

AFFIRMED.

ELVINA BRAASCH ET AL., APPELLANTS, V. CEMETERY ASSOCIATION OF THE EVANGELICAL LUTHERAN CHRIST SOCIETY OF NORFOLK, NEBRASKA, ET AL., APPELLEES.

FILED JUNE 3, 1903. No. 12,829.

1. **Injunction: CEMETERY.** A court of equity will enjoin the use of a tract of land for cemetery purposes so situated that the burial of the dead there will injure life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs.
2. **Cemetery: NUISANCE.** A burial ground near dwellings is not necessarily a nuisance, and the court will only interfere and enjoin its use on clear and convincing proof of probable injury.
3. **Evidence.** Evidence examined, and *held,* insufficient to sustain an injunction.

APPEAL from the district court for Madison county: JAMES F. BOYD, DISTRICT JUDGE. *Affirmed.*

H. F. Barnhart and *Fred H. Free,* for appellants.

William V. Allen, Willis E. Reed and *D. J. Koeningstein, contra.*

BARNES, C.

The appellants, plaintiffs in the court below, brought this action in the district court for Madison county, to obtain a permanent injunction against the Cemetery Association of the Evangelical Lutheran Christ Society of Norfolk, Nebraska, C. H. Krahn, August Lenz, C. F. Haase, August Mathieson, Anton Bucholz and William Brummond, officers of said association, forever restraining them from establishing or continuing a cemetery for the burial of the dead, on a certain tract of land hereinafter described. The allegations of the petition were substantially as follows:

"That plaintiff, Elvina Braasch, is the owner of a life estate in the following described land, to wit, commencing at the northwest corner of the southeast quarter of the northwest quarter of section 22, in township 24, range 1 west of the 6th P. M., running thence due south 100 rods, thence due east to the right of way of the Fremont, Elkhorn & Missouri Valley Railway Company, thence along said right of way in a northwesterly direction, to a point directly opposite the place of beginning; thence due west to the place of beginning, containing 18 and 80-100 acres; that the remaining plaintiffs are the heirs at law of one Herman Braasch who died seized of the said premises, and have each an undivided one-tenth interest in said lands subject to the life estate of his widow, their coplaintiff; that many years prior to the 3d day of July, 1901, the said Herman Braasch made improvements upon said lands and premises, and erected thereon residence buildings, caused wells to be dug therein, and ever since

said time said wells have been used by said Herman Braasch and his family, including the plaintiffs, for general and domestic purposes, and they are and have been dependent thereon for their water supply for said purposes; that Herman Braasch caused a cellar to be excavated beneath the residence situated on said land, and ever since said time the same has been and now is being used for the storage of food products for the plaintiffs, residents thereon; that said premises are situated on the eastern slope of a high hill or elevation of land, and said land extends to within twenty or thirty feet of the point of the highest elevation of said hill; that said elevation and slopes thereof are composed of a porous, unstratified clayey deposit, known geologically as loess, through which, by reason of its porous nature, all fluids and gases readily percolate; that for a great depth thereunder there is no strata impervious to the percolation, seepage or passage of fluids. That the defendant cemetery association was organized on the 3d day of July, 1901, and in pursuance of its organization it became on or about the 23d day of August, of said year, the owner of the following described real estate, to wit: commencing at the southeast corner of the southwest quarter of the northwest quarter of section 22, in township 24, range 1 west of the 6th P. M., in the county of Madison and state of Nebraska, running thence west forty rods, and thence north twenty rods, thence east forty rods, thence south to the place of beginning, containing about five acres; that by virtue of its ownership it entered into the possession and control thereof, and in the further prosecution of the main design of said association caused the said tract to be platted into cemetery lots and blocks, to be sold for cemetery purposes; the said defendants are in possession and control of the premises, and are advertising and offering said lots for sale, under the rules of said society, for the purpose of the interment of dead bodies or human remains on said premises; that said cemetery tract is situated and abuts upon the western side of the lands belonging to the

plaintiffs, and upon the summit of the hill or elevation of land, as above stated, and is many feet above the lands of the plaintiffs; that the soil thereof is of the same porous unstratified clayey substance known as loess, and is likewise without any strata impervious to the passage of fluids and gases; that the ground upon which said cemetery is located, slopes in nearly every direction from the high elevation upon which it is situated; that the surface drainage from said cemetery will necessarily be carried along and upon the lands belonging to these plaintiffs; that subterranean percolations from underneath the cemetery will necessarily penetrate under the lands of the plaintiffs and adjoining lands; and that if the defendants are allowed to continue the main design of said association, and the said cemetery becomes occupied and filled with human interments, the decomposition of human remains therein interred will necessarily contaminate, poison and infect the subterranean streams of water in that locality, and will cause the wells and cellars already existing there for the use of inhabitants of the lands belonging to the plaintiffs to become dangerous, unhealthful and unfit for use, and that the gases arising from said decomposition will cause the air in the immediate locality of said proposed cemetery to become unhealthful, and said lands adjoining, thereby unfit for human habitation; that if the defendants are permitted to continue in the establishment and operation of said cemetery upon the lands by them dedicated and assigned for such purposes, the lands of these plaintiffs will become wholly valueless and worthless, and unfit to be used for residence purposes, whereby plaintiffs will suffer a great and irreparable injury for which they have no speedy or adequate remedy at law, and will be wholly remediless unless, by interposition of a court of equity, the defendants be forever enjoined from carrying on and continuing their wrongful and illegal purposes aforesaid." The petition concluded with a prayer for a permanent injunction.

The answer of the defendants admitted the ownership of

the tract of land first described to be in the plaintiffs; that Elvina Braasch had a life estate therein, and that the other defendants had a reversionary interest in the said land, and were each the owners of an undivided one-tenth part thereof; admitted that Herman Braasch made the improvements and dug the wells upon the premises, as alleged in the petition; admitted the corporate organization and existence of the defendant cemetery association; that the persons named in the petition were its officers, as therein alleged; admitted the purchase and ownership of the tract of land; that it was purchased and was to be used for cemetery purposes; admitted that the said tract abutted upon the west side of the plaintiffs' lands, and denied each and every other allegation in the petition.

Upon these issues the cause was tried, and at the close of the plaintiffs' evidence the defendants moved the court to dismiss the action for the following, among other reasons: That there was no evidence introduced to show, or from which an inference can be drawn, that the wells in question, or the wells that will probably be dug or constructed upon the Braasch tract, will be contaminated by any deposits resulting from interments of human bodies in the cemetery tract.

The trial court sustained the motion, and dismissed the plaintiffs' cause of action; from the judgment thus rendered the plaintiffs appeal to this court.

The appellants contend that the court erred in sustaining the motion and dismissing their case, and in support of such contention has filed a brief, in the preparation of which counsel has taken much pains and show considerable erudition. Counsel for the appellees as strenuously, and with no less skill and ability, argue in support of the judgment. Under our present rules it becomes necessary for us to carefully review the evidence and form our independent conclusions of fact and law. This we will proceed to do.

It will be observed that two propositions are urged by appellants: *First,* that the surface water falling

upon the cemetery tract will flow upon, across and over their land, and thus contaminate their wells and render them dangerous to their health and comfort; *Second,* that the bacteria which inhabit and are generated in decomposing human remains will escape from the receptacles of interment and enter the earth, and by subterranean seepage or flowage from the cemetery reach the premises of the plaintiffs and become infiltrated in the water of the wells and thus poison and render it unfit for use and injurious to health.

It is the settled law of this state that a use made by one of his property which works an irreparable injury to the property of his neighbor, or whereby the unwritten but accepted law of decency is violated, or which deprives his neighbor of the reasonable and comfortable use of his property, or will probably injure the health or life of his neighbor, is a private nuisance and may be enjoined. *Lowe v. Prospect Hill Cemetery Ass'n,* 58 Neb. 94; *Farrell v. Cook,* 16 Neb. 483; *Barton v. Union Cattle Co.,* 28 Neb. 350; *Anheuser-Busch Brewing Ass'n v. Peterson,* 41 Neb. 897; *Beatrice Gas Co. v. Thomas,* 41 Neb. 662.

It is equally well settled that in such a case, to authorize an injunction, it must be established by satisfactory evidence that the threatened or apprehended injury will probably result. It is also the rule that a burial ground near dwellings is not necessarily a nuisance, and its use can only be enjoined on clear proof of probable injury.

Having in view these principles we will proceed with our examination of the questions involved herein. No dispute arises as to the *locus in quo,* and it appears that the cemetery tract of land abuts onto the appellants' tract near the middle, and on the west side of it for a space of twenty rods. The appellants' land is irregular in shape, being widest at the south end; is 100 rods in length, and as before stated contains 18 and 80-100 acres. A part of it lies on the hillside; it slopes down to the valley of the Northfork river, and a portion of it is situated in said

valley. From the highest point on the cemetery tract the slope is to the north and east into a large ravine which drains its surface, and also the surface of Prospect Hill Cemetery, and two others which lie near by to the north and west. This large ravine empties its waters into the Northfork valley across the north end of the appellants' land; the buildings and wells in question are near the southeast corner of said land; the stock well is about fifty feet south of a line drawn due east from the southeast corner of the cemetery tract, and the house well is 125 feet still farther south; the stock well is 570 feet, and the house well 682 feet from the nearest point of the cemetery tract; the stock well is 25 feet deep, and the house well 23 feet deep. The highest point on the cemetery tract is about 100 feet above the water in these wells. There is a small ravine starting on the east side of the cemetery tract and running to the northeast into the large ravine, so that all the water which falls on the surface of said tract flows and is carried off to the northeastern part of the appellants' land, and none of it ever reaches the vicinity of their house, barns and wells; the slope of the hill is about twenty degrees; the land is used for pasturage, and is in its natural state, being covered with grass or what is called green sward. This description alone is sufficient to dispose of the question of the surface drainage or surface water. It is apparent, without further discussion, that appellants failed to establish their right to an injunction so far as that branch of the case is concerned, and the matter will not be again referred to.

We will now consider the contention relating to the percolation of subterranean waters, from the cemetery tract to the plaintiffs' wells. The record shows that it is 570 feet from the nearest point of the cemetery to the nearest well, and that from the surface of the ground at the highest point in the cemetery to the level of the water in this well, is about 100 feet; that the soil for the whole distance and depth is a clayey substance called loess,

without fissures or seams; that there are no percolating waters or streams, and no veins of water therein; that the soil, while highly porous, is so solid that when excavated the sides of the excavations, such as wells or cellars, not exposed to the destructive elements of weather and water, will stand like a cement wall for a generation; that while it readily absorbs water it at the same time acts as a filter. It further appears that the water in the wells on appellants' land and in that vicinity, is found at a uniform depth, and in a strata of water bearing sand interspersed with small stones or gravel. Fred Braasch testified that he was present when the house well was dug in the year 1866; that the soil was clay all the way down until they came to the water which was in sand and came in from all directions. Another witness testified that he dug a well at one time near the tract of land in question and just north of the cemetery tract, upon the slope leading from the cemetery north and to the east; that the soil was clay all the way down until he struck the water; that he dug a well on the tract known as the Cotton land, a little farther north; that the soil was clay all of the way down to the water; that when he struck water he also struck stones or gravel in the bottom of the well. A third witness also testified that he had dug wells in that vicinity; that the soil was clay, and that when they got down to the water it came in around the sides; that he curbed the well which he dug by putting in one piece of curb at the bottom and one at the top.

It is thus shown beyond question, that the water in appellants' wells does not come from the seepings or percolations of surface water through the soil, because in digging them no water was found, and none came in by seepage from any direction until the water bearing strata was reached. It appears that the water in this strata does not flow, and has no current or movement in any direction, because the well diggers all say that when the water was struck it came in equally from all sides. Appellants attempted to prove that the soil was so porous that it would

take up and absorb 90 per cent. of the water falling thereon, amounting to many millions of gallons each year, and in such quantities as to take up the bacteria, bacilli, toxins and ptomains, release them from the decomposing human bodies interred in the cemetery and carry them through the soil a sufficient distance to poison and pollute these wells, and to that end showed by certain scientific persons that the average absorption of the rainfall in this state is 90 per cent. This evidence is entirely beside the mark, because we know without resorting to the evidence of experts, that nearly all the water which falls on the slopes of a hill having an elevation of approximately twenty degrees, and which is in a state of nature, being covered by sod, will run off, and there will be scarcely enough of it absorbed to sustain ordinary vegetable life; that grass growing thereon will frequently perish for want of moisture. In view of these facts the evidence given by doctors Mackay and Crummer, the principal witnesses for appellants, loses all of its probative force. Doctor Crummer, after attempting to qualify himself as an expert, testified as follows:

Q. If a cemetery, or place of sepulture, were situated upon the summit of a hill which, together with its slopes, is composed of a uniformly porous soil, without having in the soil any strata impervious to water for many feet down, would the germs or spores of poisonous products from dead and diseased bodies containing ptomains or germs of these various diseases (referring to typhoid fever, diphtheria and tuberculosis), would these germs and poisons be liable to be carried by percolating waters through the soil, so as to contaminate the water in wells dug upon the slopes of such hill; the water level in said wells being at least 80 to 100 feet below the level of the dead body or bodies buried in the cemetery above, and the distance from such cemetery being approximately 250 to 350 feet?

A. In a porous soil a well drains a cone shaped area, the base of which is on the ground, and naturally the

apex at the bottom of the well, which base is in feet laterally the square of the depth of the well; that is the standard rule for measuring the distance laterally which will be drained by a well. A well 35 feet deep would drain an area of 1,225 feet in diameter, which would be 612 feet on either side of the well; a well 50 feet deep drains an area of 2,500 feet in diameter; so that the distance a contamination might reach a well increases very rapidly as the depth increases. A well 50 feet deep would drain twice as wide an area as a well 35 feet deep. It would be liable to carry the contamination from a cemetery into these wells.

Q. Would or would not such wells as you have described under such conditions be dangerous to the health of persons using the water for domestic purposes?

A. They would, surely so.

It thus appears that the hypothetical question put to this witness does not correspond to the situation or the distances as shown by the evidence, and that his answers do not respond to the conditions which exist in the case at bar. The witness was asked upon cross-examination the following question:

Q. Do you know how far surface water passing through a cemetery can be transmitted through the soil before it becomes sufficiently pure as not to be at all dangerous to health?

A. I do not know that we have any absolute data upon that particular subject.

The doctor then proceeded to illustrate by the well known and historical example of a well in Germany, which became infected with drainage from a distant village, through the soil. In that case, however, there was a large, open crack in the top of the ground which was supposed to facilitate the flow of poisonous material. In order to test it they put four barrels of salt in this crack, and the water three or four miles away became infused with salt in a few hours. It was evident that there was a subterranean stream which facilitated the carrying of

the poisonous materials to the point in question, while in the case at bar no such condition exists. In the testimony of doctor Mackay we find the following:

Q. Suppose the body of a person dying from typhoid fever, tuberculosis or diphtheria, or any of the enteric diseases, was buried in a porous soil upon the summit of a hill or elevation of ground, the summit and slope of the hill itself being of loess formation, the body being buried in the ordinary manner, the soil being of such a nature as to permit percolating or subterranean waters to pass directly through it, would the presence of such a body containing the germs of the diseases mentioned be a menace and a danger to the health of persons living upon the slope of the hill, upon the summit of which this cemetery is placed, and drawing water supplied for domestic purposes from an open well dug into the slope of the same hill upon which the cemetery is placed, the summit of the hill being at least 75 feet above the bottom of the open well dug upon the slopes and directly below the cemetery?

A. My answer to that would be, that reasoning from analogy from cases where it has been determined that contamination resulted from the pollution of the water drawn from a similar watershed, the presumption would be that such a cemetery would constitute a menace to the health of those drawing water from wells in its vicinity, if not immediately, then in years following.

This is the kind of evidence from which we are asked to find that the appellants have established, by clear proof, a case of probable injury. The case of *Lowe v. Prospect Hill Cemetery Ass'n, supra,* is strenuously pressed upon our consideration as being in point and authorizing us to grant the relief prayed for. An examination of that authority discloses that the wells in question therein were just across narrow streets in a well settled portion of the city of Omaha, the distance not exceeding 75 feet from the proposed cemetery. It further appears in the opinion that the land adjoining was laid out into lots and blocks, and many of them were occupied for residence purposes.

In such a case the conditions would amply justify the court in finding that the wells so situated would be likely to be poisoned and contaminated by the use of the tract for the interment of dead bodies; that the danger to the health and welfare of those using water from the wells and residing upon the lots in which they were dug, would be imminent; while in the case at bar the distance from the cemetery tract to the appellants' wells is so great that no comparison can be made between the two cases, and one is no authority for a decision of the other.

From the facts shown in the record we are constrained to hold that the appellants failed to prove the existence of conditions which would justify a reasonable belief that the acts complained of would result in any injury whatever to their health and comfort.

In order to authorize a court of equity to interfere, it must be made to clearly appear, by competent evidence, that it is reasonably certain that the anticipated injuries will probably occur. The law protects against real wrong and injury combined, but not against either or both when merely conjectural or fanciful. *Kingsbury v. Flowers*, 65 Ala. 479, 39 Am. Rep. 14; *Adams v. Michael*, 38 Md. 123, 17 Am. Rep. 516; *Begein v. City of Anderson*, 28 Ind. 79; *Town of Lake View v. Letz*, 44 Ill. 81; *Dunning v. City of Aurora*, 40 Ill. 481; *Newark Aqueduct Board v. City of Passaic*, 45 N. J. Eq. 393, 18 Atl. 106; *Shivery v. Streeper*, 24 Fla. 108; *City of Greencastle v. Hazelett*, 23 Ind. 186.

The evidence not being sufficient to sustain a decree in favor of appellants, it follows that the judgment of the trial court was right and we recommend that it be affirmed.

ALBERT and GLANVILLE, CC., concur.

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

AFFIRMED.

SMITH H. MALLORY, REVIVED IN THE NAME OF A. D. MALLORY, SPECIAL ADMINISTRATOR, V. ESTATE OF JOHN FITZGERALD AND MARY FITZGERALD, ADMINISTRATRIX OF THE ESTATE OF JOHN FITZGERALD, DECEASED.

FILED JUNE 3, 1903. No. 11,466.

1. **Negotiable Instrument:** ORAL AGREEMENT: EVIDENCE. Where a note is negotiable in form and by its terms payable on demand, evidence of a contemporaneous oral agreement, destroying its negotiability, and making the time of payment contingent on the happening of an uncertain event, is inadmissible.
2. **Directing Verdict:** EVIDENCE. Where evidence of such agreement is received over the objection of the party against whom it is offered, the court may disregard it in determining whether a verdict should be directed against the party offering it.
3. **Appeal:** ISSUES. On appeal to the district court, the parties are restricted to substantially the same issues as those upon which the cause was submitted below.

ERROR to the district court for Lancaster county: EDWARD P. HOLMES, DISTRICT JUDGE. *Affirmed.*

Lionel C. Burr, Charles W. Burr, Lorenzo W. Billingsley, Robert J. Greene and *Richard H. Hagelin,* for plaintiff in error.

James Manahan, contra.

ALBERT, C.

This case originated in the county court, by the filing of five promissory notes as a claim against the estate of John Fitzgerald, deceased, by Smith H. Mallory, whom we shall hereafter call the plaintiff. The notes, by their terms, are payable on demand, and bear date of January 16, July 30, September 25, November 22 and November 23, 1888, respectively. The maker of the notes, at the respective dates thereof, and thereafter, to the date of his death, namely, December 30, 1894, was a resident of this state. The administratrix of the estate, whom we shall hereafter call the defendant, filed an answer to the claim

in the county court, urging among other defenses the statute of limitations. In avoidance of that defense, the plaintiff in his reply alleged that the notes were given to him by the maker with the understanding and agreement that payment should not be demanded by the plaintiff until the maker of the notes recovered judgment in a certain action, then pending, wherein such maker was a party; that said judgment was not recovered until the 17th day of November, 1890; and, that no demand for payment was made until the said claim was filed in the county court, as hereinbefore stated. A trial was had, which resulted in an order disallowing the claim. The plaintiff appealed to the district court.

In the district court, to avoid the bar of the statute of limitations, the plaintiff alleged in his petition that, notwithstanding the dates borne by the several notes, they were all executed and delivered at the same time; that soon after they were executed and delivered, it was agreed between the maker of the notes and the plaintiff, that demand of payment of the notes should not be made, until about the 11th day of April, 1896, and that the time of payment thereof, and the interest thereon, should be extended until the maker should recover judgment in a certain action and receive certain money which he claimed to be due him from a third party; that the plaintiff should not sell, transfer or hypothecate the notes, and that the notes should draw seven per cent. interest instead of ten, the rate provided by the terms of the notes; that the maker of the notes did not recover the judgment and receive the money from the third party, which by the terms of the agreement fixed the time for the payment of the notes, until about the 11th day of April, 1896.

At the close of the testimony the court directed a verdict for the defendant, and gave judgment accordingly. The plaintiff brings error.

A considerable portion of the argument is directed to the question, whether the matter pleaded by the plaintiff, in the district court, in avoidance of the statute of limita-

tions, tenders other and different issues than those presented by his pleadings in the county court. But, in view of the evidence on that point, we do not deem it necessary to go into that question. The evidence, introduced by the plaintiff in support of the agreement, is substantially as follows: In the fall of 1889, the notes were prepared by a third party, and left at a bank for the maker to sign. In the forenoon of the same day, the maker called at the bank, signed the notes and left them with the cashier for the defendant, with the understanding that they were to be kept in the bank, not hypothecated and were not to be paid, until he realized on the litigation referred to in the agreement set out in plaintiff's pleadings. In the afternoon of the same day, the plaintiff and the maker of the notes, accompanied by their attorney, called at the bank and got the notes. It appears that the terms upon which the maker had left the notes were not entirely satisfactory, as the plaintiff feared the statute of limitations might run against the notes before the litigation, upon the result of which their time of payment depended, was ended. It was then orally agreed, that the rate of interest should be seven per cent. instead of ten, as expressed in the notes, that demand for payment should not be made until the maker realized on the litigation above mentioned, and that the maker of the notes should waive and not plead the statute of limitations. In consideration of this agreement, the plaintiff paid the maker of the notes one dollar. This evidence was introduced over the objection of the defendant to any testimony of a contemporaneous oral agreement, contradicting or varying the terms of the notes, or changing the issues raised in the court below. By the terms of the notes, they are payable on demand, with interest at ten per cent. per annum, and are negotiable in form. By the terms of the oral agreement, their negotiability is destroyed, and their time of payment and their payment itself, are made contingent on the happening of an uncertain event. That the effect of such oral agreement would be to contradict and vary the terms of the

notes is obvious. Bradner, Evidence (2d ed.), 264; *Waddle v. Owen,* 43 Neb. 489, and citations.

But the plaintiff's theory appears to be, that the oral agreement was subsequent and not contemporaneous. The evidence, heretofore recited, does not sustain that theory. It is true, the notes were signed and delivered to the cashier of the bank in the forenoon, but that of itself did not make them a contract between the parties. So far as appears from the evidence, the delivery of the notes by the maker to the cashier of the bank, in the forenoon, was no more than an offer on the part of the former, which the plaintiff might or might not accept; unless accepted as made, it was no contract. That it was not thus accepted, is conclusively shown by the subsequent acts of the parties in relation thereto, when the alleged oral agreement was made. It was not until the terms of that agreement had been settled that the notes were finally accepted by the plaintiff, and the contract evidenced thereby perfected by their delivery to him. That being true, the oral agreement and the notes were contemporaneous, and evidence of the former was clearly inadmissible. *Waddle v. Owen, supra.* Such evidence being inadmissible, and having been received over the defendant's objection, the court could rightfully exclude it, so far as the plaintiff is concerned, at any stage of the case, or disregard it entirely, as it did, in this case, by directing a verdict for the plaintiff.

As regards the agreement of the maker of the notes to waive the statute of limitations, without going into the validity of such agreement, it will suffice to say, it was not pleaded in the county court. It has been repeatedly held by this court that, on appeal to the district court, the parties must confine themselves to substantially the same issues as those upon which the cause was submitted to the court below. *Western Cornice & Mfg. Works v. Meyer,* 55 Neb. 443. Besides, no such agreement was pleaded in the district court. The evidence of this part of the agreement, like that of the other parts of it, was

therefore inadmissible, and it was not error for the court to disregard it in the final submission of the cause to the jury.

It appears, therefore, that there was no showing of anything that would remove the bar of the statute of limitations. That being true, the court properly directed a verdict for the defendant.

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

AMES and DUFFIE, CC., concur.

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

AFFIRMED.

SEDGWICK, J., dissents.

C. N. FOLSOM, ADMINISTRATOR OF THE ESTATE OF ADAM BERKHEIMER, DECEASED, v. PERU PLOW & IMPLEMENT COMPANY.

FILED JUNE 3, 1903. No. 12,888.

1. **Chattel Mortgage: CREDITORS.** The term creditors as used in section 14, chapter 32, Compiled Statutes, making an unrecorded chattel mortgage void as to such creditors where the mortgagor retains possession of the property, applies only to such as have legally fastened a lien or charge upon the property for the satisfaction of their debts.

2. ———: ———. A mortgagor of chattels, who retained possession thereof, died, and the mortgage was not filed for record until after the appointment of an administrator on his estate and the mortgaged property had passed into his hands; thereafter the mortgagee brought an action against the administrator for possession. *Held*, That the administrator could invoke said section only in behalf of creditors whose claims had been proved and allowed against the estate before the filing of the mortgage for record, and before the property had passed to the possession of the mortgagee.

ERROR to the district court for Saunders county: BENJAMIN F. GOOD, DISTRICT JUDGE. *Affirmed.*

T. B. Wilson, Andrew J. Sawyer and *N. Z. Snell,* for plaintiff in error.

Frank H. Woods, contra.

ALBERT, C.

In March, 1900, one Adam Berkheimer executed an instrument, which the parties hereto have seen fit to treat as a chattel mortgage on certain farming implements, to secure a *bona fide* indebtedness; the mortgagor retained possession of the property. In November of the same year the mortgagor died, and on the 5th day of the following December C. N. Folsom was appointed administrator of the estate, and, as such administrator, took possession of the mortgaged property. The mortgage was not filed for record until the 29th day of March, 1901, after the administrator had taken possession of the property. After filing the mortgage for record, the mortgagor brought this action against the administrator for possession of the mortgaged property, basing his claim thereto on the chattel mortgage, the debt thereby secured remaining unpaid.

A trial was had to the court without a jury, which resulted in a finding and judgment for the plaintiff. The defendant brings error.

The defendant contends that as administrator he represents the creditors of the estate, and that the chattel mortgage, not having been filed before his appointment, and before he had taken possession of the property, was void as to him as representative of such creditors. This contention is based on section 14, chapter 32, Compiled Statutes (Annotated Statutes, 5963), which so far as is material is as follows:

"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditor of the mortgagor, and as against subsequent

purchasers and mortgagees, in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides, or in case he is a non-resident of the state, then, in the office of the clerk of the county where the property mortgaged may be at the time of executing such mortgage, and such clerk shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or instrument may be so filed, although not acknowledged, and shall be valid, as if the same were fully spread at large upon the records of the county."

The case of *Becker v. Anderson,* 11 Neb. 493, would seem to support the defendant's position. It was there held that an unrecorded chattel mortgage, being void as to creditors, the mortgaged property became assets in the hands of the executor for the payment of debts of the estate. The decision in that case is based on *Kilbourne v. Fay,* 29 Ohio St. 264, where it was held, that an unrecorded chattel mortgage, where the mortgagor died in possession of the property, leaving an insolvent estate, was void as to creditors of the estate, and the mortgaged property became assets in the hands of the executor for the payment of the debts of the estate. Some doubt is thrown on both these cases by the criticism indulged in *Lancaster County Bank v. Gillilan,* 49 Neb. 165. But in neither of those cases was the precise question involved in this case necessary to a decision. In both those cases it was shown that there were creditors of the estate, and that the estate was insolvent. In this case it is not shown that there are any creditors of the estate, save the plaintiff in this case. It is true, the evidence shows that the administrator presented a petition to the county court, wherein he alleged that, in his opinion, a sale of the personal property would be necessary to pay the debts of the estate, and that the estate was insolvent, and that the county court found, in passing on the petition, that the estate was probably insolvent. But such allegations and findings do not, in our opinion,

show the fact that there were any creditors of the estate, within the meaning of the section above quoted. It has been repeatedly held by this court, that the term creditors, as used in that section, applies only to such as, by legal process, have fastened a lien or charge upon the property for the satisfaction of their debts, and not to general creditors. *Forrester & Co. v. Kearney Nat. Bank,* 49 Neb. 655; *National Bank of Commerce v. Bryden,* 59 Neb. 75; *Fitzgerald v. Andrews,* 15 Neb. 52. The cases just cited would seem to imply that such lien or charge could be acquired only by the levy of an attachment or execution. But the principle underlying those cases is, we think, that a mortgage is void as against creditors who, by legal process, have acquired a specific lien upon the property for the satisfaction of their debts. But we do not think such liens are acquired by the mere appointment of an administrator, nor by his possession of the property. It may be conceded that he takes the property as trustee and holds it in trust for the benefit of the creditors of the estate, as well as for the benefit of all other persons interested in the estate. But that does not charge the property with a specific lien in favor of any creditor. The administrator, as representative or trustee of the creditors, certainly occupies no more advantageous position, with reference to the property, than the creditors themselves. The relation of a creditor to the assets of the estate, before his claim has been proved and allowed, is analogous to that of a general creditor to the property of his debtor before he has levied upon it under an attachment or execution. In neither case is he in a position to assail a conveyance of the property on the ground that it was made in fraud of his rights. In *O'Connor v. Boylan,* 49 Mich. 209, 13 N. W. 519, it was held that claims against the estate must be adjudicated before they become such a charge against it as would warrant the creditor in filing a bill to set aside a conveyance made by the testator in fraud of his creditors. To the same effect is *Ohm v. Superior Court of the City and County of San Francisco,* 85 Cal. 545, 26 Pac. 244, which

was followed in *Field v. Andrada,* 106 Cal. 107, 39 Pac. 323.

The principle underlying these cases is, that a general creditor of an estate has no lien on the assets, until his claim has been adjudicated and allowed. If that be true, and we have no doubt of it, and if, as repeatedly held by this court, the term creditors in the section of the statute quoted applies only to such as have acquired a lien upon the property while in possession of the mortgagor and before the filing of the mortgage for record, then there is no escape from the conclusion, that an unrecorded chattel mortgage, where the mortgagor dies in possession of the mortgaged property, is void only as to those creditors whose claims had been adjudicated and allowed before the mortgage was filed for record and before the mortgagee had reduced the property to his possession, and, that an administrator, as the representative of the creditors, can invoke said section only in behalf of those creditors whose claims have been thus allowed. It not having been shown that there are any such creditors in this case, it follows that the administrator is not in a position to assail the chattel mortgage, and that the judgment of the district court is right.

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

BARNES and GLANVILLE, C. C., concur.

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

AFFIRMED.

DOUGLAS PRINTING COMPANY ET AL. V. LILLIE OVER ET AL.

FILED JUNE 3, 1903. No. 12,880.

1. **Corporation:** TRANSFER OF ASSETS: ACTION AT LAW BY CREDITOR. Where a debtor corporation transfers all of its assets to a new one, organized for the purpose of taking such assets and therewith continuing the business in which the former corporation was

engaged, and no provision is made for payment of its debts and it ceases to do business, one holding a judgment against the old corporation may bring an action at law against the new one, and a finding in his favor by the trial court will not be disturbed, when the evidence shows that the circumstances attending the creation of the new corporation, and its succession to the business and property of the old, are of such a character as to warrant the finding that the new corporation is a mere continuation of the old one.

2. **Evidence.** Evidence examined, and *held* ample to support the finding and judgment of the trial court under the above rule.

ERROR to the district court for Douglas county: JACOB FAWCETT, DISTRICT JUDGE. *Affirmed.*

E. C. Hodder, for plaintiffs in error.

Lysle I. Abbott, contra.

GLANVILLE, C.

The plaintiffs in error prosecute this proceeding in error, asking the reversal of a judgment rendered against them by the district court for Douglas county.

It sufficiently appears in the evidence, and is conceded, that Douglas Printing Company and Douglas-Watters Company is in fact the same concern, without reorganization, but simply with a change in name. To prevent confusion of names in the discussion of this case, we will call the plaintiff in error company, the new company, and the company designated in the pleadings and evidence as The Douglas Printing Company, the old company.

Defendants in error recovered a judgment against the old company, and after return of execution unsatisfied, brought this action against the plaintiffs in error, and in their petition allege as follows:

"Plaintiffs further allege that on or about the 12th day of September, 1898, the defendant, the Douglas-Watters Co., a corporation, was organized under the laws of the State of Nebraska, and that the stockholders of the said, The Douglas Printing Company, became and were the

stockholders and organizers of the defendant, Douglas-Watters Co., and that the said defendant, Douglas-Watters Co., thereupon took possession of all the property, assets, emoluments, business and good will of the said, The Douglas Printing Co., and assumed all debts and liabilities of the said, The Douglas Printing Co., and that the said Douglas-Watters Co. did not become the *bona fide* purchaser and holder of the rights and property of the said, The Douglas Printing Company, but that said transfer was, in truth and in fact, and in law, fraudulent and void, as to the creditors of the said, The Douglas Printing Company, and was made for the purpose of hindering, delaying and defrauding the creditors of the said, The Douglas Printing Company, and preventing them from collecting their just claims against said corporation.

"That the said Douglas-Watters Co. was in truth and in fact merely a continuation of the said, The Douglas Printing Co., and was the successor of the said, The Douglas Printing Co., in conducting, managing and carrying on the same business in the same plant.

"Plaintiffs further allege that said defendants, Douglas Printing Co. and Douglas-Watters Co., as hereinbefore set forth and by reason of the transfer hereinbefore described, have assumed the said claims of these plaintiffs against the said, The Douglas Printing Co., and are now liable therefor and that there is now due this plaintiff from said defendants upon said judgment the sum of $318.72, with interest at 7 per cent. per annum, from the 25th day of June, A. D. 1901."

The action was tried to the court without a jury, and the court found generally for the defendants in error, and rendered judgment against the plaintiffs in error for the amount involved.

A motion for a new trial was filed and overruled and a petition in error filed in this court containing the following assignments:

1. The finding of the court is not sustained by sufficient evidence.

2. The finding of the court is contrary to law.

3. That the district court erred in overruling the motion for new trial.

The only inquiry we are authorized to make upon the record is whether or not there is sufficient evidence to sustain the finding and judgment of the trial court, under the well known rule established by the decisions of this court, sustaining such findings unless clearly wrong.

It sufficiently appears in the evidence that John Douglas was the moving spirit in all the corporations affected by the proceedings. He held one-third of the stock in the old company, and also in the new one, and he gave the names to the corporations. He was called as a witness, as was also John Pendray, who also owned one-third of the stock of the old company, and from their evidence it appears, with reasonable certainty, that all of the property that belonged to the old company found its way into the new one. That the three parties, John Douglas, John Pendray and one Charles Hammond, each owned one-third of the stock of the old company; that the old company became somewhat embarrassed and the business was not prospering. A transaction took place which is testified to by the witness Pendray, as follows:

Q. State what you know about any change in the assets of the company.

A. After they had held several consultations on the matter it was decided to transfer all the stock to Mr. Douglas and let him wind up the business of The Douglas Printing Company, get in all the outside obligations, collect all the accounts that were due.

Q. Why was that done?

A. Because we were not satisfied with the profits of the business. We were dissatisfied with the plant or business and were unable to increase it, and get out from under the obligations. * * *

Q. What did he do?

A. He wound up the business affairs, paid all the outstanding obligations we knew of, he and I consulted and

straightened up the affairs with the Carpenter Paper Company, *who owned the books and obligations and held a mortgage.* They didn't foreclose it, because we turned over the place to them. All the small accounts were paid, everything was paid that I have any knowledge of.

The testimony of Mr. Douglas is in part as follows:

Q. The other stockholders in The Douglas Printing Company transferred their one-third to James H. Watters and Alexander Watters?

A. No sir.

Q. What did they do with theirs?

A. They transferred it to me as trustee.

Q. They transferred it all to you as trustee?

A. Yes sir.

Q. What did you do with it?

A. I turned it over to the Carpenter Paper Company.

Q. What did you turn it over to the Carpenter Paper Company for?

A. They had a mortgage on the plant and have taken the whole thing in.

Q. What did the Carpenter Paper Company do with the stuff that was turned over to them?

A. They turned it over to Douglas-Watters Company.

It further appears from the testimony that the new company gave to the Carpenter Paper Company a new mortgage for all the indebtedness of the old company to the mortgagee in the sum of $2,000.

In what manner James H. and Alexander Watters obtained or paid for the stock in the new company, nowhere appears in the evidence. Mr. Douglas claimed to have an account with a certain bank as trustee, and intimates that money collected by him as trustee, after the assignment to him in trust of the stock of his associates in the old company, was in that fund, and that a certain payment made upon the claim of the defendant in error, after the organization of the new company, was by check against that fund. The check is in evidence, and was signed, "John Douglas, Mgr.," and it appears from the evidence of Mr. Pendray,

that the Carpenter Paper Company had all the books and obligations of the old concern, and it further appears that upon the new concern giving a mortgage to the Carpenter Paper Company for its entire claim, whatever it had of the assets of the old company were turned over to the new one.

It is clearly shown that the mortgage given to the Carpenter Paper Company by the old concern was never foreclosed, but it is claimed that in some manner all the assets of the old company were turned over to it, and then as the witnesses expressed it, were turned over to the new concern.

This question was asked by Mr. Hodder, attorney for plaintiffs in error, of the witness Douglas:

"Referring to the matter, you say the assets of the Douglas Printing Company were assigned to the Carpenter Paper Company. I will ask you to state whether or not they released the indebtedness, or state the facts as you now remember them with reference to that."

A. They released the mortgage on The Douglas Printing Company, and took a new one on the Douglas-Watters Company. That is the way I understand it.

It is clearly established that after the completion of these turning over processes, whatever they were, that a bill of sale was made by the old, The Douglas Printing Company, for the named consideration of $5,000, conveying all the stock and good will of the business of the old company, including its personal property therein mentioned to the new company.

This bill of sale contains the following paragraph, with all the blanks in the printed matter carefully filled:

"And we hereby covenant with the grantee herein, that we are the lawful owners of said goods, chattels and personal property; that they are in our possession; that they are free from all incumbrances; that we have good right to sell the same as aforesaid, and that we will warrant and defend the same against the lawful claims and demands of all persons."

In reference to the giving of this bill of sale, the witness Douglas testified as follows:

Q. Then how does it come that you executed this bill of sale?

A. Why I don't know how it came, but that was executed some weeks later. The Watters brothers had the other interests; that didn't seem to suit them; they thought probably that the stockholders of The Douglas Printing Company thought they might use them, or something. They wanted to get a quitclaim deed; that was why it was made.

And again he testified: "At the time of the first meeting of the board of directors of Douglas-Watters Company, the Watters brothers were not just exactly satisfied and their attorneys drew up this paper and asked us to sign it; that is all there was to it; they wanted a quitclaim deed."

The witness Pendray in reference to the same matter stated in answer to a question:

"Substantially as Mr. Douglas has stated, that he called me in, brought it to me and asked that we should sign it. Their attorney wanted it signed in order that there might be no future trouble about the affairs of the old, The Douglas Printing Company, conflicting with the Douglas Watters Company. I signed it under that consideration."

This took place after the turning over of the assets to the new company as testified to.

We have said that Mr. Douglas appeared to be the leading spirit in these corporations. On the witness stand he testified as follows:

Q. What position did you hold with Douglas-Watters Company?

A. I was foreman of the mechanical department, also president of the company.

Again this question: "What position did you occupy with Douglas-Watters Company?"

A. I was foreman of the composing room, also treasurer of the company.

We think the evidence fairly discloses that what was done by the changes made is that Pendray and Hammond dropped out of the business and the Watters brothers

came in as their successors. It is noticed that although a trial in the county court resulted in a judgment against plaintiffs in error, yet on appeal, no one connected with the new concern appeared as a witness except Mr. Douglas. Neither of the Watters brothers came to explain the transaction by which they got an interest in the business, and it is evident that Pendray expected all the debts were to be taken care of, and that his transfer of his interest to Douglas was with that understanding. The turning over process from Pendray and Hammond of their stock to Douglas, from Douglas to the Carpenter Paper Company, carrying the stock according to his evidence, and from that company back to the new company, are vague and indefinite transactions. We think the circumstances attending the creation of the new company, and its succession to the business and property of the old one, are of such a character as to warrant the finding that this new concern is a mere continuance of the old one.

In *Hibernia Ins. Co. v. St. Louis & New Orleans Transportation Co.*, 13 Fed. 516, it is held:

"Equity will not permit the stockholders in one corporation to organize another, and transfer all the corporate property of the former to the latter, without paying all the corporate debts." In the opinion it is said by McCrary, C. J.:

"It (the old company) ceases to transact business. Its stockholders organize themselves into another corporation, and all the property is transferred from the old to the new. It matters not that the stockholders in the two companies may not be precisely identical. We are not prepared to say that it would make any difference if the members of the new company were none of them interested in the old. The thing which we pronounce unconscionable is an arrangement by which one corporation takes from another all its property, deprives it of the means of paying its debts, enables it to dissolve its corporate existence and places itself practically beyond the reach of creditors, and this without assuming its liability."

In the concurring opinion of Treat, D. J., it is said:

"It is the duty of the court to examine the whole transaction, and to cut through mere paper transfers designed to obstruct or destroy the rights of parties."

In *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412, this court held:

"In order to render a newly organized corporation liable at common law for the debts of an established corporation or firm to whose business and property it has succeeded, it should, in the absence of a special agreement, affirmatively appear from the pleadings and the proofs that the action in question is fraudulent as to creditors of the old corporation, or that the circumstances attending the creation of the new and its succession to the business and property of the old corporation are of such character as to warrant the finding that it is a mere continuation of the former."

In *Reed Bros. Co. v. First Nat. Bank of Weeping Water*, 46 Neb. 168, it is held:

"Where a partnership engaged in a general mercantile business, in straitened and failing circumstances, incorporated, and the assets and business of the partnership were transferred or assigned to the corporation and appropriated to its objects and purposes, the business of the partnership being continued by the corporation, the corporation was presumptively liable for the partnership debts."

In *Campbell v. Farmers & Merchants Bank of Elk Creek*, 49 Neb. 143, it is held:

"The purchase of part of the assets of a copartnership or corporation by a new corporation, organized by the members of the old corporation or copartnership, does not raise a conclusive presumption against the new corporation that by its purchase it assumed or became liable for the debts of the old corporation or copartnership, notwithstanding the fact that the new corporation engaged in and continued to carry on the business in which the old corporation or copartnership had been engaged. Such facts at most raise a rebuttable presumption that the new corpora-

tion assumed the liabilities of the old corporation or co-partnership."

We are clearly of the opinion that the evidence contained in the bill of exceptions sustains the finding of the trial court, and recommend that its judgment be affirmed.

BARNES and ALBERT, CC., concur.

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

AFFIRMED.

FIRST NATIONAL BANK OF PAWNEE CITY, NEBRASKA, V. AVERY PLANTER COMPANY.

FILED JUNE 3, 1903. No. 12,400.

1. **Attachment:** SUCCESSIVE WRITS: SALE OF ATTACHED PROPERTY UNDER EXECUTION IN FIRST ACTION: (1) ACTION BY SUBSEQUENT ATTACHING CREDITORS: (2) STATUTE OF LIMITATIONS. Writs of attachment, issued in separate suits of several creditors against a common debtor, were successively levied on the same property. Motions to dissolve these attachments were overruled and afterward all the actions were prosecuted to final judgment. From the order sustaining the first attachment and a final judgment rendered in the same proceeding, the defendant in attachment prosecuted error to this court where the order was reversed and the final judgment affirmed, but no proceeding in error was prosecuted from the order sustaining the other attachments. Pending a review in this court, the property attached, belonging to the defendant, was sold to the first attaching creditor under an order of sale issued on the judgment of such party, rendered in the attachment suit, and the proceeds applied on that judgment, the other judgments remaining wholly unsatisfied. *Held:* (1) That an action for restitution would not lie against the first in favor of the subsequent attaching creditors, but that an action for money had and received could be maintained to which the defendant might interpose a counter-claim or set-off; (2) that the statute of limitations did not begin to run until the first attachment was dissolved.

2. **Attaching Creditors and Sheriff, Joint Tort-Feasors.** The seizure of the goods of a third party by the sheriff under an order of attachment is tortious, and attaching creditors who join with the sheriff in resisting an action brought by such third party to re-

cover the goods become trespassers *ab initio*, and jointly and severally liable for a money judgment rendered therein in favor of such third party.

3. Contribution. When such judgment is satisfied by one of the parties, contribution will be enforced, where it appears that the parties acted in good faith and without any intention of committing a trespass.

4. ———. The basis of contribution in such cases is the ratio the claims of the several attaching creditors bear to each other.

5. Defect of Parties: ESTOPPEL. A plaintiff will not be heard to complain of a defect of parties in a counter-claim, where the record discloses that the omitted party is equally necessary to a determination of his own cause of action.

ERROR to the district court for Pawnee county: JOHN S. STULL, DISTRICT JUDGE. *Reversed.*

A. S. Story and *R. W. Story*, for plaintiff in error.

Harry C. Lindsay, E. L. Fulton and *John B. Raper, contra.*

DUFFIE, C.

On the 16th day of February, 1895, a firm having sixty-five creditors, and with the knowledge and consent of but three of them, made and filed a chattel mortgage on all its personal property to secure the amount due each of its creditors. Afterward, three of the creditors, namely, the Avery Planter Company, which we shall hereafter call the plaintiff, the First National Bank of Pawnee City, which we shall hereafter call the defendant, and Maggie Wishard, being among the number without whose knowledge or consent the mortgage was given, brought separate actions against the firm, and caused attachments to be levied on the personal property covered by the chattel mortgage, and on certain real estate belonging to the firm. The defendant's attachment for $4,283.86 was levied first, that of Maggie Wishard for $152.10 was next in point of time; that of the plaintiff for $271.44 was levied last. Motions, all based on the same ground, were made to dis-

solve these attachments, were heard on the same evidence and were overruled. A judgment was rendered and an order for the sale of the attached property made, in each case, in favor of the plaintiffs in attachment. Error was prosecuted from the judgment in favor of the defendant in this case to this court, where the order sustaining the attachment was reversed and the attachment dissolved, but the judgment on the merits affirmed. Neither the order of the district court sustaining the attachment nor its judgment on the merits, was stayed by a supersedeas. The case is reported under the title of *Skinner v. First Nat. Bank of Pawnee City,* 59 Neb. 17.

After the actions in attachment were begun, and before the writs were levied, the attaching creditors, in anticipation of a claim to the personal property by some of the mortgagees, each gave the sheriff an indemnifying bond to hold him harmless from any damages that might result to him by reason of a levy of the attachments on the property in question. After the attachments were levied certain of the mortgagees brought an action in replevin against the sheriff to recover possession of the mortgaged property. The property was not delivered to the plaintiffs in that action and the case proceeded as one for damages. All of the attaching creditors joined in the defense of that action although they were not parties to the record. The action in replevin resulted in a judgment in favor of the mortgagees and against the sheriff for $4,089.87 and costs of suit. The sheriff prosecuted error to this court where the judgment was affirmed. *Sloan v. Thomas Mfg. Co.,* 58 Neb. 713. In resisting the action in replevin the attaching creditors acted in good faith, and in the honest belief that the sheriff was entitled to the possession of the property, as against the mortgagees, by virtue of the attachments, and that the property was liable for the satisfaction of their respective claims, but not in pursuance of any agreement between them.

While the case last cited, and that of *Skinner v. First Nat. Bank of Pawnee City, supra,* were pending in this

court, by stipulation of all the parties to the attachment cases, the sheriff was appointed receiver of the personal property and advertised and sold the same, reporting his proceedings to the district court where his report was confirmed. He was then directed by the court to hold the proceeds, pending the result of the action in replevin. The real estate was sold by the sheriff, pending said action, under an ordinary order of sale issued in favor of the bank, and the proceeds, amounting to $505, applied on its judgment. The defendant was the purchaser at such sale, and afterward, and before the commencement of this action, conveyed the land to a stranger. After the defendant's attachment had been dissolved, by virtue of the decision of this court in *Skinner v. First Nat. Bank of Pawnee City, supra,* certain of the mortgagees who had been excluded from sharing in the judgment in replevin, because they did not accept the mortgage until after the levy of the attachment, commenced an action in equity to share in the proceeds of the judgment in replevin. In this action the sheriff was ordered to apply the proceeds in his hands, as receiver of the personal property, on the judgment in replevin, which was done. Such proceeds were not sufficient to satisfy the judgment, and the defendant paid the deficiency, amounting to $1,703.30, and, in addition thereto, some costs and expenses incurred in the action in replevin, making a total of $1,872.08.

Afterward, and after the dissolution of the defendant's attachment, the plaintiff brought this action against the defendant for restitution to the extent of its judgment, out of the money which the defendant had realized on its judgment by a sale of the real estate before its attachment was dissolved. The defendant pleaded a counter-claim for contribution for the amount paid by it on the judgment in replevin, and certain costs and disbursements incurred and made by it in that action.

Portions of the answer containing, among other things, allegations showing the good faith of the attaching creditors, in directing their levies, and in resisting the action in

replevin, were stricken out on motion of the plaintiff. The plaintiff then demurred to the counter-claim on the grounds that the facts stated were not sufficient to constitute a cause of action in favor of the defendants, and that there was a defect of parties, because Maggie Wishard was a necessary party to a determination of the issues tendered by the counter-claim. The demurrer was sustained. A trial resulted in a finding and judgment for the plaintiff. The defendant brings error.

Numerous errors are assigned and argued, but they render themselves into two questions, namely, whether on the facts stated the plaintiff has a cause of action against the defendant, and, whether, on the same state of facts, the defendant has a cause of action against the plaintiff for contribution? We shall consider these questions in their order. The case has been argued on the assumption that it is one for restitution.

In *Hier v. Anheuser-Busch Brewing Ass'n,* 60 Neb. 320, it was held that a set-off would not be allowed in an action for restitution; the reason being that the court, having, through a mistaken view of the law, wrongfully taken the property of one and given it to another, would not seek to adjust equities between them until it had restored the party injured to the position he occupied before the wrongful order of the court was enforced against him. The right of the defendant to ask contribution against the plaintiff and to enforce it in this case rests, therefore, upon the question whether this action is one of restitution or for money had and received and for which the common law action of assumpsit could be maintained.

While this is termed an action of restitution, I have grave doubt if such is really its character, as restitution, properly speaking, is made only to a defendant whose money or property has been taken from him by the erroneous order of a court and is not available to third parties. *Garr v. Martin,* 20 N. Y. 306. In this case three parties, the bank, Maggie Wishard and the Avery Planter Company, procured to be issued and levied upon the real estate

in question attachments in the order above named. According to priority of levy the bank had the first lien, Miss Wishard the second, and the Avery Planter Company the third. These attachments were all based on the same grounds and, in a motion made to dissolve them, the same evidence was taken and relied on by the defendant in support of his motion to dissolve, while the three attaching plaintiffs each used the same evidence to sustain their writs. The district court sustained the attachments, gave judgment in each case for the amount of the plaintiff's respective claims, and ordered a sale of the attached property. The defendant in these actions took error to this court in one case only, that of the bank, where the judgment on the merits was affirmed, but the order of the district court sustaining the attachment was overruled and the attachment dissolved. *Skinner v. First Nat. Bank of Pawnee City,* 59 Neb. 17. In the meantime the defendant having failed to give a supersedeas bond, the bank sold the attached real estate, being itself the purchaser, for the sum of $505, which was applied on its judgment. In this condition of the case, this action was commenced against the bank by the Avery Planter Company, which asserts that the attachment of the bank having been dissolved, its claim to a first lien was thereby devested while the lien of Miss Wishard was advanced to a first lien and that of the company to second place, entitling these parties to the value of the property which the bank had appropriated under its void attachment and the value of which was sufficient to satisfy the judgments of both Miss Wishard and the company.

If Skinner, the attachment defendant, had brought this action, then, on the authority of *Hier v. Anheuser-Busch Brewing Ass'n, supra,* it is plain that the bank would be compelled to refund to him the value of the property sold under an attachment held good by the judgment of the district court, but afterwards declared by this court to have been illegally issued, and the bank would not be allowed to set off a demand held by it against Skinner to

cancel or reduce the amount of his recovery, the theory being that the court will restore to a party money or property taken from him by another under a wrongful order made by the court and place him in the same position he occupied before the illegal order was made.

The Avery Planter Company does not, however, occupy, in this respect, the same position held by the defendant in the attachment proceeding. The court decided no controversy between attaching creditors. It made no decision against the attaching creditors whose writs were levied subsequent to that of the bank. It took from them no right for which they were contending as against the bank, and unless one has been wrongfully compelled by the court to abandon a position which he was defending, he is not entitled to restitution regardless of the equities of the party against whom he is seeking to enforce such a claim. In this case the lien of the Avery Planter Company was advanced from third to second place, not on account of any action of its own or of any merit or equities it possessed over the bank, but solely because Skinner, the defendant whom all were pursuing, elected to appeal from the order of the district court sustaining the bank's attachment against his property and having that order reversed. We think that under such conditions the bank is entitled to plead any set-off it may have against the Avery company.

It is true that in the attitude the case has finally assumed, Miss Wishard and the Avery Planter Company are entitled to the property sold by the bank under what, at the date of the sale, was supposed to be a first lien and to appropriate that property or its value to the satisfaction of their judgment. This right arises in this way. At the time the property was sold it was held by the sheriff under the three writs sued out by the attaching creditors; the defendant questioned the right of all the creditors to an attachment against him, and, being defeated in his contention in the district court, appealed to this court in the bank case and secured a decision that the writ of the bank was illegally

issued. Prior to this decision being made, the sheriff had sold the property for the bank and had, in effect, paid over the proceeds, the bank being the purchaser. When it was finally decided that the property was sold on a void attachment lien, the proceeds of the sale, or the value of the property sold, should have been returned by the bank to the sheriff who would then hold it for the benefit of the subsequent attaching creditors whose writs had not been set aside. When the bank appropriated this property it knew that its right to do so was being litigated in the supreme court, and the law raised an implied promise on its part to refund the value of the property to the sheriff for the benefit of the other parties for whom he had levied, in case it should finally be determined that the sale was wrongfully made. This implied promise will now be enforced, and the law is well settled that a third party for whose benefit a promise or contract is made may maintain an action in his own name. The action is clearly one for money had and received and against which a counter-claim may be pleaded. Miss Wishard and the Avery Planter Company may, therefore, maintain an action against the bank for the value of this property.

The defendant contends that plaintiff's cause of action is barred by the statute of limitations. The plain answer to this is that the plaintiff's right to bring this action did not and could not accrue until, by the determination of this court, the attachment under which the defendant claimed and came into possession of the money was adjudged invalid, and this was less than four years before the commencement of this action. Defendant also contends that it is entitled to contribution for the amount paid by it on the judgment in replevin, and for certain disbursements made by it in that action. In this view we are disposed to concur. It is true, as urged by the plaintiff, that the mere levy and indorsement of the writs of the plaintiff, and the other attaching creditor, did not make them joint trespassers with the bank. So far as appears from the record, in directing the levy to be made, the parties acted inde-

pendently of each other. The levy of each writ, therefore, was a separate trespass, for which the parties participating therein alone were liable. But the parties did not stop there. After notice of the claim of the plaintiffs in replevin they joined in the defense of that action. The result in the action in replevin is conclusive on the point that the possession of the sheriff was tortious. By assisting in the defense of that action the attaching creditors, one and all, ratified the tort and became liable as trespassers *ab initio*. *Cole v. Edwards,* 52 Neb. 711. The attaching creditors, having thus joined in the defense of the action in replevin, are as effectually concluded by the judgment rendered therein as though they had been parties to the record. 2 Black, Judgments, sec. 539. Such judgment, therefore, was a joint liability, and upon its discharge by one of the parties liable, a cause of action arose in favor of such party against the others, for contribution. *Vandiver v. Pollak,* 107 Ala. 547, 54 Am. St. Rep. 118; *Farrwell v. Becker,* 129 Ill. 261, 21 N. E. 792. The general rule that contribution among tort-feasors will not be enforced, does not apply where, as in this case, the parties acted in good faith without any intention of committing a trespass. *Johnson v. Torpy,* 35 Neb. 604, and the cases last above cited.

On what basis contribution should be enforced is a question of some difficulty. In *Vandiver v. Pollak, supra* it is held, that the parties should contribute equally, without regard to the amount of their respective attachment liens. We can not assent to that rule. The right to contribution results from natural equity, and its enforcement is an application of the principle, that one should be compelled to do that, which, in equity and good conscience, he ought to do; that being true, it should be enforced according to the rules of equity, and its enforcement should stop short of the point where it becomes unjust and oppressive. To enforce contribution in the present instance according to the rule under consideration, it seems to us would be manifestly unjust. The attachment lien of the defendant

was for $4,283.80; that of the plaintiff was for $271.44; that of the other creditor, $152.10. These amounts, respectively, are the measure of the interest of the several attaching creditors in the result of the litigation in the action of replevin. Their joining in the defense of that action was not in pursuance of any agreement, but was merely the result of a desire on the part of each to protect his own lien. It would seem that the case is analogous to that of where the estates of two or more persons are affected by a common incumbrance, which one of them pays. In such case, contribution is enforced in proportion to the value of the several estates. *Morrison's Administrator v. Beckwith,* 4 Mon. (Ky.) 73, 16 Am. Dec. 136. The defense, in the action of replevin, in a certain sense, was a joint venture, and there would seem to be no good reason why the losses should not be apportioned according to the interest of the respective parties in the result, as in other joint ventures. The rule announced in *Vandiver v. Pollak, supra,* to a man of ordinary prudence, situated as was the plaintiff when the action in replevin was brought, would amount to a prohibition against protecting his rights in such action, because the risk, under such rule, would be out of all proportion to all he could hope to gain. We conclude, therefore, that the defendant is entitled to contribution for the amount paid by it in discharge of the judgment, and the reasonable expense incurred in defense of the action; but that the amount should be apportioned according to the ratio the several attachment liens bear to each other.

It will be observed that the plaintiff demurred to the counter-claim on the ground of a defect of parties, as well as generally. By the general demurrer the facts pleaded in the counter-claim stand admitted. If those facts be true, then the defect of parties, if there be a defect, goes to plaintiff's cause of action as well as that stated in the defendant's counter-claim; the other attaching creditor, if a necessary party to a determination of the counter-claim, is also a necessary party to the cause of action

stated in the plaintiff's petition. The plaintiff having omitted a necessary party to the action, can not be heard to complain that such party is a necessary party to a determination of the issues tendered by the counter-claim, and is not before the court. We do not mean to be understood to hold that the other attaching creditor was a necessary party in either case.

It should be noted in this connection that the demurrer to the counter-claim was interposed after the portion of the counter-claim, showing good faith on the part of the attaching creditors in making the levy and resisting the action in replevin, had been stricken out on plaintiff's motion. With this matter stricken out, the counter-claim was vulnerable to a demurrer, because it showed nothing to remove the case from the operation of the general rule against the enforcement of contribution between wrongdoers. Technically, therefore, the ruling on the demurrer was right, but the ruling on the motion was erroneous. The motion should have been overruled, and then the counter-claim would have been good as against a general demurrer.

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

AMES and ALBERT, CC., concur.

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

REVERSED.

JENNIE S. SNYDER V. HERMAN GROSS ET AL.

FILED JUNE 3, 1903. No. 12,869.

Justice of the Peace: ACTION ON BOND. A justice of the peace has no authority to accept money in lieu of the bail required by section 298 of the criminal code; and in case he does so, his bondsmen are not liable for his failure to properly account for the same.

ERROR to the district court for Saline county: GEORGE W. STUBBS, DISTRICT JUDGE. *Affirmed.*

A. S. Sands, for plaintiff in error.

George H. Hastings and *C. H. Denney, contra.*

DUFFIE, C.

In 1900, Daniel H. Walker was a duly elected and qualified justice of the peace in and for Saline county, Nebraska. The defendants in error are his bondsmen. In March, 1900, John S. Snyder, the husband of the plaintiff, was arrested on a warrant issued by justice Walker on a complaint charging a criminal offense. The case was continued for ten days and the defendant required to furnish a bond in the sum of $130. This he was unable to do. His wife, the plaintiff in error, with the consent of the justice, deposited $130 in cash in lieu of a bond, and Snyder was released. On the day following the continuance Snyder appeared before justice Walker, pleaded guilty to the charge on which he was arrested, and was fined; $13.15 of the money deposited by Mrs. Walker was used by the justice in the payment of costs taxed in the case; $50 was paid to one Van Auken, the complaining witness, with the consent and on the direction of John S. Snyder, and the remainder of the money was paid over to said Snyder. After this disposition was made of the money, Mrs. Snyder demanded the return of the full amount deposited by her, and, being refused, brought this action to recover the same against Walker and his bonds-

men. Judgment went against Walker, the justice, for the amount of the deposit, but under a peremptory instruction from the court the jury returned a verdict for the sureties on his official bond. Mrs. Snyder has brought error to this court, claiming that Walker received this money in his official capacity and that his bondsmen are liable therefor; the argument being that by his appearance to answer to the charge he had fulfilled the conditions upon which the deposit was made and that Mrs. Snyder is entitled to a return of the money.

Section 298 of the criminal code provides:

"When it shall become necessary to adjourn any trial according to the provisions of the preceding section, the person accused may enter into a recognizance before the magistrate, with good and sufficient security to be approved by the magistrate, in such amount as he shall deem reasonable, conditioned for the appearance of such person before such magistrate, at a place, day and hour in said recognizance specified."

Plaintiff in error earnestly insists that the wording of this section contemplates a deposit of money by the defendant or some one for him, or at least allows that to be done, as well as taking his recognizance with sureties; that "security" means a deposit of money or any other guarantee which satisfies the justice that the defendant will be produced before him. The law is well settled that a magistrate or officer has no authority to accept a deposit of money in lieu of bail in the absence of a statute conferring such right upon him. *Appelgate v. Young,* 62 Kan. 100, 61 Pac. 402; *United States v. Faw,* 1 Cranch (U. S. C. C.), 486; *Reinhard v. City,* 49 Ohio St. 257; *City of Columbus v. Dunnick,* 41 Ohio St. 602; *Butler v. Foster,* 14 Ala. 323; *Smart v. Cason,* 50 Ill. 195.

In *Applegate v. Young, supra,* a deposit of money was made instead of bail under a statute similar to our own. It is section 6, article 2, chapter 104 of the code of Kansas, pertaining to misdemeanors before justices, and is as follows:

"Upon good cause shown the justice may postpone the trial of any cause to a day certain, in which case he shall require the defendant to enter into a recognizance with sufficient security, conditioned that he will appear before the justice at the time and place appointed, then and there to answer the complaint alleged against him."

It will be noticed that this statute, like our own, uses the word "security" instead of "surety," but it was held that the statute contemplated a recognizance signed by duly qualified sureties and that a deposit of money instead of the usual bail was not authorized. Justice Walker had no authority under our statute to accept money instead of bail, and having received money from Mrs. Snyder it was upon an implied contract to return it on demand. The judgment against him for its return was therefore proper, but not being authorized to receive it, it was not received in his official capacity and his bondsmen are not liable for his failure to repay it to Mrs. Snyder. The judgment of the district court was right and we recommend its affirmance.

POUND and KIRKPATRICK, CC., concur.

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

AFFIRMED.

EQUITABLE TRUST COMPANY, APPELLANT, V. CITY OF OMAHA, APPELLEE.

FILED JUNE 3, 1903. No. 12,067.

1. **Execution Sale: APPRAISEMENT: ESTOPPEL.** While a purchaser at an execution sale takes the real interest of the debtor, and is not necessarily concluded by the appraisement, yet, where the amount of a tax lien, which has not been mentioned or included in the decree, has been deducted from the gross appraised value of the property by the appraisers, and the purchase is made for less than two-thirds of the gross appraised value, upon the assumption that such taxes are a valid lien, the purchaser, taking advantage

of the deduction thereof, will be presumed to have undertaken to pay such taxes, and will not be heard to deny their validity in an equitable proceeding seeking to enjoin their collection.

2. **Pleadings and Judgment.** Pleadings examined, and *held* that the judgment thereon was properly entered.

APPEAL from the district court for Douglas county: JACOB FAWCETT, DISTRICT JUDGE. *Affirmed.*

William A. Saunders, Frank H. Gaines, J. E. Kelby, John A. Storey and *George C. Martin,* for appellant.

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

KIRKPATRICK, C.

Appellant filed in the district court for Douglas county its petition in equity, pleading that it was the owner and in possession of lots 3 and 4, in block 261, in the city of Omaha; that certain paving and curbing taxes laid by the city of Omaha were illegal and void for many reasons pleaded; and that certain general taxes for the years 1892, 1893, 1894, 1895, 1896 and 1897, were also illegal and void, and praying that such taxes be decreed null and void, and to be no lien upon appellant's property, that the title be quieted in appellant, and that the city of Omaha, together with its servants, officers, etc., be enjoined from collecting or attempting to collect any of such taxes. To this petition the city of Omaha, in answer, pleaded in part as follows:

"Defendant further admits that the property described in the plaintiff's petition is situated in the paving districts therein mentioned. Defendant admits that the various ordinances in said petition set forth, were duly passed by the city council of the city of Omaha, and approved by the mayor thereof, on the dates alleged in said petition. Defendant admits that the city claims a lien of the special and regular taxes as stated. Defendant admits that the Equitable Trust Company is the owner of the property described in its petition as lots 3 and 4, in block 261, and in

that behalf alleges that it secured title to said property, namely, lots 3 and 4, by and under a sheriff's deed issued by the sheriff of Douglas county, Nebraska, in pursuance of the order of confirmation in the case of *Equitable Trust Company v. Katherine Zimmerman,* docket 54, page 320, of the records of the district court for Douglas county, Nebraska. This defendant further shows that said suit in the district court for Douglas county was brought for the purpose of foreclosing the mortgage upon the property in plaintiff's petition in said suit set forth, and that from the appraised value of said property as found by the sheriff and freeholders there was deducted by the sheriff at the request of plaintiff, the Equitable Trust Company, the county and city taxes then due and delinquent upon said property; that said property was appraised at the sum of $15,000, and that there was deducted from said appraisement, county taxes amounting to $121.12 on lot 3, and $160.16 on lot 4, and regular and special city taxes as follows:" etc.

It is then pleaded that on lot 3 there were regular and special city taxes due, amounting to the sum of $867.76, setting such taxes out in detail; that upon lot 4 there were due regular and special city taxes, amounting to the sum of $1,281.23, which were set out in detail. It is then pleaded:

"That after deducting the said county taxes, and the said regular and special city taxes, there remained a net appraisement of $5,511.12 on lot 3, and $7,058.61 on lot 4, described in plaintiff's petition, or a total net appraisement on the two lots of $12,569.73; that the plaintiff, at the foreclosure sale under said appraisement, did upon the 8th day of February, 1898, bid the sum of $9,205 for the said two lots, and the said property was thereupon sold to the said plaintiff for the said amount, and said sale was duly confirmed by the district court for Douglas county, Nebraska, at its February, 1898, term, and a deed ordered made to the purchaser, and that under said order the sheriff of Douglas county issued a deed to the property in

controversy in this suit to the Equitable Trust Company. The defendant further shows to the court that in making said bid, the said Equitable Trust Company deducted from said appraisement the special taxes in controversy in this suit, together with all the regular taxes in controversy herein, and that in said bid the said plaintiff took advantage of all said taxes in controversy in this suit, and that without the deduction of said taxes and assessments, the plaintiff's bid was not two-thirds of the defendant's interest in said property; and the defendant submits to the court that the plaintiff, having taken advantage of said taxes, and deducting them as valid liens in said foreclosure suit, is and ought to be estopped from contesting the validity thereof in this action. Defendant denies each and every allegation in said petition contained except as herein admitted to be true. Further answering said petition, defendant alleges that all of said proceedings with reference to said paving and curbing, and the assessment and levy of said regular taxes were fully known to plaintiff, who had actual knowledge thereof and of the laying of said paving at the time."

For reply to this answer of the city of Omaha, appellant pleaded as follows:

"Now comes the plaintiff, and for reply to the amended answer of the defendant filed herein on December 17, 1900, admits that the title of the plaintiff to the premises described in the petition is based upon the foreclosure proceedings in the case of Equitable Trust Company v. Katherine Zimmerman, docket 54, page 320, of the records of the district court for Douglas county, Nebraska, as alleged in the defendant's answer.

"This plaintiff denies that it requested the sheriff to deduct the county and city taxes and special assessments from the appraised value of lots three (3) and four (4), in block two hundred sixty-one (261) of the city of Omaha, Douglas county, Nebraska, but plaintiff admits that the sheriff did deduct all the taxes both regular and special in controversy herein from the appraised value of said property, and that plaintiff's bid and the said appraisement

and deductions are correctly set forth in defendant's answer.

"This plaintiff also denies that it is in any way estopped to maintain this suit or to contest the validity of the taxes described in the petition.

"The plaintiff also denies that it had any knowledge, until within the past year, of the defects of the assessment or tax proceedings, or had any knowledge that the paving or curbing was being constructed in a manner contrary to law.

"Plaintiff alleges that in the case of Equitable Trust Company v. Zimmerman, 54-320, mentioned in the answer of the defendant, the treasurer of said defendant represented to the sheriff of Douglas county, Nebraska, prior to said sheriff's sale, that there was a large amount of general and special taxes unpaid upon the property described in the decree in said case, all of which he represented to be valid liens, and all of which he certified as liens to the said sheriff, as shown by the certificate attached to the copy of the appraisement in said cause. That the city treasurer, and the city of Omaha, at said time well knew that all said general and special taxes set forth in said certificate were invalid, void and no lien on said real estate, on which statement and certificate the sheriff and plaintiff wholly relied; that the plaintiff at the time of said sale and ever since said time, and until December, 1899, did not know that the said representations and certificates of the treasurer were false and untrue; that the sheriff would not have deducted the items of alleged taxes had not the said treasurer certified them to be valid liens. That the said real estate was appraised at $15,000 before deducting any alleged taxes; that the amount due plaintiff under its decree was over $10,100, which amount the plaintiff could have bid for the property; that the plaintiff did not then and does not now claim any deficiency. That by reason of said representations and false certificate of the city treasurer the plaintiff did not bid as much as it otherwise would, and the plaintiff was thus misled to its injury. On

account of all the above, the plaintiff alleges that the defendant should be estopped from pleading or proving an estoppel against the plaintiff, by reason of the deduction from the appraised value of the invalid general and special taxes, which the treasurer certified to be valid liens.

"That the sheriff in making said sale did not act as the agent of the plaintiff and the action of the sheriff in relation to the appraisement and sale were not under its contract, but the said sheriff acted under and by direction of the court."

The city of Omaha then filed a motion for judgment upon the pleadings. No evidence having been offered by either party, the trial court thereupon found that appellant had treated the taxes as valid and real in causing them to be deducted from the appraised value of the interest of the defendant in its foreclosure suit, and that appellant would not be heard in a court of equity to allege that the taxes were invalid, or entitled to an injunction restraining their collection on the ground of their invalidity. Appellant's bill was thereupon dismissed for want of equity.

Appellant was plaintiff in the foreclosure proceedings and was the purchaser at the sheriff's sale. It purchased the property for $9,205, which was $795 less than two-thirds of the gross appraised value. Appellant made no objections to the appraisal, but took advantage of the deduction of the taxes, and purchased the property at much less than the gross appraisement. Appellant, in effect, said to the defendant in the case, the owner of the lots, that the taxes were valid and it would therefore have them deducted from the appraised value, and retain in its hands sufficient money to pay them. Its purchase was made upon this condition. This is, in effect, a contract, by the terms of which appellant retains out of the purchase money a sufficient amount to pay the taxes, and agrees to pay them. This is in the nature of a contract which accrues to the benefit of a third party, namely, the city of Omaha. If appellant does not propose to pay the taxes in question, what does it propose to do with the money it has withheld

from the owner of the land? The taxes were presumptively valid, and the owner of the property was at least under moral obligations to pay them. Appellant obtained title on the assumption that the taxes were valid, and therefore properly deducted by the appraisers. The owner of the premises relied upon this, and appellee herein has a right to rely upon it. Appellant having taken the position that the taxes were valid, will not now be permitted, after acquiring title, to change its position and question their validity. This would be to permit appellant to perpetrate a fraud, not only upon the prior owner of the property, but upon appellee as well. If appellant, upon its discovery that the taxes in question were void, had tendered to the owner of the property the sum of $795, the amount of its bid less than two-thirds of the gross appraised value of the property, and had said to him: We kept out $795 of the appraised value of your interest for the purpose of paying the taxes, which were an apparent lien upon this property due to the city of Omaha, but we have now discovered that those taxes are wholly void, and not a lien upon the property, and you are therefore entitled to the money, then, appellant, with clean hands, might have come into a court of equity and obtained relief. But the fact that the taxes were deducted from the gross appraised value and were treated by appellant as valid and subsisting liens upon the property, raises a presumption that appellant promised, agreed and intended to pay the taxes, and it will not now be permitted by a court of equity to take advantage of its own wrong, retain the money which it deducted from the actual interest of the owner of the land, and decline to pay the city the amount of the taxes. While a party at an execution sale takes the real interest of the debtor, and is not necessarily concluded by the appraisement, yet, where the amount of a tax lien not mentioned or included in a decree, has been deducted from the appraised value of the debtor's interest, by the appraisers, and the purchaser, assuming that the taxes are valid, takes advantage of the deduction thereof, he will be presumed to have agreed with the judg-

ment debtor that he will pay the taxes so deducted. To permit appellant to defeat the taxes, in this case, would be to permit it to acquire a much larger estate than it bargained for. The finding and judgment of the trial court seem equitable, and it is accordingly recommended that the same be affirmed.

HASTINGS, C., concurs.

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

AFFIRMED.

SULLIVAN, C. J.

For the reasons stated in *Hart v. Beardsley*, 67 Neb. 145, I dissent from the opinion and judgment.

BURTON RICE, APPELLANT, V. HUGH A. ALLEN ET AL., APPELLEES.

FILED JUNE 3, 1903. No. 12,725.

1. **Fraudulent Conveyance: HUSBAND AND WIFE: BURDEN OF PROOF.** The rule that conveyances between husband and wife whereby creditors are delayed in the collection of their debts will be closely scrutinized, does not throw upon the wife the burden of proving the good faith of conveyances to her made by third parties, where it is not made to appear that the husband purchased the property or that his funds were used in payment.

2. **Void Judgment.** Where a judgment is void for want of jurisdiction over the person of the defendant, the latter may wait until an effort is made to enforce the judgment, before instituting proceedings to have such judgment voided or set aside.

3. ———: **EQUITY.** A judgment was rendered against the defendant in Douglas county without service of summons upon him. It was transcribed to Holt and other counties and allowed to become dormant. Proceedings of revivor were commenced in Douglas county and defendant was personally served with notice, but he made no appearance. The judgment, after revivor, was transcribed and made the basis of an action in the nature of a creditor's bill in Holt county. It appeared that the judgment was not only wholly

void, but that defendant was not indebted to the plaintiff at the time of its rendition. *Held*, That the judgment was a cloud on the title to defendant's lands, which a court of equity has power to remove.

4. **Revivor of Void Judgment.** Where a judgment, apparently valid upon its face, is void for want of service upon the defendant, and subsequently such judgment becomes dormant, it is not validated by personal service upon the defendant of an order of revivor, to which no appearance is made.

5. **Evidence.** Evidence examined, and found sufficient to sustain the findings and judgment of the trial court.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, DISTRICT JUDGE. *Affirmed.*

E. H. Benedict, for appellant.

Michael F. Harrington and *R. R. Dickson, contra.*

KIRKPATRICK, C.

This suit grows out of the following matters: In 1887, appellant, Burton Rice, resided in Holt county, and gave a mortgage on a one-half section of land owned by him for $1,400. The loan was negotiated by Hugh A. Allen, appellee, who was acting as the agent of some investment company. Some months after the loan was negotiated, appellee, Allen, examined the land and found it to be of very little value. About this time appellant removed from the land and located in South Omaha, and about the same time, and on September 20, 1887, he and his wife executed a quitclaim deed in blank for the premises, with an expressed consideration of $3,000. This deed was delivered to appellee, Hugh A. Allen, with the understanding that he was to sell or trade the premises for whatever he could get above the amount of the mortgage, and whatever he obtained was to be divided with appellant, Rice. Some time after appellee, being unable to dispose of the land, sent the quitclaim deed to one Lusk, in Omaha, for Lusk to attempt to dispose of the land. Lusk, it appears, traded the quitclaim deed for an equity in some lots in the outskirts

of Omaha which were incumbered for much more than they were worth. Subsequently, appellant agreed to make a trade of the land to Herman E. Cochran and Elbert H. Cochran, who were real estate dealers in Omaha, and doing business under the firm name of Cochran Brothers. On writing to Holt county to get an abstract, appellant ascertained that the land had been disposed of, and in the fall of 1888 he commenced a suit in the district court for Douglas county, making the Cochrans and Hugh A. Allen, appellee, defendants. The record discloses that a summons for appellee, Allen, was sent to the sheriff of Holt county for service, and was duly returned showing personal service upon Allen. It is further disclosed that an attorney, by the name of Williams, appeared in the action claiming to represent Allen. Such proceedings were afterwards had that on the 13th of March, 1890, a judgment was rendered against Allen, for $3,400 and costs, and shortly afterwards the action was dismissed as to the Cochrans. Subsequently, and in September of the same year, a transcript of this judgment was filed in the district court for Holt county. No execution having been issued, the judgment became dormant, and in the fall of 1900 application was made in the district court for Douglas county, to revive it. Upon this application a conditional order of revivor was made, and personal service upon Allen had, who, however, made no appearance, and on December 10, 1900, an order of revivor was duly entered.

In January, 1901, this suit, in the nature of a creditor's bill, was instituted in the district court for Holt county against Hugh A. Allen, his wife and other persons, appellees, to set aside, as fradulent, deeds made by third parties to Mrs. Allen for a large amount of land in Holt county, upon the ground that the land was in reality the land of Hugh A. Allen and that title had been taken in the name of Mrs. Allen to prevent the collection of the judgment of appellant. The petition is in the usual form, and in additional allegations the revivor of the judgment is set out. Separate answers were filed by Hugh A.

Allen and Mary E. Allen, his wife, each denying all allegations in the petition not expressly admitted. The answer set out the proceedings in the district court for Douglas county, alleging that the same were a fraudulent conspiracy between appellant, Rice, and the Cochrans; alleged that no service or summons was ever made on appellant Allen; that the proceedings were void; and that the appearance made in the case by Williams was a part of the conspiracy; that he was unknown to appellee, Hugh A. Allen, and had never been employed or authorized to appear in any way by him. The answers also alleged, that the judgment and *lis pendens* notices that had been filed in Holt and some other counties were a cloud upon the title to the land owned by Mrs. Allen; that Rice intended and was about to institute other suits to collect the judgment. The answers closed with a prayer for an injunction, and a decree removing the cloud and quieting the title.

To the answers of Hugh A. Allen and his wife, there was filed a reply, which among other things pleaded that Hugh A. Allen should have appeared in the revivor proceedings and set up the invalidity of the judgment, and having failed to do this, he was concluded by the judgment of revivor; that it was *res adjudicata* as to these proceedings, and that any relief he might otherwise have been entitled to, was barred by the statute of limitations. Trial was had resulting in a finding and judgment for appellee, perpetually enjoining any attempt to collect the judgment, removing the cloud cast by the judgment from the title of appellee, and that appellant pay the costs. From this judgment an appeal is prosecuted to this court. It is disclosed by the record that the conveyances which are alleged to be fraudulent, were conveyances made by third parties to Mary E. Allen, the title to such land never having been in the husband, Hugh A. Allen. Under this state of the record, appellant contends that the burden of proof is upon the wife to show the good faith of such conveyances. The trial court held otherwise, and placed the burden of proof upon appellant to show that the conveyances were

in fraud of creditors. This is the first error assigned. The rule is well settled in this state, that:

"Transactions between husband and wife in regard to the transfer of property from him to her, by reason of which creditors are prevented from collecting their just dues, will be scrutinized very closely, and it must clearly appear that such transfers were made in good faith and for value." *First Nat. Bank v. Bartlett,* 8 Neb. 319.

But this rule has no application to conveyances made by third parties to the wife, no showing being made that the husband purchased the property or that any of his funds were used in payment. In such case the burden is upon parties alleging fraud to establish it by evidence. The authorities cited by appellant upon this branch of the case are not in point, and do not support the contention made. The appellant having wholly failed to sustain the charge of fraud in the conveyances to the wife by any evidence, it follows that the judgment of the trial court as to defendant, Mary E. Allen, is beyond question right, and must be affirmed.

It is further contended, that the finding of the trial court, that Hugh A. Allen was never served with summons in the proceedings in the Douglas county district court, is unsustained; and that there was error in the finding that the appearance of the attorney, Williams, was unauthorized, and the judgment void. It may be remarked that the judgment referred to is made beyond question to appear to be wholly and entirely without equity. It appears that at the time Rice, appellant, obtained the loan of $1,400, the land was worth not to exceed $1,000. Appellee seems to have made an honest effort to find a purchaser for the premises who would pay the interest on the loan; fearing that the fact that he had made a loan of $1,400, on land not worth to exceed $1,000, would reflect on him; although it was disclosed that he was not the examiner, and never saw the land until long after the loan was made. But he was unable to sell the land and never received anything for it, and, at the time appellant recovered

the judgment against him for $3,400, Allen was not in any way indebted to him in any sum.

Appellee testifies that no summons was ever served upon him, and that he had no knowledge of the proceedings of the Douglas county district court until long after the judgment was entered. This evidence was in no way contradicted. The sheriff was not called to sustain his service, although it was disclosed where he resided, and that his deposition might have been taken. Again, appellee testifies positively that he never authorized Williams to appear, and questions whether there was in fact such a person. Soon after he learned that judgment was entered against him, he made inquiries both in Omaha and South Omaha, and was unable to find any such person. It is made to appear that soon after the judgment was entered, the action was dismissed as to the Cochrans, and this fact makes all the more credible the contention of appellee that the entire transaction was a fraud perpetrated in the most deliberate manner. Courts of equity can not lend their aid to the enforcement of judgments so clearly fraudulent as that which is the basis of the creditor's bill in this case. It is clear that the testimony of appellee, supported as it is by the circumstances indicated, is amply sufficient to sustain the finding of the trial court in this regard.

It is contended that even though no service was had upon appellee, and no authorized appearance by him in the proceedings in the Douglas county court, yet, personal service of the order to show cause why the judgment should not be revived against him, having been served upon him, and he having failed to appear in the revivor proceedings, he is now concluded by the order of revivor. We are unable to find merit in this contention. A number of cases are cited to this point. Our examination of them convinces us that they do not sustain the contention made. Among these cases are, *Enewold v. Olsen*, 39 Neb. 59, and *Wittstruck v. Temple*, 58 Neb. 16. In each of these cases, the judgment being considered showed upon its face that it

was void for want of proper service, while the judgment of the district court for Douglas county under consideration was valid upon its face. In *McCutchen v. Askew*, 34 La. Ann. 340, the court, speaking of the effect of an order of revivor, said:

"The object of such proceedings is not to strengthen or improve the original judgment, but merely to screen it from the operation of prescription; and the judgment of revivor can not have the effect of stripping the defendant of any means of attack by a direct action on said judgment for nullity."

We are of the opinion that the rule stated is the correct one, and that if the judgment is one of form only, and is void for want of jurisdiction, it will remain void, notwithstanding proceedings to revive.

It is very clear that appellee, had he appeared in the revivor proceedings, could not have obtained the relief to which he appears to be entitled in the case at bar. Even though he could have shown that the judgment was void, it is well settled that he could not have gone beyond the judgment and shown that he was not indebted to appellant. The judgment, long prior to the proceedings to revive, had been transcribed to the district court for Holt county, and probably other counties. The judgment so transcribed was a cloud and an apparent lien upon the lands owned by Hugh A. Allen in such counties, so that had he appeared and shown that the judgment was void, this would not have removed the cloud cast by the judgment. It would probably have required one or more additional suits, in order to obtain the relief needed. This is always one of the grounds upon which the jurisdiction of a court of equity may be invoked. Appellee might, if he saw fit, disregard the revivor proceedings, and wait until an attempt was made to execute the void judgment, before attacking it for nullity. We are satisfied that in the case at bar, the judgment being void in the first instance for want of service, it remained void, notwithstanding personal service of the notice to revive. What would have been the

effect had Allen entered an appearance in the revivor proceedings, and set up the invalidity of the judgment, and, upon trial, judgment had gone against him, is not involved in this case and need not be determined. What we hold is that Allen was in no way deprived of his right to urge the void character of the judgment in question in this proceeding, by reason of the fact that personal service of the order of revivor was made upon him.

Shortly after the judgment in the Douglas county district court was rendered, defendant saw in the newspapers a notice of that fact, and upon inquiry found that he was the judgment defendant. This does not conclude him, as contended by plaintiff in error. The judgment of the trial court seems to us to be amply sustained. It is therefore 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.

GEORGE N. YOUNGSON, ADMINISTRATOR OF THE ESTATE OF WARREN BOND, DECEASED, APPELLEE, V. HARRIET M. BOND ET AL., APPELLANTS.*

FILED JUNE 3, 1903. No. 10,473.

1. **County Court: JURISDSCTION.** Where a suit in equity is to be regarded as part of the proceedings for settlement of the estate of a deceased person, it must be brought in the county court, which has exclusive original jurisdiction of such matters.

2. **Suit by Administrator with Will Annexed for Construction of Will.** Hence a suit by an administrator with the will annexed for construction of the will in order to enable him to administer the estate properly, is not maintainable in the first instance in the district court.

3. **Distinction Between Suit by Administrator and by Trustee Under a Will.** It seems that a distinction is to be drawn between such

* Rehearing of case reported in 64 Neb. 615.

a case and a suit by trustees under a will, after settlement of the estate, to obtain a construction of the provisions of the will relating to their trust, and that in the latter case suit must be brought in the district court.

4. **Constitutional Provision.** Section 16, article 6, of the constitution does not preclude a county court from construing a will, in a proper case, and determining the effect and meaning of a devise of lands so far as is necessary to give proper directions to an executor or administrator with the will annexed.

5. **Construction of Will by Probate Court.** The construction of the will in such a case, is for the information and benefit of such executor or administrator only, in order to advise him what course to pursue. It adjudicates nothing beyond his rights and liabilities in the execution of his office; controversies between adverse claimants under the devise or between the executor or administrator and persons claiming adversely to the estate, will not be affected thereby.

APPEAL from the district court for Kearney county: FREDERICK B. BEALL, DISTRICT JUDGE. *Former judgment of reversal adhered to.*

John L. McPheeley, William Gaslin and *G. L. Godfrey,* for appellants.

Ed L. Adams, John B. Scott, Claude C. Flansburg and *Richard O. Williams, contra.*

POUND, C.

Upon rehearing, it is contended that this suit is to be regarded as one for construction of the will, and hence is maintainable notwithstanding the principles of law laid down in the former opinion. But we are of opinion that, even upon that ground, it was not within the original jurisdiction of the district court and that the former judgment should be adhered to.

The suit is brought by an administrator with the will annexed, and, in view of the decision in *Kennedy v. Merrick,* 46 Neb. 260, would be maintainable only upon the theory that a construction of the will was necessary to enable him to settle the estate. So regarded, we think the suit was within the exclusive original jurisdiction of the county

court. *Williams v. Miles*, 63 Neb. 859; *Genau v. Abbott*, 68 Neb. 117. It is well settled that the county court has full and complete equity powers as to all matters within its exclusive jurisdiction. Clothed with these powers, its authority to construe a will, when necessary to enable its officers to settle an estate properly, is as clear as its authority to set aside on equitable grounds an order admitting a will to probate. Is its jurisdiction in such a case exclusive? This, we think, must depend upon the purpose and end of the proceeding. Where a suit in equity is to be regarded as part of the proceedings for settlement of the estate of a deceased person and has no further object than to procure or advance such settlement, it must be brought in the county court. The obvious purpose of the statute is to give all powers necessary to complete and speedy settlement of estates to one court, and to require all proceedings toward that end to be brought in that court in the first instance. To permit a concurrent equity jurisdiction, as to such proceedings, in the district court, in view of the principle that a court of equity which has acquired jurisdiction for one purpose will hold it for all purposes so far as necessary to give complete relief and render a full decree covering the whole controversy, would be very likely to lead us back little by little to the old time suits for administration. For these reasons, we think a suit by an administrator with the will annexed for construction of the will, in order to enable him to administer the estate properly, is not maintainable in the first instance in the district court. Such a suit is in reality a part of the proceedings for settlement of the estate. It is very different from a suit by trustees under a will, after settlement of the estate, to obtain a construction of the provisions of the will relating to their trust. Such a suit is not in any sense a part of the settlement of the estate. The district court has undoubted jurisdiction over such a trust, whether to enforce it, to give directions for its execution, or to appoint new trustees. Hence its power to construe the instrument creating the trust is clear. With respect

to the administrator with the will annexed pending settlement of the estate, the case is entirely distinct. The estate is not before the district court for settlement, nor can it come before that court except by appeal. Hence that court ought not to be giving directions to the officer of another court, how to administer an estate in the other court, except as its appellate jurisdiction is invoked.

It is urged that section 16, article 6, of the constitution precludes a county court from construing a devise of lands. We do not think the provision in that section that the county court shall have no jurisdiction "in actions in which title to real estate is sought to be recovered, or may be drawn in question" affects the conclusion already reached in any way. The evident meaning is that the county court shall have no jurisdiction of actions to recover real property or wherein the present title to real property is directly or substantially involved. But the provision does not mean that the county court is to be without jurisdiction where a question of title arises incidentally or collaterally or where the present title is not involved. Many actions which are not in form brought to recover the title to real property, nevertheless, have the effect of settling and adjudicating the present title. Such actions would not be within the letter of the first portion of the constitutional provision and yet are clearly within its reason. The object of the remainder of the provision in question is obviously to cover such cases. This court has construed the constitutional provisions as to jurisdiction of the county court and justice's court consistently in this manner in a series of decisions. *Stout v. Rapp,* 17 Neb. 462; *Mushrush v. Deveraux,* 20 Neb. 49; *Garmire v. Willy,* 36 Neb. 340. Similar constitutional provisions in other states have received the same construction. *Branson v. Studabaker,* 133 Ind. 147, 33 N. E. 98; *Hilton v. City of St. Louis,* 129 Mo. 389, 31 S. W. 771; *Norris v. Nesbit,* 123 N. Y. 650; *Harvey v. Travelers Ins. Co.,* 18 Colo. 354, 32 Pac. 935. In *Stout v. Rapp* the court said:

"Suppose a debtor is not the owner of any real estate,

and under the proceedings provided for by section 34 so testifies, has the county court lost jurisdiction of the matter upon the ground that by hearing the testimony offered, that the assignor had neither 'lands, town lots nor houses,' he is trying the question of title to real estate? * * * In the case at bar the question of ownership of any of the kinds of property exempt as a home might be incidentally drawn in question, but question of title could not possibly be adjudicated thereby, even if the court had jurisdiction to try the question of title. What higher or greater right to real estate could a party have after such an adjudication than he had before?"

In *Branson v. Studabaker,* there was a controversy as to the jurisdiction of the appellate court of Indiana, which has no jurisdiction of appeals wherein the title to real estate is in question. The court said (p. 154):

"As effective a practical test as can be found is supplied by the answer to the question: Is the effect of the judgment appealed from such as to divest one of the parties of the title or to invest one of them with the title? It is manifest that if the issues and judgment are of such a character as to settle the question of title and enable the parties to make use of the judgment as the basis of a plea of *res adjudicata,* in a controversy concerning the title, jurisdiction is in this court, but it is equally evident that, where the judgment can not be regarded as conclusively adjudicating the question of title, jurisdiction is in the appellate court, although the question of title may be incidentally or indirectly involved."

These considerations are decisive. A county court is not precluded from construing a will in a proper case and determining the effect and meaning of a devise of land, so far as is necessary to give proper directions to an executor or administrator with the will annexed. The directions given by the court to the administrator can not be used as the basis of a recovery by any one or to defeat a recovery by any one. The present title to the land is in no way brought in question. The construction of the will in

such a case, is for the information and benefit of such executor or administrator only, in order to advise him what course to pursue. Controversies between adverse claimants under the devise or between the executor or administrator and persons claiming adversely to the estate will not be affected thereby, except as to claims for maladministration or improper execution of the trust. As pointed out in the former decision, the interest of the administrator with the will annexed extends only to possession of the land and disposition of the rents and profits in settlement of the estate. Such instructions as the court may give him, based upon construction of the will, in order that he may act intelligently with respect to lands devised, are not to be taken as adjudicating anything beyond his rights and liabilities in the execution of his office, and if there were any possibility that they might be given further effect, the constitutional provision in question would prevent it.

We therefore recommend that the former judgment be adhered to.

BARNES and OLDHAM, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the former judgment of this court is adhered to.

FORMER JUDGMENT ADHERED TO.

DODGE COUNTY, NEBRASKA, V. HERMAN DIERS.

FILED JUNE 3, 1903. No. 12,831.

Counties. In the absence of a statute, a county is not liable for necessaries furnished to persons not paupers while quarantined in their residence for the time being.

ERROR to the district court for Dodge county: CONRAD HOLLENBECK, DISTRICT JUDGE. *Reversed.*

Robert J. Stinson, and *Grant G. Martin,* for plaintiff in error.

Frank Dolezal, contra.

POUND, C.

A bridge-gang, working on a railroad in the defendant county, was lodging in a house belonging to the plaintiff. Smallpox broke out among them, and one of the members of the county board, acting, apparently, under section 5, article 7, chapter 55, Compiled Statutes (Annotated Statutes, 9487), quarantined a number of them in plaintiff's building. A guard was put over them with instructions to keep them confined and to prevent others from coming in contact with them. While they were so quarantined, their meals were provided by the plaintiff, through and at the instance of the guard. This action is brought to recover for the meals furnished to the persons quarantined, while they were so confined, and for some other items not now material.

There is no evidence to show that the persons in question were paupers, or that the county was liable for their support or maintenance at the time the quarantine was imposed. Hence the sole question is, whether by reason of the quarantine the county became liable for the necessaries furnished by plaintiff. In our opinion this question must be answered in the negative. In the absence of a statute, we think a county is not liable for necessaries furnished to persons not paupers while quarantined in their residence for the time being. Some of the states have statutes by virtue of which such liability exists in certain cases. *City of Clinton v. County of Clinton,* 61 Ia. 205, 16 N. W. 87; *Smith v. Commissioners of Shawnee County,* 21 Kan. 669; *Town of Montgomery v. County of Le Sueur,* 32 Minn. 532, 21 N. W. 718; *Town of Louriston v. Board of Commissioners of Chippewa County,* 89 Minn. 94, 93 N. W. 1053. But the liability in these cases is recognized as completely

statutory, so that if the quarantine was not imposed by the authority named in the statute, or was imposed before the statute took effect, or the persons quarantined did not come within the purview of the provisions creating liability for necessaries, the county or municipality has never been held. *Smith v. Commissioners of Shawnee County, supra; State v. Bradford,* 36 Ga. 422; *People v. Supervisors of Macomb County,* 3 Mich. 475; *Kollock v. City of Stevens Point,* 37 Wis. 348; *Gill v. Appanoose County,* 68 Ia. 20, 25 N. W. 908. In consequence, where the statute goes no further than to provide for the maintenance of indigent persons while quarantined, or provides that the county or municipality shall be liable in case those chargeable with their support are unable to maintain them, the burden is upon the claimant to show that the patients were paupers or that those primarily liable were unable to respond. *Gill v. Appanoose County, supra; People v. Supervisors of Macomb County, supra; Kollock v. City of Stevens Point, supra.* The mere fact that they are quarantined, for the public safety, does not relieve persons who are able to support themselves of the duty of so doing.

Counsel contend that the quarantine amounted to an imprisonment of the persons quarantined "as effectively as if they had been locked up in the county jail." But the liability to maintain prisoners in the jail is statutory. At common law, a prisoner, if able, was bound to maintain himself. *Dive v. Maningham,* 1 Plowd. (Eng.) 60. And this liability still exists in certain cases in some jurisdictions. *State v. Peter,* 53 N. Car. 346; *Jefferson County v. Hudson,* 22 Ark. 595. Moreover where the county is made liable by statute, the liability is confined to cases within the purview of the act; persons not within its purview and able to provide themselves with necessaries must do so, though actually imprisoned in the jail. *Malone v. Escambia County,* 116 Ala. 214, 22 So. 503. It has been said that a quasi-contractual obligation must rest upon a record, a statutory, official or customary duty, or upon the doctrine

that no one shall be allowed to enrich himself unjustly at the expense of another. Keener, Quasi-Contracts, 16. The case at bar cannot be brought within any of these heads. The persons quarantined, not the county, got the benefit of the necessaries furnished. If they were paupers, there was a statutory liability resting upon the county to provide for them. If they were not, no benefit or advantage accrued to the county.

We therefore recommend that the judgment be reversed the cause remanded.

DUFFIE 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 is remanded.

REVERSED.

GEORGE H. DOWNING, APPELLEE, V. CHARLES D. HARTSHORN ET AL., APPELLANTS.

FILED JUNE 3, 1903. No. 12,856.

1. **Homestead in Life Estate.** A wife may claim a homestead in a life estate held by her husband.
2. **Right of Tenant for Life Who Has Paid Mortgage.** Where a tenant for life pays off a mortgage or other charge upon the entire estate, he is presumed to do so for his own benefit, and may preserve and enforce the lien for reimbursement over and above the proportion of the debt which he is bound to contribute.
3. **Reimbursement and Contribution: ASSIGNMENT CREATES NEW LIEN.** But his right to preserve and enforce the lien exists for the purpose of reimbursement or contribution only; so far as his estate or interest is concerned, in the absence of intervening interests or other special circumstances making such result inequitable, the lien is extinguished, and a subsequent assignment of the whole charge is, in substance, the creation of a new incumbrance thereon.
4. **Mortgage Kept Alive by Assignment.** The mortgage or other charge upon the entire estate may be kept alive as to the individual estate or interest of the person paying it off, by taking an assignment.

5. **Where Preservation of Lien Operates Fraudulently.** If in such case, however, the preservation of the lien as to such estate or interest would operate fraudulently or inequitably, it will not be permitted, and the lien will be deemed extinguished so far as it covered and to the proportion chargeable upon the individual estate or interest of the person paying it off.

6. **Mortgage:** HOMESTEAD. A husband, holding a life estate in property of a former wife, married again and continued to occupy it as a homestead. The property was subject to a mortgage, which he paid, taking an assignment. Afterwards he reassigned the mortgage to the plaintiff, as security for a new debt. His wife did not join in the assignment. *Held*, That this amounted to an incumbrance of the homestead, and that the mortgage was not enforceable, as against the life estate.

7. **Tenant for Life:** ADVERSE TITLE. The rule that a tenant for life who buys in an outstanding incumbrance is regarded as holding it for the benefit of the reversioner as well as for his own benefit, means only that he will not be permitted to acquire an adverse title by or through such purchase or otherwise cut out the reversioner's right of contribution without affording the latter an opportunity to redeem.

8. **Assignment of Mortgage by Life Tenant:** FORECLOSURE. Hence it will not operate to prevent assignment of the incumbrance to a third person and a foreclosure suit by the latter to require the reversioner to redeem to the extent of his proportion and to subject the property to satisfaction of the incumbrance in default thereof.

APPEAL from the district court for Buffalo county: HOMER M. SULLIVAN, DISTRICT JUDGE. *Reversed with instructions.*

Hector M. Sinclair and *James M. Easterling*, for appellants.

E. C. Calkins, contra.

POUND, C.

James H. Bock holds a life estate in the property in controversy as surviving husband of Bertha E. Bock, deceased, the property being a homestead. After her death, he continued to reside upon the property with three minor children, who are entitled to the reversion under the statute. He has since married the defendant Jennie Bock,

and she has lived upon the property from the date of the marriage. At the time the title was acquired by his first wife, it was subject to a mortgage executed by her grantors. Sometime subsequent to his second marriage, he paid the remainder due upon the mortgage and took an assignment thereof. Three years later, he borrowed money of the plaintiff and assigned the mortgage and the note thereby secured as security for the new loan. The present suit is brought to foreclose the mortgage.

It is clear that the defendant Jennie Bock was, at the time the mortgage was assigned to the plaintiff, and still is, entitled to claim a homestead in the life estate held by her husband. *Dennis v. Omaha Nat. Bank,* 19 Neb. 675; *Giles v. Miller,* 36 Neb. 346; *Kendall v. Powers,* 96 Mo. 142, 8 S. W. 793; *Deere v. Chapman,* 25 Ill. 610; *Beranek v. Beranek,* 113 Wis. 272, 89 N. W. 146. The question arises at once, therefore, whether the reassignment to plaintiff amounted to an incumbrance of the homestead within the purview of section 4, chapter 36, Compiled Statutes (Annotated Statutes, 6203), as, if such is the case, the mortgage is not enforceable, as against the life estate, for the reason that the defendant Jennie Bock did not join in such assignment. It is undoubtedly a general rule that where a tenant for life pays off a mortgage or other charge upon the entire estate, he is presumed to do so for his own benefit, and may preserve and enforce the lien for reimbursement over and above the proportion of the debt which he is bound to contribute. Equity will prevent a merger in such cases, in furtherance of the intention of the person who pays off the mortgage, and will presume an intention to preserve the lien, where manifestly for his benefit and advantage, although he may, in form, have discharged it. 2 Pomeroy, Equity Jurisprudence, sec. 799. But his right to preserve and enforce the lien exists for the purpose of reimbursement or contribution only. He can not, in the absence of intervening interests or other special circumstances requiring that the lien be kept in force, assert it generally as a charge upon the

whole estate, including his estate for life, especially where the result would be unjust or inequitable. In such cases, he has no legitimate interest in keeping it alive.

"When the estate has no connection with other interests, what motive can a man have, who owns the equity of redemption, and purchases in a subsisting mortgage, to keep this mortgage alive in his own hands, against his own estate? * * * It could not be of any use but a mischievous one, as against subsequent purchasers or encumbrancers, and for such a purpose, the merger is not to be prevented, nor the charge upheld by the aid of this court." *Starr v. Ellis,* 6 Johns. Ch. (N. Y.) *393. He will not even be allowed to keep it alive for the sole purpose of throwing the whole burden upon the reversioner, taking an assignment and keeping it outstanding during the continuance of his estate. *Lamson v. Drake,* 105 Mass. 564. So far as his estate or interest is concerned, in the absence of intervening interests or other special circumstances making such result inequitable, the lien is extinguished. *Singleton v. Singleton,* 60 S. Car. 216, 38 S. E. 462; *Miller v. Miller,* 22 Misc. Rep. (N. Y.) 582, 49 N. Y. Supp. 407.

"A court of equity will keep an incumbrance alive or consider it extinguished, as will best serve the purposes of justice and the actual and just intention of the party. The intention, however, must be innocent, and injurious to no one." *Andrus v. Vreeland,* 29 N. J. Eq. 394. In the case at bar, to keep the lien alive, as to the life estate of the husband, could not fail to operate injuriously to the wife, and the sole interest which the husband could have had in preserving the charge for any purpose beyond reimbursement out of the reversion for the proportion justly chargeable thereon, was to enable him to borrow money upon his life estate and pledge it for payment thereof, without his wife's concurrence and in fraud of her homestead rights. An intention to prevent merger for such a purpose will not be countenanced in a court of equity. Equity will look at the substance, rather than the form;

and, in substance, the subsequent assignment of the whole charge is the creation of a new incumbrance upon the life estate. No refinements of equity will be permitted to circumvent the express and salutary requirement that the wife must concur in the incumbrance of the homestead. *Jenkins v. Simmons,* 37 Kan. 496, 15 Pac. 522; *Campbell v. Babcock,* 27 Wis. 512; *Spencer v. Fredendall,* 15 Wis. *666; *Barber v. Babel,* 36 Cal. 11. In several of these cases the very doctrine that equity will prevent a merger, relied upon in the case at bar, was urged as a ground for enabling the husband, acting alone, to revive or reissue an incumbrance upon the homestead which he had paid.

But counsel contend that a distinction is to be made in the case at bar by reason of the fact that the husband took an assignment at the time he paid the mortgage debt. They say:

"Where he takes an assignment, it does not merge in any degree, but remains as distinct as if it was in the hands of the assignor, or as it might have been in the hands of the assignee, had he no other interest in the property."

Taking an assignment is merely evidence of the intention with which the incumbrance was paid. It is not the assignment, but the intention and the interest of the party, which prevents merger. If one pays off a mortgage or other charge upon his own estate, or upon the entire estate for the protection of his individual estate or interest, he may often keep the charge alive, as to such individual estate or interest, by taking an assignment which makes his intention manifest. But if the preservation of the lien as to such estate or interest would operate fraudulently or inequitably, it will not be permitted, and the lien will be deemed extinguished, so far as it covered, and to the proportion chargeable upon, the individual estate or interest of the person paying it off, notwithstanding the assignment. *Atherton v. Toney,* 43 Ind. 211; *Moore v. Olive,* 114 Ia. 650, 87 N. W. 720; *Frey v. Vanderhoof,* 15 Wis. 397. In *Atherton v. Toney, supra,* the court said:

"To allow the appellee, Toney, to buy in the outstanding obligation, to secure which the mortgage was given, and use it as a set-off against a note given for the purchase money, would enable him to hold the whole interest in the land, when he purchased only the equity of redemption. It would give him the benefit of a covenant against incumbrances when none was made. It would enable a purchaser of an equity of redemption on a credit, at a price equal to an outstanding mortgage given to secure a note * * * of the seller, to defeat the collection of the purchase-money by buying up and taking an assignment of the debt and using it as a set-off, and thus secure the property at one-half of the purchase-price. That would not be for an innocent purpose."

However convenient it might sometimes be for husbands, and however much they might deem it to their interest, to be able, when once the homestead had become subject to an incumbrance, to take an assignment upon payment thereof and revive the incumbrance, as their debts or future necessities might require, without the necessity of consulting their wives, a court of equity cannot be asked to sanction such proceedings. We think, therefore, that the assignment of the mortgage to the plaintiff was ineffectual, as to the life estate of the husband, and that the mortgage is not enforceable against that estate.

A further question is raised, how far the mortgage is enforceable in this suit as against the holders of the reversion, who are infants. It is urged, on their behalf, that when their father, who was tenant for life, paid off the outstanding incumbrance, he must be held to have done so, and to have held it, for the benefit of the reversioners as well as for his own benefit, and that they were entitled to an election whether to contribute the proportion justly chargeable upon the reversion, before the tenant for life could make use of the incumbrance for his own purposes. It is urged also that the reversioners, being infants, have not had this election afforded them. But we think the

rule that a tenant for life who buys in an outstanding incumbrance is regarded as holding it for the benefit of the reversioner as well as for his own benefit, means only that he will not be permitted to acquire an adverse title by or through such purchase, or otherwise cut out the reversioner's right of contribution, without affording the latter an opportunity to redeem. Where the mortgagee has the legal title and the mortgagor only an equity of redemption, a tenant for life who acquires the mortagee's title and claims possession under it is misusing his possession. If in any other way he takes advantage of his possession and of his purchase of the outstanding incumbrance to obtain an adverse title, he is abusing the advantage which his possession gives him. In such cases, equity requires him to hold the new title for the benefit of the reversioner, and the latter may sue to establish the trust and to be permitted to redeem. The tenant for life, in the case at bar, had the right to be reimbursed, out of the reversion, for the proportion of the amount paid in discharging the incumbrance which was justly chargeable upon the reversion. For that purpose, the mortgage, in his hands, was still a lien. He could have brought suit to enforce this lien by compelling the reversioners to redeem and subject the property to payment of the charge if they did not. This right he assigned to the plaintiff, and we think the latter may foreclose, as against the reversion, for the proportion for which it is liable.

It is urged also that an admission that no proceedings at law had been had for collection of the claim secured by the mortgage was not binding upon the infant defendants. But we need not examine this matter, as there must be a further hearing, and additional findings, and the question is not likely to arise again.

We recommend that the decree be reversed and the cause remanded with directions to find the proportion of the incumbrance paid off by James H. Bock which is justly chargeable upon the reversion, to enter decree of foreclosure against the defendants Royal Bock and James

Bock, Jr., therefor, and to dismiss the petition as to the defendants James H. Bock and Jennie Bock.

DUFFIE 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 is remanded with directions to find the proportion of the incumbrance paid off by James H. Bock which is justly chargeable upon the reversion, to enter judgment of foreclosure against the defendants Royal Bock and James Bock, Jr., therefor, and to dismiss the petition as to the defendants James H. Bock and Jennie Bock.

REVERSED WITH INSTRUCTIONS.

ALLEN C. ABBOTT V. P. N. CAMPBELL.

FILED JUNE 3, 1903. No. 12,867.

1. **Verification.** A verification of a pleading need not be in the exact words of the statute; it is sufficient if the substance of the statutory requirements is fairly set forth.
2. ———. The word "instrument" imports a writing. Hence a verification by an attorney, in an action upon an instrument for the payment of money only, is not defective because it fails to state expressly that the instrument sued on is in writing.

ERROR to the district court for Loup county: JOHN R. THOMPSON, DISTRICT JUDGE. *Affirmed.*

Alphonso M. Robbins, for plaintiff in error.

A. S. Moon and *Elliott J. Clements, contra.*

POUND, C.

While we may suspect that the real object of the petition in error is time, its professed purpose is to challenge the sufficiency of the verification of the plaintiff's peti-

tion; the trial court, having refused to strike such petition from the files, rendered judgment upon defendant's failure to plead thereto. The petition is verified by an attorney, who sets forth, among other things, that the action is founded "upon a contract for the payment of money only, and such instrument is in my possession." This verification is objected to because it does not state that the action is founded upon a "written instrument for the payment of money only" as required by section 120 of the code. We see no merit in the objection. A verification of a pleading need not be in the exact words of the statute. It is sufficient if the substance of the statutory requirements is fairly set forth. If there could be any doubt as to this, sections 1 and 145 of the code should suffice to obviate it. The verification in the case at bar expressly states that the contract for payment of money only, upon which suit is brought, is an "instrument." But the word "instrument" imports a writing. *Hoag v. Howard,* 55 Cal. 564; 16 Am. & Eng. Ency. Law (2d ed.), 824. Hence the verification is not defective because it fails to state expressly that the instrument sued on is written.

We recommend that the judgment be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

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

AFFIRMED.

KNIGHTS OF THE MACCABEES OF THE WORLD V. LOUISE NITSCH.

FILED JUNE 3, 1903. No. 12,897.

1. **Fraternal Beneficiary Associations:** STATUTE. Section 112, chapter 43, Compiled Statutes, applies to fraternal beneficiary associations organized under the laws of other states, as well as to those organized under the laws of this state.

2. ———: ———. OBLIGATION OF CONTRACTS. The provision in said section that before any amendment to or alteration in the constitution or by-laws of such an association shall take effect or be in force a copy of the amendment or alteration, duly certified, must be filed with the auditor of public accounts, is not unconstitutional, as impairing the obligation of contracts, when applied to a benefit certificate issued prior to the statute and expressly subject to all future changes in or amendments to the by-laws of the association.

ERROR to the district court for Hall county: JAMES N. PAUL, DISTRICT JUDGE. *Affirmed.*

Adolphus R. Talbot and *Thomas S. Allen,* for plaintiff in error.

William H. Thompson and *W. H. Platt, contra.*

POUND, C.

One August C. Nitsch became a member of the Knights of the Maccabees of the World, a fraternal beneficiary association organized under the laws of another state, but duly authorized to do business in this state, and as such member received a benefit certificate providing for the payment of certain sums to his wife in case of his death. He became a member and received his certificate in the year 1892. He died in 1902, and this suit is brought by his widow, as beneficiary, to recover upon the certificate. The defendant sets up a violation of a by-law of the association wherein it is provided, that in case a member shall commit suicide, whether sane or insane, his certificate shall be forfeited. At the time Nitsch became a member, the provision in question was not contained in the by-laws of the association. There was a provision, however, that the certificate should be subject to any and all amendments to or alterations of the constitution or by-laws of the society thereafter to be made. From time to time, a number of successive amendments to the by-laws were adopted providing that if the holder of the certificate should commit suicide, whether sane or insane, within a certain

period after the issuance of the certificate, such certificate should be forfeited. Finally, the amendment now relied upon was adopted, whereby it was provided that suicide, sane or insane, at any time should be ground for forfeiture. None of the prior amendments are available by way of defense in the present case, for the reason that all of them prescribed a period less than that which had elapsed from the issuance of the certificate at the time Nitsch committed suicide. The amendment set up in the answer of the defendant and now relied upon was adopted subsequent to section 112, chapter 43, Compiled Statutes (Annotated Statutes, 6504), and it appears affirmatively from the pleadings that no copy thereof was filed with the auditor of public accounts as required by said section. Upon this ground the trial court held that said by-law was not available to the association as a defense and rendered judgment for the plaintiff.

We think the ruling of the trial court was correct. It is urged on behalf of the defendant that said section does not apply to fraternal beneficiary associations organized under the laws of other states, but has reference only to those organized under the laws of this state, pursuant to section 110 of said chapter 43; and that even if such section properly construed does apply to societies organized under the laws of other states, the provision that before any amendment to or alteration in the constitution or by-laws of such an association shall take effect or be in force, a copy of the amendment or alteration, duly certified, must be filed with the auditor of public accounts, is unconstitutional as impairing the obligation of contracts, when applied to a benefit certificate issued prior to the statute and expressly subject to all future changes or amendments. Neither of these contentions is well founded. Said section 112 expressly refers to "every such society." If we take this to refer to the societies last mentioned in the act it clearly embraces all organizations of the kind doing business in the state, whether foreign or domestic, because section 111, just preceding, expressly governs "all societies,

orders and associations contemplated in this act." The act contains provisions as to the manner in which foreign beneficiary associations shall obtain permission to do business in this state and also prescribes the manner in which domestic associations shall be organized. There is nothing in said section 112, nor in any part of the act, to indicate any intention to limit the provisions of that section to domestic associations. As to the other objection, we may admit that an amendment to the by-laws, properly adopted, would have been binding, although adopted subsequent to the issuance of the certificate. This was clearly a part of the contract between Nitsch and the association. But such contract went no further than to provide for the effect of a subsequent amendment when adopted and put in force. There was no agreement with reference to the manner in which such changes should be made. That was a matter which the state had a right to regulate and did regulate by said section 112. When, after the enactment of said section, the association desired to amend its by-laws, it had only to record the amendment in the manner prescribed by the statute. It is well settled that statutes requiring instruments to be filed or recorded and making them invalid or postponing them to instruments subsequently executed, in case they are not so filed or recorded, are not unconstitutional, as impairing the obligation of contracts, with respect to pre-existing instruments. *Jackson v. Lamphire,* 3 Pet. (U. S.) 280; *Vance v. Vance,* 108 U. S. 514; *Weil v. State,* 46 Ohio St. 450, 21 N. E. 643; *Bird v. Keller,* 77 Me. 270; *Stafford v. Lick,* 7 Cal. 479; *Varick v. Briggs,* 6 Paige Ch. (N. Y.) 323.

We therefore recommend that the judgment be affirmed.

DUFFIE and KIRKPATRICK, CC., concur.

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

AFFIRMED.

STATE OF NEBRASKA, EX REL. EDWARD D. DAVIS, RELATOR, v. PETER MORTENSEN ET AL., CONSTITUTING THE BOARD OF PUBLIC LANDS AND BUILDINGS OF THE STATE OF NEBRASKA, RESPONDENTS.

FILED JUNE 11, 1903. No. 13,207.

1. **Contract:** CONSTRUCTION. A construction that will completely emasculate a clause of a contract will not be adopted, if any other reasonable construction is admissible.

2. **Board of Public Lands and Buildings:** MANAGEMENT OF PENITENTIARY. The board of public lands and buildings is vested with the general management and control of the penitentiary and may, in its discretion, let out by contract the labor of any or all the convicts.

3. ———: CONTRACT FOR CONVICT LABOR. A written contract for the hiring of convict labor, drawn under the provisions of section 16, chapter 86, Compiled Statutes, is not valid unless executed by the warden of the penitentiary, and approved by the governor and the board of public lands and buildings.

4. ———. The alleged contract upon which this action is grounded would, if valid, impose no active duties upon the board of public lands and buildings.

5. **Mandamus:** PUBLIC CORPORATION. The courts will not by means of the writ of mandamus compel municipal or public corporations to perform specifically their ordinary business contracts.

6. **Action at Law Against State.** A sovereign state can not be sued in its own courts without its consent. This state has in a measure waived its prerogative; it has given its consent to be sued, but only in the cases mentioned in section 1106 of the code. The present action does not fall within the provisions of that section.

7. ———: JURISDICTION. This court has, under the existing law, no jurisdiction of an action brought against the state to enforce specific performance of a contract, or for any other purpose.

8. ———. A contract with the board of public lands and buildings for the leasing of convict labor is in substance a contract with the state; and an action against the members of the board to compel specific performance of such a contract is in substance an action against the state.

9. **Board Acts for State.** The state, like an individual or private corporation, may refuse to keep its engagements; and the board of public lands and buildings, as a governmental agency having full authority in all matters relating to the management of the penitentiary, is vested with power to determine whether a con-

tract for the leasing of convict labor shall be kept or broken. The action of the members of the board in the matter is the action of the state; their determination is its determination.

ORIGINAL application for a writ of mandamus to compel the state board of public lands and buildings to perform a contract for the hiring of convict labor. *Writ denied.*

George E. Hager, for relator.

Frank N. Prout, Attorney General, and *Charles O. Whedon, contra.*

SULLIVAN, C. J.

In this case the relator, Davis, seeks by means of the writ of mandamus to compel respondents, who constitute the state board of public lands and buildings, to perform a contract for the hiring of convict labor. Two members of the board, Mr. Mortensen and Mr. Folmer, admit the execution of the alleged contract, assert its validity, and say they are ready and willing to comply with its terms. The other two members, Mr. Marsh and Mr. Prout, in effect, deny that the contract is valid and insist that, if valid, it cannot be enforced by mandamus. The Lee Broom & Duster Company, a corporation having a prior contract for convict labor, has intervened in the action, on the theory that the allowance of the writ would be prejudicial to its rights. The intervener's contract is in part as follows:

"Articles of agreement made in duplicate and entered into this first day of April, A. D. 1902, by and between E. D. Davis, Warden of the Nebraska State Penitentiary, party of the first part, and Lee Broom & Duster Co., incorporated, of Davenport, Iowa, party of the second part, witnesseth: That said parties agree as follows:

"1. That party of the first part shall furnish to said party of the second part, one hundred and twenty-five (125) convicts, in the Nebraska State Penitentiary, to carry on the broom and whisk-broom business for manufacturing purposes.

"2. That should party of the second part have use for more than 125 convicts, then, at its option, party of the first part shall furnish party of the second part additional convicts not exceeding in number 250, in preference to any other employment of such convicts, save for such work as convicts are now employed in and about the prison, in the performance of menial prison duties."

It can hardly be doubted that by the second clause of this contract the option is given to the intervener and not to the warden, who is described as the party of the first part. It would be an exceedingly awkward and inaccurate use of language to say that the warden shall, at his option, etc. Besides such a construction is, on practical grounds, inadmissible. Give the warden the option and the intervener the right to determine whether it has use for additional convicts, and the clause is completely emasculated.

There are now in the penitentiary 280 convicts, 100 of whom are performing menial prison duties. The others are in the service of the intervener. The contract which the relator is seeking to enforce is as follows:

"This article of agreement made in triplicate copies and entered into this first day of April, 1903, by and between A. D. Beemer, Warden of the Nebraska State Penitentiary, party of the first part, and Edward D. Davis, party of the second part, witnesseth:

"1. That said party of the first part shall furnish to said party of the second part thirty-five (35) convicts now confined in the Nebraska State Penitentiary, to carry on the business of a button manufacturing company.

"2. That during the continuance of this contract no convict assigned to said party of the second part shall be taken away from him and assigned to other trades without the consent of both parties hereto.

"3. That during the continuance of this contract whether or not party of the second part shall be working convicts in excess of this contract or not, no convict once assigned to said second party shall be taken from him and assigned

to other work without the consent of the party of the second part.

"4. The said party of the second part shall have the exclusive control of convicts assigned to this contract subject to the rules and regulations and discipline of the Nebraska State Penitentiary.

"5. Convicts who shall be sick or undergoing punishment shall be returned to second party when fit for duty.

"6. A day's labor between October first and April first shall be eight hours and between April first and October first shall be ten hours provided, that when convicts are doing task work, then whenever any convict shall have completed his day's work, if it be before the end of the day's work, it is agreed that he has completed a full day's [work] and payment shall be made by the said second party for the same as a full day's work.

"7. That when any convict is withdrawn from this contract by reason of death or pardon or expiration of time of sentence, the party of the first part shall assign an equal number of other convicts, which shall be selected by said party of the second part from those unemployed.

"8. That the day's labor under this contract shall be each day of the year excepting Sundays and all legal holidays.

"9. The party of the second part shall have the exclusive right to maintain a button factory for manufacturing purposes in said penitentiary with said convict labor.

"10. The party of the first part shall assign to the party of the second part, suitable room, in which to manufacture buttons, to card and prepare them for shipment and furnish steam and heat and power not to exceed one-horse power to each five (5) men employed, which shall be furnished said party of the second part free of charge, but any additional horse power furnished at the request of the second party, shall be furnished at the rate of fifty cents per horse power, per day, over and above the one horse power to each five convicts.

"11. That all work performed under this contract shall

be under the supervision of a foreman furnished by party of the second part, and the party of the first part guarantees unto the party of the second part, that all work shall be executed as directed by said foreman, and that under no circumstances will the warden allow prisoners to slight their work or turn out poor careless work; party of the second part shall not be compelled to pay for such slighting of the work, or for careless work so as aforesaid.

"12. That should any convict employed by the party of the second part be unable to learn and master the button trade or should any convict turn out poor work, he shall be transferred and the party of the second part shall have the privilege of selecting a suitable convict from those unemployed to fill his place.

"13. That should any convict employed by the party of the second part be or become unable to perform his daily task on account of sickness, inability or other reason, or that when convicts are first taken to work and are unable to complete their daily task, party of the second part shall pay party of the first part only for that portion of the task or day's work, performed by said convict on that day.

"14. That said party of the first part shall provide necessary guard and keepers for the supervision of the convicts employed under this contract free of expense to the party of the second part, which said guards and keepers shall at all times remain under the official control of the warden of said penitentiary, and are to be selected, retained or discharged by said warden.

"15. Party of the first part shall keep a runner in said shop to perform duties for the state, such as carrying reports, books, etc., to deputy warden's office; gathering and distributing laundry for convicts, carrying around wash water twice a day; cleaning up shops and closets daily and other necessary jobs that the guard may have for them to do, and should the state runner have any surplus time he shall perform similar duties for the party of the second part.

"16. That said party of the second part shall pay to said

party of the first part as full compensation for the labor of the convicts employed under this contract, and power to operate the machinery used in the manufacture of buttons, and to properly heat the room occupied by such manufactory in said prison the sum of fifty-five (55) cents per day for each and every convict, which sum shall be received as satisfaction in full except for additional power furnished as provided for in section 10 of this article.

"17. The party of the second part agrees to pay the party of the first part for the labor of convicts hired under this contract on the 10th day of each month succeeding the one in which the labor or service has been performed.

"18. TASK FOR CUTTERS.

"That the daily task on the different grades of buttons shall be as follows:

CUTTING DISKS OR BLANKS OUT OF SHELLS.

16 line.....	117 oz.....	task.
18 line.....	124 oz.....	"
20 line.....	130 oz.....	"
22 line.....	148 oz.....	"
24 line.....	160 oz.....	"

"Provided always that all the cutting of disks or blanks of shell shall be done so that there shall be no waste of good material of shell. The cutting shall be close and no disk or blank shall be cut out of the shell under thickness of three lines, known in button manufacturing rules.

FACING BUTTONS, EXTRA FINE, 45 GROSS TASK.

No. 2 supers.....	40	gross task.
No. 3 "	35	" "

DRILLING.

All 2 holes.....	60	gross task.
All 4 holes.....	50	" "

"19. All tasks or day's work not herein above mentioned or all new tasks or day's work needed by party of the second part shall be fixed in same proportion as the foregoing tasks by the warden, and party of the second part shall have the right at any time to put in any new or improved

machinery, and the warden shall arrange a task satisfactory to the party of the second part to be performed on such machines for the party of the second part.

"20. That in case of a serious fire or other inevitable accident in prison shops, in order to resume operations, the warden shall allow the party of the second part a reasonable time to procure machinery and material for manufacturing purposes.

"21. That this contract is drawn with the provision that in case the United States Government, or the State of Nebraska, shall create laws hostile to prison made goods, or restrict the sale of same, or to brand the same 'Prison Made' then the party of the second part shall not be beholden to pay the within mentioned price for said convict labor, and said second party may have the privilege or option to cancel this contract.

"22. This contract shall take effect from and after the 15th day of April, 1903, and remain in force until the 15th day of April, 1904, with the privilege to the party of the second part of continuing the same for one year further unless sooner terminated by mutual consent.

"23. This agreement to be binding upon the heirs, executors and assigns and successors of the respective parties hereto.

"In witness whereof the parties hereto have hereunto set their hands the year first above mentioned.

"(Signed) E. D. DAVIS,
"_____,
"Warden Nebr. State Penitentiary.

"In presence of

"Approved by the board of public lands and buildings including the governor of the state of Nebraska.

"_____,
"Governor.

"(Signed) PETER MORTENSEN,
"State Treasurer.

"(Signed) GEO. W. MARSH,
"Secretary of State

"(Signed) F. N. PROUT,
"Attorney General.
"(Signed) GEO. D. FOLLMER,
"Commissioner of Public Lands and Buildings."

The day after the foregoing instrument was signed the intervener exercised the option given it by the second clause of its contract and notified the warden of the penitentiary that it had use for seventy additional convicts. One of the grounds upon which relator's application is resisted is that compliance with the second contract would put the state under the necessity of violating the first. In our opinion this position is not tenable. The intervener has, under the contract, no claim on the convicts now in the penitentiary; they are engaged in the performance of menial prison duties and, consequently, it would not be injured by the assignment of them to the relator. Whether by reason of such an assignment the intervener would become entitled to the service of new convicts, we need not determine; that question is not before us. The board of public lands and buildings had authority to let out the services of any or all the convicts. If, therefore, the relator's contract had been duly executed it would have been valid. *State v. Holcomb,* 46 Neb. 612. But it was not duly executed. It was undoubtedly drawn under section 16, chapter 86, Compiled Statutes (Annotated Statutes, 9699), which is as follows:

"It shall be the duty of the warden, with the approval of the governor and the prison inspectors, to provide labor for the prisoners and keep them in industrial employment, so far as possible and for the greatest practical profit to the state and the general welfare and health of the prisoners. The warden may manufacture articles for use in the prison and all other state institutions, or let the service of prisoners for such purpose, and whenever there shall be any surplus of prison labor which can not be so utilized to advantage or profit, the warden may let out the service of such unemployed or idle prisoners for a term of

years, not exceeding three years at any one time or for any one contract; and he shall be charged with the duty of collecting for such services and collecting all other debts due to the state under his administration. When the service of convicts confined in the penitentiary is let out by contract, the warden shall be at all times charged with the custody, discipline, control and safe keeping of such prisoners and provide them with board and clothing. As rapidly as it may profitably be done, the state shall provide for the employment of the labor of the convicts on its own account to the end that the state may eventually provide means for the employment of all prisoners without the intervention of contractors; and the warden shall be charged with the duty of making the state prison as nearly self-sustaining as possible and of promoting, as far as circumstances will permit, the welfare of the convicts."

This section clearly contemplates a contract to be made by the warden and approved by the governor and the board of public lands and buildings. The relator does not allege that he made any contract with the warden or that the instrument above set out received executive approval. It is true that in the separate answer of Mr. Mortensen and Mr. Follmer it is admitted that the warden and governor were present when the contract was made and agreed to it, but this admission is not binding upon either Mr. Marsh or Mr. Prout and can not, therefore, be regarded as an admission by the board. Upon the whole record it is evident that the signature of the warden and the approval of the governor were necessary to the completion of the contract.

But assuming that the contract is valid we do not see how it can be enforced by mandamus against respondents. It purports to be, not their contract, but the contract of the warden; the duties and obligations which it imposes are imposed upon him and not upon them. They have not obstructed its enforcement; neither have they done, nor refused to do, any thing in violation of its terms and consequently they could not, in any view of the case, be subjected to coercive process.

The contract purports to be the contract of the warden, but, assuming it to be valid, it is in truth the contract of the state; and the present action is in substance a suit against the state for specific performance. *Hapgood v. Southern,* 117 U. S. 52; *Ex parte Ayres,* 123 U. S. 443; *People v. Dulaney,* 96 Ill. 503; *Miller v. State Board of Agriculture,* 46 W. Va. 192; *Mills Publishing Co. v. Larrabee,* 78 Ia. 97; *Board of Public Works v. Gannt,* 76 Va. 455; 13 Ency. Pl. & Pr. 654. An action to enjoin state officers from doing acts which would constitute a breach of a contract with the state, and thus indirectly to compel specific performance was held, in *Ex parte Ayres, supra,* to be a suit against the state. And in *Hapgood v. Southern, supra,* it was decided that an action against state officers is an action against the state where the things required by the decree to be done are the very things which when done will constitute a performance of the state's contract. It was held in *People v. Dulaney, supra,* that the courts have no authority to compel by mandamus the performance of a business contract like the one here in question; and such seems to be the general rule. *Parrott v. City of Bridgeport,* 44 Conn. 180; *State v. Zanesville & Maysville Turnpike Road Co.,* 16 Ohio St. 308; *State v. Howard County,* 39 Mo. 375. But if the rule were otherwise, and if the contract were valid, the action could not be maintained. It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. *Davis v. Gray,* 83 U. S. 203; *United States v. Lee,* 106 U. S. 196; *Poindexter v. Greenhow,* 109 U. S. 63; *Cunningham v. Macon & B. R. Co.,* 109 U. S. 446; *Commonwealth v. Weller & Sons,* 82 Va. 721. A state may, of course, lay its sovereignty aside and consent to be sued on such terms and conditions as it may prescribe. This state has in a measure waived its prerogative. It consents to be sued in the cases mentioned in section 1106 of the code. "This section," says LAKE, J., in *State v. Stout,* 7 Neb. 89, "designates and includes all the various claims and demands on which the state may be sued and also the courts in which

actions thereon may be brought." The provision of the constitution in relation to the bringing of suits against the state (section 22, article 6) is not self-executing; legislative action was necessary to make it available. *Chicago, M. & St. P. R. Co. v. State,* 53 Wis. 509. The statute gives no remedy against the state by mandamus or otherwise in this court (*Ex parte Greene & Graham,* 29 Ala. 52); and in no court does it give a right to sue upon the facts disclosed by the present record. The state, like an individual or private corporation, may refuse to keep its engagements; and the board of public lands and buildings, as a governmental agency having plenary authority in all matters pertaining to the control and management of the penitentiary, is vested with power to determine whether the state will perform or refuse to perform its contracts for the leasing of convict labor. The action of the members of the board in the matter is the action of the state; their determination is its determination. The case of *State v. Toole,* 26 Mont. 22, upon which counsel for relator seem mainly to rely, is not pertinent. That was not an action for specific performance, but to compel certain state officers to discharge a duty specially enjoined upon them by statute. In refusing to sign the contract in question those officers did not do the will of the state. On the contrary they refused to do what the state had in express terms commanded them to do. The distinction between that case and this is obvious.

The writ is denied.

WRIT DENIED.

FRANK EDWARDS V. STATE OF NEBRASKA.

FILED JUNE 18, 1903. No. 13,147.

1. **Rape.** Sections 11 and 12 of the criminal code describe three classes of crimes, each of which is totally distinct from the other two. The second clause of section 12 makes it unlawful for a man to have sexual intercourse with a female child, with her consent, whether she is or is not his daughter or sister.

2. **Leading Questions.** The trial court has a large, though not an unlimited, discretion in granting or refusing permission to ask a witness leading questions.

3. **Harmless Error.** Error in sustaining an objection to a question is without prejudice, if the same question is afterwards asked and answered.

4. **Instruction: ERROR.** The failure of the court to instruct the jury, that a defendant charged with rape can not be convicted without evidence corroborating the prosecutrix, is not error, unless it appears that such an instruction was requested.

5. ———: PENALTY. Where the jury are not required to fix the punishment, the trial court is under no obligation to tell them what penalty is annexed by law to the crime charged in the information.

6. ———: PRESUMPTION. An instruction, in which the jury are told that the presumption of innocence continues until the material allegations of the information are established by the evidence "to the exclusion of all reasonable doubt," is entirely accurate.

7. ———: REASONABLE DOUBT. The instruction on the subject of reasonable doubt, considered by this court in several cases, and found in Good and Corcoran, Instructions to Juries, sec. 146, at page 261, is, perhaps, less intelligible than the phrase defined, but yet plain enough to be within the comprehension of ordinary men.

ERROR to the district court for York county; BENJAMIN F. GOOD, DISTRICT JUDGE. *Affirmed.*

George B. France and *M. M. Wildman,* for plaintiff in error.

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

SULLIVAN, C. J.

Edwards was tried in the district court for York county upon an information charging him with having had sexual relations with Ruby L. Robinson, a female child under the age of thirteen years. The jury found him guilty and he was sentenced to imprisonment in the penitentiary for a term of three years. It was neither alleged nor proven that the girl was not the daughter or sister of the accused, and this is the first point urged against the conviction.

The argument by which it is sought to support the claim that the information is defective in failing to negative kinship is not convincing and is hardly specious. Sections 11 and 12 of the criminal code describe three classes of crimes, each of which is totally distinct from the other two. By section 11 it is declared to be unlawful for any person to have carnal knowledge of his daughter or sister forcibly and against her will. By the first clause of section 12 the act of having forcible carnal knowledge of any woman or female child, other than a daughter or sister, is denounced as a crime; and by the second clause sexual intercourse with a female child under the age of eighteen years, without force and with her consent, is forbidden. The act charged in the information does not constitute a violation of section 11 nor of the first clause of section 12, because the elements of force and non-consent are wanting; but it does clearly charge a violation of the second clause of section 12. That clause makes it unlawful for a man to have sexual intercourse with any girl under the age of consent. It takes no account of blood relationship. The defilement of the child without force is what constitutes the crime; whether she is or is not the daughter or sister of the accused is an irrelevant consideration. These views are supported by *George v. State,* 61 Neb. 669, and are, we believe, in harmony with the whole current of judicial opinion.

Numerous assignments of error are based upon rulings of the court permitting leading questions to be put to the witness, Ruby L. Robinson. The manner in which witnesses shall be examined is a matter over which the trial court has a very large discretion. *Schmelling v. State,* 57 Neb. 562; *Welsh v. State,* 60 Neb. 101. In this case that discretion was not abused. On the contrary it was, we think, exercised with judgment and discrimination.

The ruling of the court sustaining an objection to a question asked on cross-examination of Ruby L. Robinson is assigned as error. We need not inquire whether the ruling was right or wrong as the identical question was

afterwards asked and answered. The alleged error was, therefore, not prejudicial.

It is next insisted that the testimony of the prosecutrix lacks adequate corroboration and that the evidence is insufficient to sustain the verdict. We should be glad to accept this view of the matter if it had a reasonable basis in the record, but unfortunately it has not. Miss Robinson's story is not incredible, and it is greatly strengthened by circumstances which the defendant himself admits. Confirmation of the most persuasive kind is found in the testimony of Myrtle Johnson, who says that she saw Edwards and Ruby together at the time in question and actually witnessed the alleged criminal act.

It is contended that the venue of the crime was not proven, but in this counsel for defendant are mistaken. The evidence upon this point is plain, positive and ample.

Complaint is made because the court failed to instruct the jury that there could not be a conviction without evidence corroborating the testimony of the prosecutrix. The jury were told that they could not convict the defendant unless convinced by the evidence beyond a reasonable doubt that he was guilty as charged, but they were not informed that corroboration is indispensable in cases of this kind. There is authority for the claim that such an omission is reversible error, but the decisions of this court establish a contrary doctrine. The defendant having failed to tender an instruction embodying the idea that corroborative evidence was essential, the trial court was not in fault. *Carleton v. State,* 43 Neb. 373; *Reynolds v. State,* 53 Neb. 761; *Johnson v. State,* 53 Neb. 103; *Maxfield v. State,* 54 Neb. 44. See also 11 Ency. Pl. & Pr. 247, where a full collection of the cases bearing upon this question will be found.

It is contended that the court erred in not telling the jury that the punishment for the crime charged was imprisonment in the penitentiary for not less than three nor more than twenty years. There is, of course, no merit in this contention. It was the business of the jury to deter-

mine from the evidence whether the defendant was guilty or innocent; they had no other duty or function to perform and they could not have been aided in reaching a right conclusion by knowing what penalty the law annexed to the crime. "Where the jury are not required to fix the punishment in a criminal prosecution, it is not error to refuse to instruct them as to the penalty." *Ford v. State,* 46 Neb. 390.

The court said to the jury in the 5th paragraph of the general charge:

"The law raises no presumption against the defendant; on the contrary the presumption of law is in favor of his innocence. This presumption of innocence continues through the trial until every material allegation in the information is established by the evidence to the exclusion of all reasonable doubt."

The criticism upon this instruction is that it permits a conviction without proof of guilt beyond a reasonable doubt. We think the language employed by the court is apt and entirely accurate. The distinction between the state of a mind convinced beyond a reasonable doubt and the state of a mind from which all reasonable doubt has been excluded is too subtle and elusive to be of practical value in the administration of the criminal law. A mind from which every reasonable doubt has been excluded is not, we suppose, more likely to convict than one that has passed over every such doubt.

It is contended that the charge of the court on the subject of reasonable doubt is erroneous, but our own decisions furnish a conclusive answer to that contention. *Bartley v. State,* 53 Neb. 310, 359; *Carrall v. State,* 53 Neb. 431, 438. In the cases cited the instruction here in question was considered and not disapproved. It has, to be sure, no special merit; the definition which it gives is, perhaps, less intelligible than the phrase defined, but that may be said of the common run of such instructions.

There is no material error in the record and the judgment is therefore

AFFIRMED.

FRED RENO V. STATE OF NEBRASKA.

FILED JUNE 18, 1903. No. 12,651.

1. **Proceeding to Correct Record:** NOTICE. A defendant was accused and convicted of a felony in the district court. He appealed to this court, employing other counsel to prosecute the error proceedings. The state, finding it necessary to have the record of the trial corrected, began proceedings for that purpose, serving notice of the motion to have the record corrected, and of the hearing thereof in the district court, on the attorney of the defendant who was prosecuting the error proceedings. A special appearance was made in the district court and an objection to its jurisdiction to hear the motion was interposed on the ground that the notice served on the attorney was not sufficient to authorize the court to act on the motion. *Held*, The service of the notice on the defendant's attorney was sufficient and that the court was authorized to act on the application of the state to correct the record.

2. **Remedy to Correct Record.** Where a record of the trial court filed in this court is found to be incorrect, the remedy is by appropriate proceedings to secure a correction thereof in the lower court.

3. **Information.** The word "feloniously" can serve no practical purpose in an information charging all the essential elements of a felony. *Richards v. State*, 65 Neb. 808.

4. **Instructions.** Instructions given the jury and excepted to, examined, and the giving thereof *held* to be free from prejudical error.

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

ERROR to the district court for Sheridan county: JAMES J. HARRINGTON, DISTRICT JUDGE. *Affirmed.*

Allen G. Fisher, for plaintiff in error.

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

HOLCOMB, J.

Leave has been given the state to supplement the record in this case by the filing of an additional transcript. The original transcript, it appears, is incorrect, and for the purpose of correcting and perfecting the record of the trial the state has by supplemental proceedings in the district

court, obtained an amendment and correction of the record, which is evidenced by the additional transcript which the state has been given permission to file. The defendant not only objects to the order permitting the filing of a transcript of the corrected record, but also challenges the right and authority of the district court to correct its records in the manner it has done, as evidenced by the amended transcript. It may well be doubted whether the defendant has properly presented to this court, for review, the supplemental proceedings to correct the record had in the district court, there being no attempt to prosecute error from the order of the trial court correcting its records nor objections thereto, save those orally presented and argued on the motion of the state for leave to file a corrected transcript. Overlooking this imperfection, we are satisfied the defendant has no legal ground for complaint by reason of the order of the district court in correcting its own records to conform to what it has found to be the truth regarding the trial of the case. The corrected record relates to the instructions given the jury and eliminates one of the grounds of error relied on by the defendant for a reversal of the judgment pronounced against him; hence his objection to the correction and to the filing of the additional transcript evidencing the true record of the trial. Notice of the application to supply and correct the record of the trial, with reference to the instructions given the jury, was served on the defendant's attorney who is appearing for him in this court. A special appearance was made in the district court and objection to its jurisdiction, authority, and right to act in regard to the matter, was made on the ground that the attorney's employment was restricted, and solely in regard to his services in the supreme court, and, because thereof, the notice served on the attorney was insufficient. We regard the notice as sufficient to authorize the action taken by the district court. The correction of the record was for the very purpose of properly presenting the case for review in this court. The attorney was employed for the purpose

of obtaining such review. His employment, therefore, made him the attorney for the defendant for all purposes connected with the main object of employment, and this included the doing of all things proper and needful to have his cause reviewed in the supreme court. The authority of the attorney to accept service of notice of an application to correct the record, in order that a review properly might be had of the cause as tried in the lower court, or his right to initiate action to accomplish that purpose, can hardly be doubted. If this be true, notice served on him was good notice to his client. On authority, it would seem that service of the notice on the attorney who conducted the defense in the court below would be insufficient when another attorney had been employed to prosecute error, the employment of the former having been terminated by the rendition of the final judgment in the trial of the case. *Ellis v. Ellis,* 13 Neb. 91. But, in our view, the relationship between the defendant and his present attorney is of such character as to authorize the service of notice of any necessary step to be taken in the proceedings, whether in this court or in the lower court; for the purpose of correcting the record it is sufficient to bind the defendant and authorize action by the court to whom the application is made.

The rule is well settled that where a record of the trial court filed in this court is found to be incorrect, the remedy is by appropriate proceedings to secure a correction thereof in the lower court. *Merchants Savings Bank of Providence v. Noll,* 50 Neb. 615; *Andresen v. Lederer & Strauss,* 53 Neb. 128.

Regarding the errors complained of on the submission of the cause on its merits, it is contended the information is fatally defective and will not support a conviction of the crime attempted to be charged. The defendant was prosecuted under section 46*a* of the criminal code for sending a threatening letter to one Charles W. Clafflin the complaining witness; and the information states the offense substantially in the language of the statute but omits the use

of the word "feloniously" in charging the crime. Because of this omission it is the defendant's contention that the information is defective. A similar objection was urged on our attention in *Richards v. State,* 65 Neb. 808, and what is there said will dispose of the objection here presented.

Some of the instructions are excepted to, but we find in none of them such prejudicial error as would call for a reversal of the judgment of conviction. Instruction number five on the subject of reasonable doubt, which is more vigorously assailed than any of the others, is in the same, or substantially the same, form as given by other trial courts which have received the approval of this court in more than one instance, beginning with the case of *Carleton v. State,* 43 Neb. 373. We find no prejudicial error in the instructions complained of.

Finally, it is urged that the evidence is insufficient to support the verdict of guilty. The threat was contained in a written communication sent through the mails and was in the following language:

"Mr. Clafflan you have had a hint that you are not wanted here the next one will be worse and not long comeing Now git you sun of a bitch. THE COMMITTEY."

It appeared in evidence that the complaining witness's house had recently been burned down by incendiarism. The significance of the letter, under such circumstances, could not well be misunderstood or misinterpreted. The testimony was positive to the effect that the defendant posted the letter and that it was, on the same day, received by the complaining witness through the mails. While our attention is called to some discrepancies between different witnesses as to dates, yet this does not materially weaken the testimony establishing the principal fact in the case, that is, that the threatening communication was actually dropped in the post office mailing box by the accused and from there taken and delivered through the mails to the party to whom addressed. The defendant admits being present at the time and place when and where it is testified

by the state's witnesses he deposited the letter in the mailing box, but he denies he placed the letter there. The jury under the circumstances evidently discredited his testimony denying he mailed the letter, and we think in view of the other testimony they had good reason for so doing. They were altogether warranted under the evidence in finding the defendant guilty as charged. The conviction should stand and the judgment complained of is accordingly

AFFIRMED.

ALFRED LIEBSCHER V. STATE OF NEBRASKA.

FILED JUNE 18, 1903. No. 13,116.

1. **Statutory Rape: CONSENT.** In the prosecution for an assault upon the person of a girl under the statutory age of consent, with intent to commit a rape, it is not necessary to allege or prove that the acts were done against her will. Whether she consented or resisted is immaterial. *Davis v. State*, 31 Neb. 247, reexamined and followed.

2. **Assignments of Error in Admission of Evidence.** Assignments of error relative to the admission of certain evidence over objections examined and found untenable.

ERROR to the district court for Douglas county: IRVING F. BAXTER, DISTRICT JUDGE. *Affirmed.*

Charles W. Haller, for plaintiff in error.

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

HOLCOMB, J.

But one question presented by the record in this case which we are asked to review is deemed worthy of more than passing notice. The defendant was, in the trial court, informed against for the crime of rape upon a female child under the age of consent, to wit, about twelve years of age.

At the trial the jury were, under the instructions given them, authorized to find a verdict of guilty as charged,

or in the event they were not satisfied beyond a reasonable doubt that a rape had actually been committed to find, if the evidence satisfied them of that fact, the defendant guilty of an assault with intent to commit a rape. The accused was, by the jury, found guilty of an assault with the intent to commit a rape, and judgment on the verdict was pronounced by the court sentencing the accused to imprisonment in the penitentiary. It is insisted that the verdict and the judgment pronounced thereon are contrary to the law and the evidence. The contention is grounded on the proposition that no assault was committed on the child because she consented to the act of sexual intercourse or the attempt to commit the act. An examination of the record satisfies us the evidence was ample to have supported a verdict of guilty of rape, not by force and against the will of the prosecutrix but because under the law of this state she was incapable of consenting, and that a crime was committed regardless of the question of whether it was accomplished by force and violence or with the consent and acquiescence of the child. It is proper here to state the acts of the accused do not under the evidence disclose force and violence against the person of the prosecutrix, notwithstanding resistance on her part or lack of assent so far as she was capable of assenting. She was enticed into a bedroom of a hotel, where both were at the time, with money given her; placed on a bed and such force used as was required to accomplish the act of sexual intercourse or the attempt to commit the act, she not resisting but subjecting her person to the lascivious advances of the accused by offering no active opposition thereto. It may well be doubted whether she, in fact, consented to have sexual intercourse with the defendant or to an attempt by him to accomplish the act. Her age and immaturity of body and mind rendered her, doubtless, incompetent to understand the nature and quality of the act and to intelligently consent to the assault made on her person or the act of which the defendant was accused. She, however, was in a subjective state and offered no resistance to the indecent pro-

posals and the acts of the defendant in his endeavors to carnally know and abuse her.

The question then is, can the defendant under such circumstances be found guilty of an assault with intent to commit a rape? The authorities are divided. By section 12 of the criminal code, to have carnal knowledge by a male person over the age of eighteen years of a female child under the age of consent, is declared to constitute the crime of rape of the same degree and punishable to the same extent as though the act was committed forcibly and against the will of the person ravished. By section 14, it is made a crime punishable as therein provided for a person to assault another with intent to commit a rape. To constitute the crime under this section, there are two essential ingredients which must coexist, and be established by the evidence beyond a reasonable doubt, before a person can lawfully be found guilty of the crime, and these are the assault accompanied by an intent to commit the act charged. There can be no serious doubt as to the intent of the accused, assuming that the evidence leaves on the mind some doubt as to rape being actually consummated. Was there an assault within the meaning of the word as used in section 14 of the criminal code, when construed in connection with section 12, which describes and defines the crime of rape? Some of the authorities hold to the view that there can, in such a case, be no assault, because there is lacking the essential element of resistance or want of assent which is necessary to constitute the offense. An assault is defined as an attempt unlawfully to apply any, the least, actual force to the person of another directly or indirectly without the consent of the person assaulted or with such consent if it is obtained by fraud. Stephen, Digest of Criminal Law (Am. ed.), 181. As a rule, it is said, consent on the part of the complainant deprives the act of the character of an assault, unless non-resistance has been brought about by fraud. *Pillow v. Bushnell,* 5 Barb. (N. Y.) 156; *People v. Dohring,* 59 N. Y. 374; *Champer v. State,* 14 Ohio St. 437; *Smith v. State,* 12 Ohio

St. 466; *State v. Burgdorf,* 53 Mo. 65; *Duncan v. Commonwealth,* 6 Dana (Ky.), 295; *State v. Murphy,* 6 Ala. 765; *Anschicks v. State,* 6 Tex. App. 524.

But the authorities all recognize that there may be submission by a child of tender years to an assault, without legal consent. In such cases, consent, when obtained from a child incapable of giving it, can avail the offending party no more than if consent from a person competent to give it were obtained by fraud or deceit. *Cliver v. State,* 45 N. J. Law, 46; *Hays v. People,* 1 Hill (N. Y.), 351; *People v. Justices of the Court of Special Sessions,* 18 Hun (N. Y.) 330. This view of the subject commends itself to us as sound and to recognize the true reason at the foundation of the general rule, that the assault must be by violence directed against another without such other's consent. The statute of this state has said in unmistakable terms, that a female child under the age of fifteen years is incompetent, under any and all circumstances, to consent to sexual intercourse and that the act when committed constitutes the crime of rape. We have held more than once that on a charge of rape on such person, whether or not the act was with the consent of the prosecutrix is wholly immaterial, because the law declares her incapable of giving consent. *Davis v. State,* 31 Neb. 247; *George v. State,* 61 Neb. 669. If such a person be incapable of consenting to the act of sexual intercourse, it would seem for reasons quite apparent that she could not consent to an assault with the intent to commit the crime. It is a trite saying in the law, that the lesser crime is included in the greater, and if a person be in fact guilty of the crime of rape on a female child under the age of consent who can not legally consent to the completed act, it is difficult to escape the conclusion, by any logical process of reasoning, that such person is also guilty of an assault with the intent to commit the crime. It is conceded by counsel for the accused that *Davis v. State, supra,* is an authority against the proposition he is contending for, but it is urged the construction of the section of the criminal code defining the crime of an assault

with intent to commit rape, as therein given, is incorrect and should be repudiated; that the assault is the characterizing element of the crime described in section 14, the intent being merely an aggravation, and that force is the essential element of the assault. It is held in the case referred to, unqualifiedly, that an assault, by a male person of the age of eighteen years or upwards, with intent to carnally know a female child, under the age of fifteen years, is punishable in this state as an assault with the intent to commit a rape. In the opinion, NORVAL, J., speaking for the court, said:

"This prosecution is brought under section 14 of the criminal code, which provides that 'If any person shall assault another with intent to commit a murder, rape, or robbery upon the person so assaulted, every person so offending shall be imprisoned in the penitentiary not more than fifteen years nor less than two years.'

"Section 12 quoted above defines the crime of rape, and it was the intention and purpose of the legislature, in adopting section 14, to punish as a crime an assault upon a female child under fifteen years of age, with intent carnally to know her, whether she formally consented to the assault or not, as well as an assault made upon a female over the age of fifteen years, forcibly and against her will with intent to commit a rape. As it is not necessary in a prosecution for a rape committed upon a child under the age of consent to prove that the acts were done against her will, so an assault with intent to commit a rape made upon a girl under the age of fifteen years is punishable under the statute, although committed with the consent of the child. Whether she consented or resisted the assault is not material. *Fizell v. State,* 25 Wis. 364; *People v. Gordon,* 70 Cal. 467, 11 Pac. 762; *Hays v. People,* 1 Hill (N. Y.), 351; *Commonwealth v. Roosnell,* 143 Mass. 32; *People v. McDonald,* 9 Mich. 150; *Mayo v. State,* 7 Tex. App. 342; *State v. Johnston,* 76 N. Car. 209; *Territory v. Keyes,* 5 Dak. 245, 38 N. W. 440; *People v. Courier,* 79 Mich. 366, 44 N. W. 571; *Stephen v. State,* 11 Ga. 225; 1 Wharton, Criminal Law

(9th ed.), 577; *State v. Grossheim,* 79 Ia. 75, 44 N. W. 541."

In *Hays v. People, supra,* a New York case, the court, in holding that the consent of a female under ten years of age or even her aiding the person accused of the assault is no defense, say:

"The assent of such an infant being void as to the principal crime it is equally so in respect to the incipent advances of the offender. That the infant consented to, or even aided in the prisoner's attempt, cannot, therefore, as in the case of an adult, be alleged in his favor, any more than if he had consummated his purpose. The case submitted to the jury, was that of a man having another in his power, and within reach, threatening and exerting the means to accomplish meditated violence upon her person. This is clearly an assault within all the authorities."

The supreme court of Indiana in *Murphy v. State,* 120 Ind. 115, overrules a prior case, *Stephens v. State,* 107 Ind. 185, holding to the contrary and adopts the doctrine that an assault with intent to commit a rape may be committed upon a female under the age of consent, regardless of the question of resistance on her part or of her consenting thereto. In the opinion it is said:

"The statute having made the act of sexual intercourse with a female child under twelve years of age a crime, it must follow as a logical conclusion that the abuse of her person with a view to the accomplishment of that act constitutes an assault and battery with the intent to commit a rape, if sexual intercourse does not take place.

"If, under the law, a female under twelve years of age is incapable of giving her consent to the act of sexual intercourse, then she is equally incapable of consenting to all familiarity with her person that necessarily precedes the consummation of the act.

"It was not the intention of the legislature that a female under twelve years of age, because of her tender years, should be protected from an accomplished act of seduction, but left entirely unprotected from all of the defiling acts of the seducer that lead up to her seduction."

In speaking of the subject, the author of McClain's Criminal Law (vol. 1, sec. 464) says:

"In those states where the offense of having carnal knowledge of a female child under the age of consent is regarded as a different crime from that of rape, the attempt to have such connection is not an assault with intent to commit rape. But where (as is the rule in most states) the connection with a female child under the age of consent is considered as rape, it is almost universally held that an attempt to have such connection is an assault with intent to commit rape, the consent of the child being wholly immaterial."

The following authorities are cited by the author which seem to fully and fairly support the latter proposition contained in the text. *People v. McDonald, supra; People v. Crosswell,* 13 Mich. 427; *People v. Courier, supra; People v. Ten Elshof,* 92 Mich. 167; *Fizell v. State, supra; State v. Meinhart,* 73 Mo. 562; *State v. Wray,* 109 Mo. 594; *State v. Wheat,* 63 Vt. 673; *Davis v. State, supra; Murphy v. State, supra; State v. Newton,* 44 Ia. 45; *Territory v. Keyes, supra; State v. Johnston, supra; State v. Dancy,* 83 N. Car. 608; *State v. Staton,* 88 N. Car. 654; *Glover v. Commonwealth,* 86 Va. 382; *McKinney v. State,* 29 Fla. 565.

We are of the opinion that both on reason and authority the rule enunciated in *Davis v. State, supra,* is sound and violates no legal principle and that there exists no sufficient grounds for its modification or abandonment and it is, accordingly, reaffirmed.

Some objections are made to the rulings of the trial court on the admission of evidence, but we find from an examination of the record that neither of the two objections to which our attention is called is well taken. Finding no prejudicial error in the record, the judgment of the trial court should be, and accordingly is, in all things,

AFFIRMED.

CHARLES WILLIAMS V. STATE OF NEBRASKA.

FILED JUNE 18, 1903. No. 13,182.

1. **Arrest: ATTEMPT TO ESCAPE.** An attempt to escape by one under arrest accused of crime is an inculpatory circumstance properly to be considered by a jury and to be given such weight as it seems fairly entitled to, with the other evidence introduced at the trial, in determining the question of the guilt or innocence of the accused.

2. **Instructions.** When no proper instruction has been requested, it is not prejudicial error for a trial court not to specially instruct the jury as to the law applicable to evidence tending to prove an attempt to escape by a prisoner accused of a crime.

3. **Oral Directions as to Verdict.** Oral directions to the jury set out in the opinion relative to the reception of a verdict examined, and *held* not to be violative of the rule requiring all instructions to be in writing; nor to be evidence of coercion of the jury.

ERROR to the district court for Lancaster county: LINCOLN FROST, DISTRICT JUDGE. *Affirmed.*

Lorenzo W. Billingsley, Robert J. Greene and *Richard H. Hagelin,* for plaintiff in error.

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

HOLCOMB, J.

The defendant is charged with the crime of robbery from the person, accomplished by violence and by putting in bodily fear the victim of the assault. A trial to the court and jury resulted in a verdict of guilty as charged in the information. A motion for a new trial having been overruled, the judgment of the court was pronounced sentencing the defendant to imprisonment in the penitentiary for a period of twelve years. The defendant prosecutes error in this court for the purpose of having a review of the record of his trial and obtaining a reversal of the judgment of conviction.

On the trial of the case some evidence was introduced

by the prosecution tending to prove that the accused had attempted to escape from custody after his arrest on the charge of the commission of the alleged crime. An instruction relating to the testimony on this point was asked by the defendant in the following form:

"The jury are instructed that an attempt to escape is no evidence of guilt."

Refusal to give the instruction is assigned as error. The ruling of the court on the requested instruction was in harmony with the prior decisions of this court, and in conformity with the generally accepted rule as to the admissibility of such evidence, as we understand the question. The attempt to escape, if one was made, was an inculpatory circumstance properly to be considered by the jury and to be given such weight as it seemed fairly entitled to with the other evidence introduced, in determining the question of the guilt or innocence of the accused. Says Mr. Bishop in his new Criminal Procedure (vol. 1, sec. 1250):

"Proof is admissible that after the supposed commission of the crime, the defendant fled or concealed himself, as though to elude justice; or endeavored to avoid arrest or after arrest, attempted or effected his escape, or gave straw bail and forfeited his recognizance. The weight of this evidence is for the jury; sometimes it is slight, it is always open to explanation by the defendant, and is often greatly modified by the special circumstances."

See, also, *Matthews v. State,* 19 Neb. 330; *George v. State,* 61 Neb. 669, 675.

But it is contended that even if the instruction tendered does not correctly state the law, still it was the duty of the court to have instructed the jury on that point, as it was a material issue and the failure to do so is reversible error. Whether the defendant attempted to escape or not, was not a material issue such as required a finding of its existence or nonexistence before a verdict responding to the general issue could be returned. It was not an essential element necessary to constitute the crime charged.

The testimony relating to the matter may have had little or no weight with the jury in finding their verdict, and yet the evidence otherwise be such as to entirely justify them in finding the defendant guilty. The fact of the attempted escape, if believed by the jury, was, simply, an evidentiary circumstance to be considered for whatever it is worth in determining the guilt of the accused; and the failure of the court to charge especially as to the law applicable to such evidence would not amount to prejudicial error, any more than a failure to give a specific charge on many other incriminating circumstances shown in evidence. The jury, after hearing all the evidence, were to judge of the weight and convincing power of this evidence in ascertaining the truth of the charge, as they would other facts and circumstances tending to prove guilt, and arrive at a verdict accordingly. No reversible error was committed because of the court's failure to specifically instruct the jury on the point under consideration. After arguments by counsel and the instructions which were given to the jury by the court on the law of the case, the court it appears stated orally to the jurors:

"Gentlemen of the jury, if you agree on a verdict within a reasonable time the court will receive the same. You can not in this case bring in a sealed verdict."

One of the jurors asked what was meant by a "reasonable time," and the court responded orally:

"By a reasonable time I mean not later than 10 o'clock."

It is said this transaction as it occurred constitutes error calling for a reversal of the judgment, because the language used by the court amounted to the giving of oral instructions contrary to the statute and the rule requiring all instructions to be in writing, and that the instructions thus given also amounted to a coercion of the jury in that it required them to return a verdict within the time stated or subject themselves to the displeasure of the court or a prolonged confinement in the jury room, without an opportunity of returning a verdict when they should agree upon one. We do not think either objection is tenable.

What was said to the jury was not an instruction in the proper sense of the word, but information advanced with reference to the time during which a verdict could be received in open court on the day in which the cause was submitted, and that, in the cause then on trial, a sealed verdict, such as might be received in many cases, could not be returned. When fairly interpreted, the statement was in substance that the court would be open to receive the verdict if agreed upon at any time before 10 o'clock on that day and, if not, the jury would be required to remain together till the court again opened on the following day. No rule was violated in giving these directions by the court orally and there was nothing contained in what was said that can properly be construed as evidence of coercion. The jury will be presumed to have been composed of men of average intelligence, acquainted with the procedure and mode of conducting trials obtaining in the courts in the hearing of causes requiring the aid of a jury, and to have understood the court's statements as meaning only that the court was ready to receive the verdict, if agreed upon at any time before the hour named and, if not, it could not be returned until the opening of court the following day. The foregoing disposes of all the objections argued in the brief of counsel for the defendant; and, from a consideration of each and all of them, we are persuaded that no sufficient reason has been presented for a reversal of the judgment and sentence pronounced by the trial court. The judgment is therefore, in all respects,

AFFIRMED.

COUNTY OF ADAMS V. ADNA H. BOWEN.

FILED JUNE 18, 1903. No. 12,823.

Allowance to Clerk of County Court. Under the authority of chapter 34 of the laws of 1897, the county board may, in the exercise of good faith, make a supplemental allowance of compensation for the services of the clerk of the county court after the services have been rendered.

ERROR to the district court for Adams county: ED L. ADAMS, DISTRICT JUDGE. *Affirmed.*

Addison S. Tibbets, George W. Tibbets and *C. F. Morey,* for plaintiff in error.

John M. Ragan, contra.

AMES, C.

During the year 1901 the defendant in error was county judge of Adams county. In January of that year the county board made an order granting him the sum of $600 as compensation for clerk hire for the then ensuing year, provided the fees of his office during that time should be sufficient for the payment of the same. The fees and emoluments of the office for the time mentioned exceeded the salary of the county judge by more than $1,100. The allowance was made and a clerk of the court was duly appointed and qualified under the authority of chapter 34 of the laws of 1897. The only provision of the statute with reference to the payment of the clerk of the county court is section 4 thereof, as follows:

"The compensation of the clerk of the county court shall be fixed by the board of county commissioners."

The clerk served throughout the year and on the 13th of January, 1902, the board made an additional allowance for such service in the sum of $125. An appeal from this latter allowance was taken to the district court, where it was affirmed, and from the judgment of affirmance error is prosecuted to this court. The only question is whether the county board had power or jurisdiction to make the allowance. We do not doubt that it had. Neither the time, manner, nor amount of compensation to be allowed to the clerk is fixed by the statute, but the whole matter is left to the discretion of the county board. Doubtless this discretion is impliedly limited to the exercise of good faith, but there is no suspicion of its absence in this instance. It is apparent from the record that both the labor and emolu-

ments of the office of county judge increased, during the period in question, beyond the expectations of the board. A contingency may readily be imagined in which the service required would not have been obtainable for the compensation at first allowed, in which case its increase by supplemental allowance would have been unavoidable. There is nothing in the statute requiring that the allowance shall be made in advance of the rendition of the service, nor is there any evident public policy requiring that it should be so made.

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

HASTINGS and OLDHAM, 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.

FARMERS LOAN & TRUST COMPANY, APPELLANT, V. JAMES S. SUYDAM ET AL., APPELLEES.

FILED JUNE 18, 1903. No. 11,696.

Contract: MISTAKE: REFORMATION. Where parties have made a contract under a mutual mistake as to the existence of a fact which is a material inducement to it, such mistake may give a right to rescission, but is no ground for reforming the contract, and making it as the parties might presumably have done had they been aware of the truth.

APPEAL from the district court for Douglas county: JACOB FAWCETT, DISTRICT JUDGE. *Affirmed.*

William A. Saunders, for appellant.

A. B. Coffroth, Henry W. Coffroth, Henry W. Pennock, and *Flower, Peters & Bowersock, contra.*

HASTINGS, C.

The essential question in this case is as to the right to reform a quitclaim deed made in March, 1895, by the appellant trust company to James S. Suydam. This quitclaim deed purported to convey all the interest in and claims upon certain property in Omaha, "acquired under and by virtue of any and all tax sales and tax deeds." Plaintiff says that at the date of the deed it held a certificate of purchase of the property in question for the tax of 1893; that the fact of such ownership was not known to its attorneys and agents, through whom the quitclaim was made; and it asks to be allowed to reform the deed to except this sale certificate from its terms, and to foreclose the lien for taxes represented by it.

Defendant Close answered, denying the allegations as to a purchase for taxes of 1893; admitting his own title through Suydam, and that negotiations were had for a settlement of tax liens; and says that the quitclaim deed was given, accepted and paid for under the express agreement, as well as supposition, that it was a complete settlement of all tax liens held by plaintiff, and would have been accepted on no other consideration; that Suydam paid $795 for the deed with that understanding. He offered to reconvey and place the plaintiff in the same position as before the execution of the deed, if the $795 were repaid, or if credit to that amount as of the date of the deed were given upon the various tax liens held by plaintiff at the date of the deed. Close also alleged that the tax levy of 1893 was void, by reason of irregularities in the levy, through failure of the city board of equalization to hold its sessions, and failure of the county board to make a levy at the time provided by law. He also alleged that plaintiff was concluded by a decree of the United States circuit court foreclosing its tax liens, which plaintiff is alleged to have released. No claim of any rights, as innocent purchaser from the grantee in the quitclaim deed, was made by Close.

Plaintiff in reply denied all Close's allegations, said he got but $725 instead of $795 for the quitclaim deed, and alleged that Suydam and Close both knew what taxes were claimed by plaintiff at the time and were the basis of the quitclaim deed, and that the certificate of sale of 1894 was not included.

The court made a general finding for defendants and dismissed the action. Plaintiff appeals.

The other defenses are apparently not insisted upon, but it is insisted that there is nothing in the record which warrants any reformation of this deed, and that the utmost which the facts shown would warrant is the rescission of the agreement for settlement and the restoration of the parties to their former position. A somewhat careful reading of the evidence leads the writer to the latter conclusion.

The evidence tendered by plaintiff to establish its right to reformation of the contract consists of the depositions of its attorney, Mr. M. J. Sweeley, its president, James F. Toy, its secretary, G. N. Sweetser, and the letters by which the negotiations were wholly conducted. They show clearly that the negotiations related solely to a tax sale in 1890 for taxes of 1889, and to subsequent taxes for 1890, 1891 and 1892 paid by plaintiff as tax purchaser. It appears clearly that the certificate of sale of November, 1894, was in plaintiff's possession before the making of the deed of March 25, 1895, to Suydam, but was not known to plaintiff's attorneys and agents who negotiated the settlement, or to the officers who executed the deed.

The correspondence shows that the plaintiff was claiming in December, 1894, $778.90 as due under the sale of 1890 and on subsequent taxes paid under it. The taxes for 1894 are referred to as unpaid by the plaintiff, but it clearly appears that the entire claim of plaintiff was negotiated for. Defendants claimed that it would amount to no more than $694 in any event. In a foreclosure suit brought in the United States circuit court upon a mortgage covering the property, a decree was entered in 1894,

in plaintiff's favor, for $782 taxes, which did not include the sale of 1894. It was found that the owner of the fee had not been made a party to that foreclosure, and negotiations for settlement went on.

Suydam's attorney called attention to the fact that there had been a resale of the property. None of the parties to the negotiations, however, were aware of plaintiff's connection with the sale. Plaintiff's officers finally agreed with Close's and Suydam's attorneys to accept $725. This was paid, and the quitclaim deed in the terms stated, the tax deed issued on the sale of 1890, and tax receipts for the years 1890 to 1892, inclusive, were turned over. M. B. Proctor, of Kansas City, who was agent for Suydam, says he paid $795 to a land agent at Omaha for the settlement of plaintiff's claim. The quitclaim deed recites a consideration of $1. Proctor also paid some tax claims held by a Mr. Baer, and acted, as he swears, and there is nothing to contradict him, on the supposition that all tax claims were settled, except for the taxes for 1894, which Suydam afterwards paid.

It is clear that these negotiations which resulted in the deed, which it is sought to reform, related only to the first tax sale and to payments made under it. Suydam, on the other hand, was negotiating to clear this land of tax liens, and seems to have abandoned defenses, more or less tenable, against these taxes. It is clear that the deed was made by officers, in ignorance of the further claim for the tax of 1893, by reason of the 1894 purchase, and was accepted under the like supposition that it cleared off all liens held by plaintiff, as it purported to do. That is, the deed was made by the parties precisely as they intended it, but, under a mutual mistake of facts, there was a further lien for 1893 taxes, of which neither of them knew.

It would not be equitable to enforce a reformation of this deed, which would leave the grantor in possession of a tax-sale certificate enforcible against this land, but will leave the grantee to pay the full consideration for less

than the clear title he thought he was getting. The grantee tenders in his pleadings a reconveyance. It would seem that the plaintiff is entitled to no more than that. If it had accepted this reconveyance, it would have been at liberty to proceed with the enforcement of both its liens for the amount legally collectible upon them.

The difficulty in decreeing a reformation in this case consists in the fact that the minds of the parties do not seem to have ever met upon the contract, in the form in which it is sought to be put. 3 Pomeroy, Equity Jurisprudence (2d ed.), section 1376. It is clear from the negotiations of these parties that each at the time fully intended a final and complete settlement of the tax claims. The fact that certain items were omitted would, doubtless, entitle either party to rescind, but would not entitle either party to claim a partial settlement, which neither of them ever agreed to. The demand of the defendant that plaintiff be required either to rescind the contract *in toto,* and place the property again in the position in which it was at the time of the giving of the quitclaim deed, or else abide by the terms of that deed, seems to be much more equitable than the demand of the plaintiff that this settlement, which was supposed to have been in full of all claims, should be held valid as to claims which were under discussion between the parties, but should be held to leave the plaintiff at liberty to assert, now, its further claim for the amount of its second certificate of purchase, which it then held but made no claim upon, and which is expressly surrendered in the deed. Plaintiff having elected in the lower court to accept a decree of dismissal rather than rescind, it can not now complain of anything inequitable in the decree. It is recommended that the judgment of the district court be affirmed.

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

AFFIRMED.

NEW ORLEANS COFFEE COMPANY, LIMITED, v. HENRY F. CADY.

FILED JUNE 18, 1903. No. 12,931.

1. **Peremptory Instruction: COUNTER-CLAIM: EVIDENCE.** It is not error to refuse a peremptory instruction for a verdict for plaintiff, where defendant has introduced evidence tending to support a counter-claim set up in the answer.
2. **Verdict: EVIDENCE.** Evidence sufficient to take a question to the jury, will ordinarily support a verdict upon it.
3. **Agent's Authority: INSTRUCTION.** Not error to submit to jury the question of the extent of a selling agent's authority to accept payment in something besides money, where there is evidence of statements by the principal's general manager tending to show such authority.
4. **Instruction: EVIDENCE.** It is error to submit to a jury the question as to whether goods were purchased from one H., as principal, or from him as agent of plaintiff, where the evidence points only to the latter conclusion.

ERROR to the district court for Douglas county: JACOB FAWCETT, DISTRICT JUDGE. *Reversed.*

Crane, Crane & Erwin, for plaintiff in error.

Montgomery & Hall, contra.

HASTINGS, C.

Plaintiff brought this action in Douglas county district court, claiming $170.50 on open account for coffee sold and delivered. The defendant denied that plaintiff had sold him any goods; alleged that he bought the goods and merchandise mentioned in plaintiff's petition from one J. L. Hutchinson and paid the latter for them in full; that Hutchinson was authorized to sell the merchandise for plaintiff and receive pay, and that any indebtedness held by plaintiff for the goods is against Hutchinson and not the defendant.

By way of counter-claim, the defendant says he made an oral agreement with Hutchinson, who was acting on

plaintiff's behalf, to sell plaintiff 100 coffee stands or tables at the agreed price of $2.50 each and 100 stands or tables at the agreed price of $1.75 each; that plaintiff failed and refused to carry out the contract to defendant's damage in the sum of $175. Subsequently the counter-claim was amended, setting forth an oral contract for the purchase by plaintiff from defendant of the coffee stands at the prices before stated, but alleging increased damages; that defendant caused one stand of each kind to be manufactured and deliverd to plaintiff, who accepted it upon said contract; that defendant at once made arrangements for the manufacture of the remainder for the purpose of filling said contract, but plaintiff failed and refused to carry out its part of the contract, and refused to accept the stands and canceled the contract to purchase; that if plaintiff had not canceled the contract and had carried it out, defendant would have had a profit of $225 in the sale of the stands. A general denial was filed, for reply.

The jury returned a verdict for defendant. Plaintiff brings error on four grounds. *First:* The giving of instruction seven, to the effect that if the evidence showed that the coffee was bought from Hutchinson, the traveling salesman, as principal, and not from the plaintiff, and that the defendant settled with Hutchinson, there could be no recovery. This is claimed to be error on the ground that there was no evidence to warrant any such instruction; that the jury, under the evidence, could not have been warranted in finding that the coffee was bought from Hutchinson and such finding could not have been sustained, and that no such question should have been submitted. *Second:* The giving of instruction eight, which told the jury that if Hutchinson was plaintiff's agent and Cady knew it, but settled with the agent, and that the latter was authorized to make the settlement, then there could be no recovery. This is claimed to have been error for the same reason, namely, that there was no evidence to warrant it; that there was absolutely nothing in the record tending to show any authority on the part of

Hutchinson to make settlement. *Third:* The refusal of a peremptory instruction to find for the plaintiff. *Fourth:* That the verdict is not sustained by the evidence. This last is on the ground that it was necessary to the finding that the jury conclude that Hutchinson was authorized to make settlement for the goods, and no such authority appears.

All the alleged errors relate simply to the sufficiency of the evidence to warrant the verdict, and, also, to justify the court in submitting to the jury the specific questions as to the party from whom the goods were purchased and his authority, which were left to their determination.

The refusal of the court to instruct for a verdict, which is the first error assigned, was right. There was evidence tending at least in some degree to support a finding for defendant on his counter-claim. That being the case, of course, no peremptory instruction for plaintiff was possible. No request, by itself, for the withdrawal from the jury for the attempted defense of payment to Hutchinson, was made. The first error, therefore, need not be considered further.

The real questions in this case are: (1) Whether or not there was evidence which warranted the court in submitting to the jury the questions as to whether defendant bought the coffee from Hutchinson, and paid him for it, as principal; and, (2) whether or not, if the coffee was understood to have been bought from plaintiff, Hutchinson had authority to take the pay for it in board.

Of course, if there was evidence to warrant the court in expressly submitting these questions, as it did in the seventh and eighth instructions, then it must be held that there is evidence to support the verdict rendered on them.

It is suggested on the one side that the question of the counter-claim is out of the case, and on the other that, allowing the verdict should have been in favor of plaintiff on its account, it must nevertheless be sustained because the counter-claim may have balanced the account. Neither of these contentions can be sustained in the ab-

sence of special findings. We are not able to say whether the verdict was a finding against both account and counterclaim, or in favor of both, and that they offset each other. It results, that if there were material errors in the submission of either one, the judgment must be reversed. The error, if there is any, is in the non-applicability to the evidence of these instructions, seven and eight.

The evidence on behalf of the plaintiff consists of invoices and shipping receipts for the goods and the testimony of the secretary of the company that no payment had been received for them. The first invoice of coffee bore date April 20, 1900, and had written across its face in ink, "Paid, New Orleans Coffee Co. J. L. H.," without date. The second invoice, $35.25, bore date May 4, 1900, and had written across its face in ink, "Paid 5-14-00. New Orleans Coffee Co., Hutchinson." The third invoice bore date May 14, 1900, for $53.75, and written across its face in lead pencil was, "Wed. 5-25-1900, Paid, J. L. Hutchinson." The fourth invoice bore date June 16, 1900, and was for $36, and across its face was written, in ink, the words "Paid 6-25-1900, J. L. Hutchinson." All these invoices bore the corporate name of the coffee company and were payable in New Orleans or New York funds, in sixty days, less two per cent. for cash if paid within ten days; and any invoice not paid at maturity to be subject to demand draft, with exchange and collection charges. Two invoices, one for $8.50 and the other $11.25, were invoiced as delivered from W. L. May & Co.'s stock at Omaha, June 25, 1900. The defendant testified that he was a resident of Omaha, and, in the year 1900, was conducting the Dellone hotel; that Hutchinson engaged board and room; that the latter said he was handling coffee, but did not, at that time, state for whom; terms for board were satisfactory, if he could pay in coffee; this was acceptable to the defendant, and the coffee was received, the principal part of it turned over to the defendant by Hutchinson, personally, and a part shipped by the New Orleans Coffee Company; that the first invoices were shipped from New Or-

leans, and on its arrival payment was receipted for by Hutchinson, the latter given credit on his bill, and his receipt written across the face as above indicated. The second, third and fourth invoices were settled for in the same way; the invoices were received pursuant to orders given to Hutchinson on these terms. Defendant stated that sometime during the spring the plaintiff's manager, Jones, visited Omaha and had a conversation with the defendant, in which the manager stated, "Mr. Hutchinson represented them, and whatever arrangements Mr. Hutchinson made would be carried out by the company." Defendant also stated that he had arranged with Hutchinson to manufacture coffee stands, for the display of coffee in cans, which would be placed in various stores; that he had an oral arrangement with Mr. Jones, whereby he was to make 100 stands of a large size, at $2.50 each, and 100 of a smaller size, at $1.75 each; that this conversation was in presence of his nephew and of Mr. Cole, in the Dellone hotel; that one, each, of these stands was made and delivered to the plaintiff; that material was procured for the rest; that they were not made because the order was canceled by plaintiff; defendant stated that the larger stands would cost him $1.50, each, to make and the smaller one $1, each; two drafts, one for $150 and one for $100, received by defendant, for board, drawn by Hutchinson on the plaintiff and paid through the banks, were presented in evidence.

Henry C. Cole, a carpenter, testified to the making of two of these stands and to hearing the conversation between the defendant and the manager, Jones; that Mr. Jones, after examining the stands, or during the examination, said, "Whatever Mr. Hutchinson agreed upon, why he was responsible or whatever you may call it." Witness again stated, generally, in reference to the manager's representations with regard to Hutchinson's authority, "Whatever he said was all right or some such way, as that he represented the New Orleans Coffee Company." The manager, Jones, says that Hutchinson was a traveling salesman, in the service from about February 1 to June 29,

1900; that his authority was to take orders, and he had no authority whatever to make collections, except in one or two cases where he had been specially authorized; Mr. Jones stated that he himself employed and authorized salesmen and collectors; that no other person had authority to do so, and that he had given no such general authority to Hutchinson. Sixty days after the shipments of the invoices, drafts were drawn on defendant, from New Orleans, payment of which were refused. Mr. Jones stated that the arrangement with Hutchinson was, that his expenses were to be advanced in cash and he had no authority whatever to contract hotel bills on the credit of the coffee company. With reference to the counter-claim, Mr. Jones testifies to being in Omaha, in May, and giving a conditional order to the Omaha Box Company, through Mr. Cady, for a few coffee stands, but subject to one of them being sent to New Orleans for trial, before anything further was done; this order the Omaha Box Company acknowledged by letter to New Orleans, June 27, 1900, and they requested confirmation of the order by letter and they would proceed with the work; this letter was received June 30, and on the same day a reply was sent, stating that Hutchinson had been discharged, and the company had his letter stating that a sample stand had been shipped, but nothing further was done; and on receipt of the stand further arrangements would be made and, in the meantime, nothing further was done; the witness testified that the stand was never received and nothing further was ever said in reference to them; that the receipt of the sample stand was a condition precedent, which had not been fulfilled.

Hutchinson testifies by deposition, from Philadelphia, that he sold Cady the coffee; that he knew it was delivered, and that credit was given to himself of the amount, on board due; that this transaction was upon the refusal of payment of drafts, drawn in defendant's favor, for board.

Oliver Irwin, attorney for plaintiff, testified to two conversations with the defendant; the first, calling his atten-

tion to the claim of the plaintiff, and defendant then said, let the matter rest a while, he was in correspondence with Hutchinson and that it would be fixed up. At another conversation defendant said that he had just received $60 from Hutchinson, in the shape of a shipment of cigars, and expected to get the whole $170. Hutchinson, in his deposition, had testified that he had received no special instructions from the house, as to Cady's bill charged against the account for coffee, but that he had general authority.

It seems clear that, under the evidence, the extent of Hutchinson's authority was properly left to the jury, by the eighth instruction. The question as to whether or not the purchase of the coffee was from plaintiff or from Hutchinson, as principal, is not so clear. It is true that Mr. Cady testifies to an arrangement, in February, that Hutchinson should pay his board in coffee, and that, at that time, defendant did not know for whom the coffee was sold. He does not say, however, that he did not know, in April, when the first of this coffee came. In fact he must have known then, for he received the invoices showing himself, and not Hutchinson, as consignee, and billing the goods to himself, and not to Hutchinson, under ordinary selling terms, directly from the New Orleans concern.

Three of these six invoices of coffee were delivered in June. In May, plaintiff's manager, Jones, visited Omaha, and the relations between Hutchinson and the plaintiff were expressly discussed. The transactions were had on which defendant's counter-claim was based.

We are constrained to think that Mr. Cady's testimony, that he had no knowledge as to Hutchinson's representing the plaintiff, when the arrangement for board, and for payment in coffee, was made, is not sufficient to warrant, in the face of the other facts, any finding that when he got and settled for this coffee, he bought it of Hutchinson and paid him for it, as principal. We do not think that the evidence warranted the submission of such a question to the jury.

For error in giving instruction seven, submitting this

question to the jury, it is recommended that the judgment of the district court be reversed and the cause remanded.

AMES 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.

REVERSED.

LAURA A. GILBERT, APPELLEE, V. CATHERINE A. GARBER ET AL., APPELLANTS, IMPLEADED WITH NEBRASKA & KANSAS FARM LOAN COMPANY ET AL., APPELLEES.

FILED JUNE 18, 1903. No. 12,912.

1. **Decree of Dismissal as to Plaintiff:** LATER DECREE IN FAVOR OF CROSS-PETITIONER. After a final decree entirely dismissing plaintiff out of an action, a second decree in favor of a cross-petitioner was entered in the same action at the following term of court, before appeal from the first decree. *Held*, That second decree, taken while plaintiff was entirely excluded from participation in the action, was of no validity as against plaintiff after reversal of the decree against her.
2. **Payment:** EVIDENCE. Evidence *held* to sustain the trial court's finding, as to an alleged payment through execution of a new note and mortgage.
3. **Acknowledgment.** Pleading and proof that acknowledgment of a mortgage upon a family homestead taken by an officer and stockholder in a loan company which was agent for the loaner, *held*, not to invalidate the acknowledgment.
4. **Witness to Mortgage.** Similar pleading and proof *held* not to show incapacity of such an officer and stockholder to act as witness of the mortgage.
5. **Evidence.** Evidence *held* to sustain trial court's finding that plaintiff is the owner of the note and mortgage in question.

APPEAL from the district court for Webster county: ED L. ADAMS, DISTRICT JUDGE. *Affirmed.*

Lorenzo W. Billingsley, Robert J. Greene and *Richard H. Hagelin*, for appellants.

Bernard S. McNeny and *A. H. Kidd, contra.*

HASTINGS, C.

This case comes here upon a second appeal. The present appellee brought it here before, and a finding that her mortgage had been paid was reversed, because not sustained by sufficient evidence. The case then went back, on mandate, for further proceedings in the district court. There, the defendants, Catherine A. Garber and Joseph Garber, filed a supplemental answer. Their original answer in the case had alleged, that the mortgage, which was payable to James H. Tallman, a member of the firm of G. W. Moore & Company, of Hartford, Connecticut, was for money advanced by that firm; that the Nebraska & Kansas Farm Loan Company was the regular agent of that firm, and loaned for it a large amount of money, upon numerous mortgages, in the vicinity of Red Cloud, Nebraska. It alleged a payment to the Nebraska & Kansas Farm Loan Company; set up what purported to be the facts as to the relation between the holder of the mortgage and the loan company, and that the mortgage was wholly paid and discharged.

The new answer set out that, after the filing of plaintiff's original petition, defendant Slocum filed an answer and cross-petition; that, subsequently, defendants answered to it; that June 18, 1896, plaintiff filed reply and an answer to Slocum's cross-petition; that trial was had January 14, 1898, upon plaintiff's petition, the answers and defaults of defendants, and the evidence. Judgment of dismissal, and for costs, was entered in favor of defendants and against plaintiff; that the term of court adjourned next day; that bill of exceptions was not settled within the time allowed by law and that, on May 10, following, trial was had upon the cross-petition of the defendant, Slocum, the answer and reply of plaintiff, the answer of the defendants, Garber, and the defaults of the other parties; that the issues were found in favor of Slocum, and against plaintiff and the other defendants, and a decree entered.

This decree is set out in the answer, and recites that plaintiff did not appear; it finds that the other defendants had entered their appearance to Slocum's cross-petition, but failed to answer or demur; it finds that the mortgage was executed to Slocum by the defendants, Garber, and was a first lien; finds the amount due on it, decrees a sale and a complete foreclosure against all the defendants, unless payment should be made within twenty days.

The supplemental answer alleges, that the defendants, Garber, paid this decree, relying upon this finding that it was a first lien upon the land; the supplemental answer also alleges the agency of the loan company for G. W. Moore & Company and for the plaintiff; alleges payment made to the loan company and a discharge of plaintiff's mortgage thereby; also, alleges payment to Tallman by this means; that no assignment had ever been filed of record and that Tallman was the ostensible owner; the supplemental answer also alleges that the acknowledgment of the mortgage was taken by and before J. A. Tulleys, notary public; that he was secretary of, and beneficially interested in, the loan company, and was defendant's agent, and, also agent for Tallman, the mortgagee, and of G. W. Moore & Company, and was in the employ of Tallman, G. W. Moore & Company and the Nebraska & Kansas Farm Loan Company, and was never employed as notary by defendants; that his compensation depended upon his procuring the execution of the mortgage, and he had no right or authority to take the acknowledgment of it. The supplemental answer also alleges that there was no competent witness to the mortgage; that Shirey, the witness, was interested, in substantially the same manner as Tulleys, in the mortgage, being a stockholder and officer, or related to officers of the loan company and that the premises were the family homestead of the defendants, Garber. There was also an allegation that plaintiff was not the real party in interest, as well as a denial of her ownership.

It will thus be seen that the defenses relied upon to this mortgage, are:

(1.) *Res adjudicata,* by reason of the decree in favor of Slocum, which was not appealed from, rendered in May, 1898, after the former judgment against the plaintiff dismissing her out of the action.

(2.) The payment claimed to have been made to the Nebraska & Kansas Farm Loan Company, as to which the evidence was, in the former hearing, held insufficient.

(3.) That the premises are a homestead and the mortgage was never lawfully acknowledged.

(4.) That while the premises are a homestead the mortgage was not witnessed by any one competent to serve in that capacity.

(5.) That plaintiff is not the real party in interest.

These defenses it would be as well to take up *seriatim.* So far as the first is concerned, the arguments advanced in support of it cover 16 pages of the brief, and they rest on the proposition that the proceedings in favor of Slocum, by which the decree of May 10 was obtained, were in plaintiff's constructive presence, and are an adjudication against her. A suggestion is made, also, that they were in the nature of proceedings *in rem* and binding against the world. The latter position hardly seems tenable. At all events the doctrine has not yet been established, that proceedings in foreclosure of a mortgage are proceedings *in rem,* in such a sense as to be binding upon one not directly a party to the action. *Cram v. Cotrell,* 48 Neb. 646.

The real question, as to this branch of the case, seems to be, simply: Was the plaintiff a party to these proceedings of May 10, and, if so, is she concluded by them? It seems clear that such is not the case. By a final decree of January 1, 1898, the plaintiff had been dismissed out of the action. All of these defendants were parties to that decree and its finding, that her mortgage was paid. It ordered that mortgage to be canceled of record, and taxed costs against her. The decree of May 10 recites that she did not appear. It is clear that the court, which had dismissed her from the action, could not legally have al-

lowed her any standing at the May hearing, without first vacating the January decree. This was only done later by this court, on appeal. So long as that decree stood, she was not bound by what, thereafter, might be done by the other parties in that same action. She was no longer a party to it. It is impossible to see how she is any more bound by subsequent proceedings, after the entry of final decree against her, and before its reversal, than if she had never been a party It does not seem necessary or desirable to discuss the numerous cases cited by defendants for the proposition, that a prior judgment between the same parties, involving the same point, is necessarily conclusive. They are none of them, so far as counsel indicate, or our own examination shows, cases involving a decree between other parties, after the plaintiff had been dismissed out of the action. The decree taken when plaintiff was not present, and could not legally be heard to object, can not be held conclusive upon her.

The defense that the mortgage was acknowledged before J. A. Tulleys, that the latter was secretary of the loan company, and defendant's agent, as well as agent for Tallman and G. W. Moore & Company, and that his compensation depended upon the taking of the acknowledgment; and that he was not employed by the defendant and his certificate of acknowledgment is void, and the property a homestead, does not seem to be sufficient, in view of the fact that this mortgage, originally, was in favor of James H. Tallman. The latter is claimed to have been a member of the firm of G. W. Moore & Company, and of this firm the Nebraska & Kansas Farm Loan Company is alleged to have been the agent. It is conceded by the appellee that a mortgage upon a homestead is void unless acknowledged. *Rawles v. Reichenbach,* 65 Neb. 29; *Hedbloom v. Pierson,* 2 Neb. (Unof.) 799. It is also settled by the decisions of this court, that a conveyance to a corporation can not be acknowledged before a stockholder in such corporation. *Wilson v. Griess,* 64 Neb. 792. In the present instance, no interest on the part of Tulleys, or of the loan company of

which he was secretary, in the mortgage, is claimed, except to the extent that they were agents in the negotiations for the loan and, presumably, derived a profit from the transaction. That they had any interest in upholding the conveyance after it was made, or any beneficial interest in the consideration for it, does not appear. It seems clear that any officer acknowledging an instrument must be interested in the transaction, at least, to the extent of his fees. If the validity of his acknowledgment is to be destroyed by that fact, we should have to search for a notary who would incur all the responsibilities of that important office from pure disinterestedness. Neither the allegations nor the proof, in this instance, seem to us sufficient to justify a holding of the acknowledgment void.

The objection that the witness to the mortgage, Shirey, was a brother of the loan company's treasurer, and was an agent, employed by Tallman and by G. W. Moore & Company, does not seem any better taken. As before stated, it does not appear that he had any beneficial interest in the consideration for the mortgage, or in its upholding after it was once executed. No direct profit to himself, from sustaining the instrument when once made, is disclosed.

The evidence as to the fourth defense, of payment, is not claimed to be essentially different from that which was held insufficient at the former hearing. The parties seem to have trusted the Nebraska & Kansas Farm Loan Company to the extent of executing a new note and mortgage, ostensibly, in renewal of the one held by plaintiff. The loan company seems to have negotiated the second note and mortgage without having taken up the first. The evidence of authority on their part, to act in any such manner on behalf of the plaintiff, seems to us entirely insufficient, on this hearing, as it did to the court, in the former one.

It is urged, however, that the answer does not claim payment, but an arrangement to substitute securities made by the loan company, and that the plaintiff is a mere dummy for G. W. Moore & Company, and that the latter is

estopped from denying the authority of the loan company to make the arrangement. The evidence seems to warrant the trial court in finding against this contention.

It is urged that the former decision of this court, and the present decree of the district court, were both made under a wrong impression as to the negotiability of the note in question; that the late case of *Garnett v. Meyers*, 65 Neb. 287, is a holding, that an agreement in a mortgage to pay taxes, renders it and the note secured by it non-negotiable. We do not understand that the holding of *Garnett v. Meyers* goes to that extent. The taxes agreed to be paid in this mortgage, are only the taxes upon the the premises mortgaged, and a duty to pay them rested upon the mortgagor, independent of the agreement in the mortgage, and it is not thought that the character of the obligation is changed by the incorporation of such an agreement, or the one that the mortgagee might himself pay such taxes and should be reimbursed. This was a right which he possessed, independent of any agreement to that effect. A stipulation which did not suffice to alter the legal effect of the instrument, as between the parties, can hardly be held to suffice to render it non-negotiable. *Bradbury v. Kinney*, 63 Neb. 754.

The fifth defense, that plaintiff is not the real party in interest, hardly seems to require further consideration. There is testimony in the record, if believed by the court, amply establishing that plaintiff was the owner of the note, for value, before maturity. There is no direct contradiction of this, and the circumstances related by the defendant, Garber, are by no means conclusive. There seems no reason to disturb the finding of the trial court on this question.

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

AMES and OLDHAM, CC., concur.

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

AFFIRMED.