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# CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. WILLIAM H. CURTIS.

FILED MAY 5, 1897. No. 7103.

1. **Railroad Companies: CARS: TRANSPORTATION.** It is one of the duties of a railroad company, as a common carrier, to receive and transport over its line of road cars of other companies, if the gauge of the road is suitable and the cars are not defective or out of repair, or of such unusual and peculiar construction as to be unreasonably hazardous or dangerous to work with or handle.
2. **Master and Servant: RISKS OF EMPLOYMENT: RAILROAD CARS: COUPLINGS.** That a car belonging to a road other than the one on which a brakeman is employed is equipped with double deadwoods or buffers is a fact which is open, apparent, and obvious to any person attempting to couple the car; hence, any risk attendant on such coupling is of the hazards incident to the duty and assumed by the employe; and this is true notwithstanding the cars in general use on the road on which the brakeman is employed are equipped differently, or with single deadwoods.
3. ———: ———: ———: ———. The evidence adduced in regard to a coupling knife and its use in coupling cars equipped with double deadwoods *held* insufficient to establish or sustain a finding that it was negligence of the company not to furnish the defendant in error such a knife.
4. **Railroad Companies: RELIEF DEPARTMENT: RELEASE OF LIABILITY FOR INJURY: VALIDITY OF CONTRACT.** The contract signed by an employe of the railroad company on becoming a member of what was known as the "Burlington Voluntary Relief Department," to the effect that if he should be injured and receive moneys from the relief fund of said relief department on account thereof, the acceptance of such moneys should operate as a release of such employe's claim against said railroad company for damages because of such injury, construed, and *held*, (1) that such contract of an employe did not lack consideration to support it; (2) that the promise made by the employe to the relief department for the benefit of the railroad company was available to the latter as a cause of action or defense; (3) that such contract was not contrary to public policy; (4) that the effect of such contract was not to enable the railroad company to exonerate itself by contract from liability for the negligence of itself or servants; (5) that the employe did not waive his right of action against the railroad company, in case he should be injured by its negligence, by the execution of the contract; (6) that it is not the execution of the contract that estops the injured employe, but his acceptance of moneys from the relief department on account of his injury after his cause of action against the railroad on account thereof arises.

The doctrine announced in the second paragraph of the syllabus to the opinion in the case of *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb., 44, approved and followed.

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

The opinion contains a statement of the case.

*J. W. Deweese*, for plaintiff in error:

A foreign freight car tendered for shipment is personal property, and a railroad company is required to receive it and haul it the same as any other freight. (*Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.*, 109 Ill., 137.)

The brakeman assumed the risk of injury from coupling cars coming from another road and having coupling apparatus different from the ordinary car. It was the duty of the company to receive the car. Negligence of a carrier cannot be predicated upon the performance of a duty required by law. (*Thomas v. Missouri P. R. Co.*, 53 Am. & Eng. R. Cas. [Mo.], 146; *Michigan C. R. Co. v. Smithson*, 45 Mich., 214; *Baldwin v. Chicago, R. I. & P. R. Co.*, 50 Ia., 680; *East Tennessee, V. & G. R. Co. v. Turvaville*, 12 So. Rep. [Ala.], 64; *Kehler v. Schwenk*, 22 Atl. Rep. [Pa.], 911; *Titus v. Bradford, B. & K. R. Co.*, 20 Atl. Rep. [Pa.], 517; *Toledo, W. & W. R. Co. v. Black*, 88 Ill., 114; *Kohn v. McNulta*, 147 U. S., 240; *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill., 365; *Hathaway v. Michigan C. R. Co.*, 51 Mich., 253; *Atchison, T. & S. F. R. Co. v. Meyers*, 76 Fed. Rep., 443; *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S., 189; *Ladd v. New Bedford R. Co.*, 119 Mass., 412; *Northern P. R. Co. v. Blake*, 63 Fed. Rep., 45; *Kelly v. Wisconsin C. R. Co.*, 23 N. W. Rep. [Wis.], 890; *Darracutts v. Chesapeake & O. R. Co.*, 2 S. E. Rep. [Va.], 513; *Menominee River S. & D. Co. v. Milwaukee & N. R. Co.*, 65 N. W. Rep. [Wis.], 176; *Pittsburgh & L. E. R. Co. v. Henley*, 29 N. E. Rep. [O.], 575; *Norfolk & W. R. Co. v. Brown*, 22 S. E. Rep. [Va.], 496.)

It was not the carrier's duty to warn an experienced employe. (*Yeager v. Burlington, C. R. & N. Y. R. Co.*, 61 N.

W. Rep. [Ia.], 215; *Secord v. Chicago & M. L. S. R. Co.*, 65 N. W. Rep. [Mich.], 550.)

The contract under which the brakeman accepted benefits from the Burlington Voluntary Relief Department and released the railroad company from liability for damages is valid and binding, and prevents him from recovering in this action. (*Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb., 645; *Burlington Voluntary Relief Department v. White*, 41 Neb., 547; *Shaver v. Pennsylvania R. Co.*, 71 Fed. Rep., 931; *Johnson v. Philadelphia & R. R. Co.*, 29 Atl. Rep. [Pa.], 854; *Graft v. Baltimore & O. R. Co.*, 8 Atl. Rep. [Pa.], 206; *Spitze v. Baltimore & O. R. Co.*, 23 Atl. Rep. [Md.], 307; *Owens v. Baltimore & O. R. Co.*, 35 Fed. Rep., 718; *Black v. Baltimore & O. R. Co.*, 36 Fed. Rep., 655; *Fuller v. Baltimore & O. E. R. Ass'n*, 10 Atl. Rep. [Md.], 237; *Kinney v. Baltimore & O. E. R. Ass'n*, 53 Am. & Eng. R. Cas. [W. Va.], 34; *Donald v. Chicago, B. & Q. R. Co.*, 61 N. W. Rep. [Ia.], 971; *Leas v. Pacific R. Co.*, 37 N. E. Rep. [Ind.], 423.)

*A. W. Agee*, also for plaintiff in error.

*W. H. Woodward, contra:*

A brakeman in coupling cars has a right to assume that they are in good and safe condition, and it is not contributory negligence for him to run in between the cars without stopping to examine whether the drawheads are proper or not. (*King v. Ohio R. R. Co.*, 8 Am. & Eng. R. Cas. [U. S. C. C. Dist. of Ind.], 119.)

It is negligence to receive a dangerous foreign car, though sound in construction. (*Gottlieb v. New York, L. E. & W. R. Co.*, 24 Am. & Eng. R. Cas. [N. Y.], 422; *Mackin v. Boston & A. R. Co.*, 135 Mass., 201.)

A railroad company cannot escape responsibility from defective carriages by borrowing them from another. (*Jetter v. New York & H. R. R. Co.*, 2 Abb. [N. Y.], 458.)

A brakeman who knows nothing of the danger of coupling cars having double deadwoods, and who has but a

few seconds to observe and act, is not negligent, as a matter of law, in not noticing that double deadwoods would meet and injure him. (*Reynolds v. Boston & M. R. Co.*, 53 Am. & Eng. R. Cas. [Vt.], 178.)

A railroad company is liable for injuries to a brakeman crushed between cars, unprovided with bumpers, which he was suddenly called upon to couple without previous information as to their condition. (*Mason v. Richmond & D. R. Co.*, 53 Am. & Eng. R. Cas. [N. Car.], 183; *O'Hare v. Chicago & A. R. Co.*, 95 Mo., 662.)

A master is required to exercise ordinary care to make the service reasonably safe. (*Abel v. President D. & H. C. Co.*, 128 N. Y., 662; *McGovern v. Central V. R. Co.*, 123 N. Y., 280; *Dorsey v. Phillips & C. C. Co.*, 42 Wis., 597.)

A danger unknown to the servant, arising from a breach of duty of the master, is actionable where injury results, and such danger is not a risk of employment. (*King v. Ohio R. Co.*, 14 Fed. Rep., 277; *Gibson v. Pacific R. Co.*, 46 Mo., 170; *Huhn v. Missouri P. R. Co.*, 92 Mo., 440; *Baltimore & O. C. R. Co. v. Rowan*, 104 Ind., 88; *Washington & G. R. Co. v. McDade*, 135 U. S., 554; *Goodrich v. New York C. & H. R. R. Co.*, 116 N. Y., 398; *Louisville, N. A. & C. R. Co. v. Frawley*, 110 Ind., 18; *Coates v. Boston & M. R. Co.*, 153 Mass., 297; *Thompson v. Chicago, M. & St. P. R. Co.*, 14 Fed. Rep., 564; *Wheeler v. Wason Mfg. Co.*, 135 Mass., 294; *Smith v. Oxford I. Co.*, 42 N. J. Law, 467; *Baltimore & O. R. Co. v. Baugh*, 8 Am. R. R. & Cor. Cas. [U. S.], 198.)

A common carrier cannot, by contract or otherwise, limit its liability for negligence. (*Smith v. North Carolina R. Co.*, 64 N. Car., 235; *Railway Co. v. Spangler*, 44 O. St., 471; *Kansas P. R. Co. v. Peavy*, 29 Kan., 169; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark., 460; *Memphis & C. R. Co. v. Jones*, 2 Head. [Tenn.], 517; *Roesner v. Herman*, 10 Biss. [U. S.], 486.)

HARRISON, J.

The defendant in error instituted this action in the district court of Jefferson county to recover damages alleged

to have resulted from injuries received by him in an attempt to couple together two freight cars of a company other than the plaintiff in error, which were being, or to to be, transported over the line of road or a portion thereof of the plaintiff in error, and which had on them what were known as double deadwoods or buffers. These double deadwoods were of pieces of timber faced with iron, attached on each side of the draw-bar, and extended out from the car as far as the draw-bar, so that they were flush with the end or head of the draw-bar into which the coupling-link was to be inserted in making the coupling. The defendant in error's right hand was caught between the deadwoods and so bruised and mashed that amputation thereof was thought necessary and was performed. Defendant in error was awarded a verdict and judgment in the district court, and the company has prosecuted error proceedings to this court.

The main allegations of the petition filed for defendant in error were, in substance, that cars equipped with double deadwoods were so difficult to couple, and the act of coupling them so dangerous to persons undertaking it, that it was negligence for the company to receive them for transportation on its road; that having received them, it was the duty of the company, when it called on the defendant in error to couple them, to notify him of the peculiarity of the construction of the cars and direct his attention to the double deadwoods; that the failure to give such notice was actionable negligence; also that it was the duty of the company to furnish him with a coupling-knife, in use for making couplings of cars having double deadwoods, with which to make the coupling; that this was not done, which was negligence on the part of the company, which rendered it liable for the consequent injuries to defendant in error. The double deadwoods were referred to and described as follows: "These two freight cars aforesaid had attached to them, where the coupling was made, what is known by railroad men as 'man-killers' or deadwoods, described as follows: The

thickness and depth of said 'man-killers' and deadwoods are each about six inches, the width of each about nine inches, and the height or length of each is about sixteen or eighteen inches, and the width of the draw-bar is about ten inches, making the width from outer edge to outer edge of said 'man-killers' about three feet. The height or depth of the draw-bar is about eight inches, making the heighth or depth of said 'man-killers' about sixteen or eighteen inches."

The answer of the company admitted that defendant in error was injured at the time, place, and in the manner alleged, but of the extent of the injuries alleged a want of knowledge, and demanded proof, and joined issues as to all the other material facts pleaded in the petition. It was affirmatively stated in the answer, in substance, that cars equipped with double deadwoods were reasonably safe, and had been in use for many years on many lines of railroad engaged in interstate transportation; that the two cars which the defendant in error attempted to couple together were tendered to and received by the plaintiff in error in the regular course of the business of interstate shipments, and that it was compelled to accept and transport them over its line of road; "that the situation and use of the double deadwoods on these cars was plain to be seen, and the defendant alleges that whatever injury the plaintiff sustained at said time and place said injury was caused by his own carelessness and negligence and without any fault of this defendant." As a further defense it was stated that there had been organized and was in existence what was called and known as the "Burlington Voluntary Relief Department," of which the defendant in error was a member, and on account of such membership was entitled to certain benefits or payments, in the way of support and maintenance while injured or sick at any time during his employment by plaintiff in error; that the company had guarantied the funds necessary, if any, over and above the regular stated contributions of members to pay all calls on the funds to

meet their designated purposes. (For an extended statement of the plan of this relief department see *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb., 44.)

It was further pleaded in this connection: "That in becoming a member of said association, in consideration of the defendant company agreeing to guaranty the necessary funds for the payment of the expenses of the relief department, and of the dues and claims arising on account of such membership, the plaintiff contracted to and with the said association and company to release the said railroad company from all liability on account of any accident where the plaintiff accepted benefits due to him by reason of such accident and on account of his membership in said association, specifying in his application for membership as follows:

"'I also agree that in consideration of the amounts paid and to be paid by said company for the maintenance of the relief department, the acceptance of benefits from the said relief fund for injury or death shall operate as a release and satisfaction of all claims for damages against said company arising from such injury or death, which would be made by me or my legal representatives.'

"That shortly after the injury to the plaintiff, he made application to the said relief department for the benefits accruing to him on account of his disability resulting from said injury, and he was duly paid the full amount of benefits accruing to him on account of his membership in said relief department for such disability, from month to month, in accordance with his contract of membership, and he received the said the money as benefits accruing to him on account of his membership in said relief department, which money was paid by the defendant company on account of its guaranty for the furnishing of the necessary funds; that at said time, and prior thereto, the relief department funds fell far short of the amount necessary to satisfy the claims justly due to various sick and injured employes, on account of their membership in said relief department; and the defendant railroad company

furnished the money for carrying out the terms and conditions of the relief department benefits, in accordance with the contract with the plaintiff, as well as the other employes who were members in said department; the exact amount paid by the railroad company for such period the defendant is not at this moment advised." The aggregate or total of the sums paid to defendant in error was also stated.

In a reply the defendant in error denied all new matter set up in the answer; admitted the existence of the relief department, his membership in the same, and his reception of benefits after he was injured. Of the amount received he was not advised and could not definitely state, and among the reasons why this receiving the payment should not bar him of this action, it was pleaded that "plaintiff further alleges the fact to be that before he could engage in the services of said company he was required and compelled to join said Burlington Voluntary Relief Department and become a regular member thereof."

At the first offer of evidence, an objection to the introduction of any was interposed for the company on the ground that the petition was insufficient,—did not state a cause of action. This was overruled, and such action of the trial court is of the errors asigned and presented. When objection is made, during a trial, that the petition is defective, in that it does not state a cause of action, the pleading will be liberally construed and, if possible, sustained. (*Marvin v. Weider*, 31 Neb., 774.) Read and interpreted within the foregoing rule, the petition stated a cause of action in that it raised a question of whether a coupling-knife should have been furnished to defendant in error to use when called on to couple cars on which there were double buffers; also, whether or not the equipment of cars with double deadwoods made the act of coupling so dangerous as to constitute it negligence *per se* to have them on the line of road or to receive them and transport them, as to all the employes who were re-

quired to couple them together while they were in transit; and further, whether the company had been negligent in not notifying defendant in error of the presence of these cars and the difference in construction in regard to buffers from those in general use on its line.

There were assignments of error which make necessary an examination of the evidence in connection with the allegations of the pleadings in the light of the rules of law applicable to the points and questions raised, and which have been discussed by counsel. This we will now attempt to do. The first question which it seems proper to notice in regular order is, what was the duty of the railroad company in regard to the reception for transportation of the cars of other lines tendered to it for such purpose? In some states this matter has been regulated by constitutional provision, in others by statute, and in others been held to be a part of the duty of a railroad as a carrier. It was said on this subject in the decision in the case of *Louisville & N. R. Co. v. Boland*, 11 So. Rep. [Ala.], 667: "It may be said it is a matter of common knowledge that the demands and exigencies of commerce require in the transportation of freight that the cars of one company shall be hauled over the road of another, and that, in order to meet this demand, the gauge of the tracks of the great trunk lines have been made uniform. This necessity has been recognized and provided for by statute in many of the states, including Alabama. Section 21 of article 14 of the constitution, and section 1165 of the Code of 1886, carrying the same into effect, make it mandatory on railroads, when required, to transport or draw over its line the passengers, freight, or cars of any intersecting or connecting road, on reasonable terms, provided such cars are adapted to the gauge of its track, are sufficiently strong, and otherwise in proper condition for safe transportation." In the opinion, written by Cooley, J., in the case of *Michigan C. R. Co. v. Smithson*, 7 N. W. Rep. [Mich.], 791, is the following statement: "The primary fact that must rule this controversy is that

the Michigan Central Railroad Company is compelled to receive and transport over its road all the varieties of freight cars which are offered to it for the purpose and which are upon wheels adapted to its gauge. It is compelled to do so, first, because the necessities of commerce demand it. It cannot and would not be tolerated that cars loaded at New York for San Francisco, or at Boston for Chicago, should have their freight transferred from one car to another whenever they passed upon another road. Time would be lost, expense increased, injuries to freight made more numerous, and no corresponding advantage accrue to anyone. It is compelled to do so, second, by its own interest. To attempt to stop every car offered to it at its termini, that the freight might be transferred to its own vehicles, would be to drive away from its line a large portion of its traffic, and compel it to rely upon a local business for which it must increase its charges to make up if possible for what it would lose. But third, the statute itself requires it. It is provided by General Laws, 1873, p. 99, that 'every corporation owning a road in use shall, at reasonable times and for a reasonable compensation, draw over the same the merchandise and cars of any other corporation.' The necessities of commerce require this with such imperative force that there could scarcely be a more flagrant breach of corporate duty than would be a refusal to obey this law; and the interference of the state to punish could hardly fail to be speedy and effectual."

In the case of *Thomas v. Missouri P. R. Co.*, 18 S. W. Rep. [Mo.], 980, it was observed: "Now, as to the second point proposed for discussion: The constitution of this state declares (art. 12, sec. 13): 'Every railroad company shall have the right, with its road, to intersect, connect with, or cross any other railroad, and shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination.' And section 2626, Revised Statutes, 1889, is but a legislative declaration of the same mandate. It will be observed

that this language is mandatory. Under its terms it becomes the imperative duty of every railway company in the state to 'receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination.' Of course, this language, under the operation of a familiar principle, is to receive a reasonable construction, and such construction would obviously exclude damaged cars and cars out of repair, but not those whose construction or coupling apparatus differs from those belonging to or operated by the defendant company. Now, negligence is the result of a failure to perform a duty. From this premise it follows that no course of conduct can justly be termed 'negligent' which results from a simple performance of a duty enjoined by law, to-wit, the reception and transportation of cars from other roads." In Iowa, where a statutory provision prevailed, a similar ruling has been made. It was said: "It must be borne in mind that the question is whether it is negligence for the defendant to receive and transport cars of other roads in general use, and in the ordinary course of business, which are not constructed with the most approved appliances. Public policy has some bearing on this proposition. It is undoubtedly of great importance to the trade and commerce of the country that a car once loaded should go through to its destination without breaking bulk. It is unnecessary, it is believed, to enlarge on this point, as its importance will be readily acknowledged. Suppose, then, the Union Pacific Railroad Company should deliver a car constructed as these were to the defendant, which was loaded with merchandise destined for New York, and as provided in the Code, section 1292, and in strict accord therewith request the defendant to transport the same, would the defendant be bound to receive such car, and for a refusal would it be liable in damages, the only ground of refusal being that it was dangerous to its employes to transport such a car; while, on the other hand, it would be shown that cars so constructed were in use on all other roads. It is sufficient

to say that it admits of great doubt whether such a defense should be permitted to prevail." (*Baldwin v. Chicago, R. I. & P. R. Co.*, 50 Ia., 680.) A like doctrine has been announced in Illinois, without statutory provision. (See *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill., 365; *Toledo, W. & W. R. Co. v. Black*, 88 Ill., 112.) "Even in the absence of any statute or special contract, regulating the terms of receiving and drawing such cars, the defendant was bound, as a common carrier, to receive and draw them." (*Mackin v. Boston & A. R. Co.*, 135 Mass., 201; *Vermont & M. R. Co. v. Fitchburg R. Co.*, 14 Allen [Mass.], 462.)

In section 4, article 11, of our constitution it is provided: "Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law." This constitutional provision, giving it a fair and reasonable construction, is broad enough to include the transportation of cars of one company over the line of another, and cast the duty on a railroad, when cars of another road are tendered, of receiving and transporting them where the gauge is suitable, and the cars offered are not defective, out of repair, or of such construction in whole or in any particular as to be unreasonably dangerous to those who might be obliged to work on or to handle them. (See *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.*, 109 Ill., 135.) Moreover, aside from the constitutional requirement, we think on principle it must be said that railroads, as common carriers, must receive and transport cars of other roads, when tendered under proper conditions. (*Vermont & M. R. Co. v. Fitchburg R. Co., supra; Mackin v. Boston & A. R. Co., supra; Indianapolis, B. & W. R. Co. v. Flanigan, supra; Toledo, W. & W. R. Co. v. Black, supra.*) It was not claimed that these cars were defective, or that they were not in good repair. One branch of the complaint was that the receiving and transporting

of cars having attached to them double buffers constituted negligence. Far the greater number of freight cars belonging to and in daily use on the western railroads, and in this state, have on them what are known as "single deadwoods" on each end of a car, and immediately above the draw-bar attached horizontally, a block or piece of timber about two feet in length, about four inches thick, and four or five inches in height. On these the draw-bars extend beyond the deadwoods several inches, and when the cars are to be coupled the draw-bars are expected to meet as the one car is pushed up to the other, and bear the immediate effect of the consequent shock. If a draw-bar is weak or out of repair, and gives way when a coupling is being made, or if for some reason the draw-bars do not strike, but pass each other as they sometimes do, with the single buffers there is danger to the life of the employe engaged in effecting the coupling.

The evidence in this case disclosed that in coupling cars having double deadwoods there was more hazard to the arm and hand than in performing the same work with those having single buffers; that the double buffers furnished greater security to life than the single; also that coupling cars by hand by the use of the link and pin, whether equipped with single buffers or double deadwoods, is at best a hazardous undertaking, and one which requires care. It was further shown that freight cars with double buffers, similar in construction to the ones on these cars, were in general use by some of the long lines of railway and freight lines, and it was not shown that they have been discarded or prohibited by any. The defendant in error was about twenty-seven years old at the time he was injured, and had been "railroading" some six or seven years; had worked on several different railroads, also as a switchman in the "terminal" yard at Kansas City; had heard of cars with double deadwoods; did not remember to have seen or worked on or about any such cars; had heard the double deadwoods called "man-killers;" knew that they were carried over any and all

railroads of the country. It appears that there is to the draw-bar ordinarily used on freight cars what is called a head,—"the draw-head." This is at the end distant from the car, and is hollow, to allow the insertion of the link, which is used to connect the cars. A few inches back toward the car the draw-bar has a hole through it, into which fits a pin, which extends down through the draw-bar and link, thus effecting the coupling. It appears that frequently, when cars are to be coupled, the pin is "set" in such manner and position in or on the draw-bar of one of the cars to be coupled that when the cars are brought together the jar which results when the ends of the draw-bars strike causes the pin to drop into place and finish the coupling. About 8 o'clock, in the evening of October 15, 1891, in Woodlawn, a station in this state, on the line of the plaintiff in error, the defendant in error attempted to couple the two cars on which were the double deadwoods. They were on a side track or switch, and one had been attached to the train of cars, at the head end of which was the engine. The defendant in error states that he stepped up to the detached one and set the pin, preparatory to coupling, gave the signal to the engineer to "back up,"—the cars were at the time about fifteen feet apart,—and when they were brought together his hand, with which he had raised and directed the link in its proper direction, was caught between the buffers and mashed. In this connection, we will call attention to portions of the evidence which have a bearing on the question of the care which was exercised by defendant in error at the time he received the injury. He stated that he went to the car and set the pin, and we will now quote from the evidence:

Q. Describe it.

A. I set it in the hole so when the link came in it shook the pin down through the link.

Q. This draw-bar is between the deadwoods?

A. Yes, sir.

Q. You was on the outside about even with the deadwoods?

A. Yes.

Q. Now, then, you went there, did you, with the pin in your hands when you went between them?

A. I set the pin.

Q. Did you take the pin in with you?

A. No, sir.

Q. The pin was in the draw-bar?

A. I think so, or else on the deadwood.

Q. How did you manage to set the pin in the hole through the draw-bar?

A. I reached over the top and set it.

Q. You reached over the deadwood?

A. If you come to the end of the car you can see on the face of the draw-bar to set your pin.

Q. You stepped in there by the side of the draw-head and took up the pin and set it in the hole?

A. Yes, sir.

Q. Could you see where you was putting the pin?

A. Yes, sir.

Q. You could see the end of the draw-bar?

A. Yes, sir.

Q. Did you hold your lantern where you could see it?

A. Yes, sir.

Q. And these deadwoods, too?

A. I don't remember of seeing the deadwoods; I wasn't looking for them.

Q. You didn't pay any attention to see whether they were there or not?

A. No, sir.

And further on this subject:

Q. You set the pin in this stationary car before the others began to move back?

A. Yes, sir.

Q. So you went in there by the stationary car and fixed your pin in the hole in the draw-head between these two deadwoods before you signaled to the engineer to back up?

A. Yes, sir.

Q. After doing that you signaled him to back up?

A. Yes, sir.

Q. When he backed up what did you do?

A. I stepped up to this car and took hold of the rod for a hand hold.

Q. With your left hand?

A. Yes, sir; the lantern was in my left hand.

Q. With your back to the moving train?

A. Yes, sir; my back or side. I don't know which you want it. It wouldn't be exactly my back. I was standing in this shape.

Q. You say you would be standing angling toward the car that was approaching, your back toward that car and face toward the drawhead of the stationary car?

A. Yes, sir.

Q. As it came back you caught the link with your hand?

A. Yes, sir.

Q. What did you do?

A. I held it until I thought it was close enough to go in the draw-bar and then I took my hand out, but didn't get it out quick enough.

On page 20 plaintiff is asked:

Q. Did you look to see what kind of a car you coupled? anything about it, what kind of a coupling it was?

A. No, sir; that wasn't my business.

Q. That wasn't your business?

A. No, sir.

Q. You didn't pay any attention to the kind of car you were going to couple?

A. No, sir.

Q. You paid no attention as to what kind of a draw-bar or deadwood the car had?

A. No more than to see that they were there; to see that the pin and link was there.

Q. You saw that, did you?

A. Yes, sir.

Q. Further than that you didn't pay any attention to it, you say?

A. No, sir; I didn't.

Q. You paid no attention to the kind of deadwoods, whether it was a foreign car or whether it was a St. Joe or C., B. & Q. car?

A. I paid no attention to that at all.

As we have hereinbefore concluded, it was the duty of the company to receive and transport these "foreign cars." They were not shown to be faulty, or out of repair, nor was it shown that the deadwoods with which they were equipped were unsuited to the purpose for which they were intended or made, nor that they were unreasonably unsafe or hazardous. From which we must conclude that it was not negligence in the company to receive them and haul them over its road. The question of whether it is an act of negligence for a railway company to receive and draw cars of another company, which have on them double buffers, while its own cars have or are equipped with a different pattern of deadwoods, has been considered in a number of cases, and almost without exception it has been held not to constitute negligence. (*Pittsburg & L. E. R. Co. v. Henly*, 48 O. St., 608; *Michigan C. R. Co. v. Smithson*, 45 Mich., 212; *Hathaway v. Michigan C. R. Co.*, 51 Mich., 253; *Indianapolis, B. & W. R. Co. v. Flanigan*, 77 Ill., 365; *Baldwin v. Chicago, R. I. & P. R. Co.*, 50 Ia., 680; *Kohn v. McNulta*, 13 Sup. Ct. Rep., 298.)

It is a well settled rule that it is the duty of an employer to exercise due care for those in his employment, and not subject them to hazards or dangers by his negligence. It is also well established that one entering into the employment of another assumes the risks ordinarily incident to the employment, including such as are open, apparent, or obvious, or should be to a person of the experience and understanding of the employe. The difference in the danger in coupling cars having double buffers and those having single, is one of degree, and the extra hazard requires a greater degree of care. We have been furnished, in the record, with a photograph, which is said to be a fair representation of the deadwoods on the

cars which the defendant in error tried to couple, and it is very apparent that if a person should approach a car, on which was such an appliance, to do work which required that he place an iron pin in a hole in the draw-bar situated between the timbers of the deadwood, it would be almost an impossibility for him to do so without noticing the construction of the deadwood, unless he was at the time very careless and unobservant. Furthermore, defendant in error, with his six or seven years' experience as a railroad man, knew or must be charged with notice, that cars similar to these were passing back and forth across the country, on any and all the lines of railroad, and that he might be called upon to work on or about one at any time, and must take the necessary care and thought to do so safely; and if it could not be done by the exercise of due care, to refuse to do the task, for no one can or will be called upon to perform an impossible task, or one which cannot be safely performed, if proper care and attention be exercised.

In the opinion in the case of *Michigan C. R. Co. v. Smithson, supra*, wherein the action was predicated on an injury to the hand of an employe of the company, which occurred while he was engaged in an attempt to couple a car which belonged to another company, then being hauled over the road, and which had double deadwoods, it was stated: "But we have had produced for our inspection on the argument a model of the double deadwoods which caused the injury, and it seems impossible to give to the coupler any better or more effectual notification of their presence, and of the difference from those belonging to the defendants than their very form necessarily gives of itself. The difference is very marked and striking, and it is quite impossible to couple the double deadwoods or to approach them for the purpose with any degree of attention without observing it. This is so whether the coupling is done in the daytime or nighttime; for in the night every switchman has his lantern with him, or should have it on all occasions. If, there-

fore, a switchman were to declare that he had attempted to couple the double deadwoods without noticing how they differed from the cars of defendant, the conclusion would be inevitable that he had gone heedlessly in the performance of a duty requiring great care, and that he had not allowed his eyes to inform him what was before him. Moreover the business of the road was of itself a notification that many differences requiring attention in coupling were to be encountered by the switchmen and brakemen. The Michigan Central is a great common way for the cars of all the railroad companies of the country, and every man in the employ of the defendant, if he has ordinary intelligence, is perfectly cognizant of the fact. He knows, too, that the cars of the several railroad and transportation companies differ, and that at one time or another all these differences may appear in the cars he may be called upon to couple or uncouple. Every train is likely to have several kinds, and he cannot assume as he passes from one to another that the two will be alike; much less that the whole train will be. To notify him specially of the differences would not only be troublesome and expensive, and oftentimes, as above explained, confusing, but it would be a work of supererogation; for any man capable intelligently of performing the duty would be no wiser after the notice than before; and a man who would not heed the information the very nature and course of the business would impart to him, would be protected by no notice. The best notice is that which a man must of necessity see and which cannot confuse or mislead him; he needs no printed placard to announce a precipice when he stands before it."

In *Hathaway v. Michigan C. R. Co.*, *supra*, another case in which the facts were similar to the circumstances in the case at bar, it was said: "In this case the danger consisted in the brakeman being caught between the two deadwoods as they came together. The deadwoods were in plain sight; they were really the most prominent objects on the end of the cars. The plaintiff had full oppor-

tunity of examining the one by which he stood some moments before the cars came together. Its size, shape, and the location of the draw-bar were before him. He had only to look at it to be informed of any peril surrounding it. The moving car at a distance of 20 feet, with its deadwood and draw-bar in plain view, slowly approached the one where the plaintiff was standing. It does not appear there was any hurry about the business. How could the plaintiff have been better warned? Certainly he knew the car was coming, and could see the deadwoods and draw-bar thereon as well as if he had made the coupling a thousand times before. He could not fail to see if he looked at all. It was no special risk to which he was subjected, but it was common to all that class of cars going daily over the defendant's road, and of which the plaintiff had had, for nearly a week, at least, the opportunity of knowing, whether he availed himself of it or not. The risk in making that coupling was incident to the service the plaintiff had voluntarily engaged in,—one of which, from the very nature of the business, he must, under the circumstances, have been cognizant; and no other or better notice of which could be possibly given than that which the plaintiff had as he stood there and saw the two cars, with the deadwoods approaching each other; and no amount of experience could further or better warn the plaintiff of the dangers then before him in making the unfortunate coupling. * * * The plaintiff had full opportunity to see and examine the cars from which he received his injury, and all the peculiarities of the double deadwoods, if there were any, and the differences between them and the deadwoods upon the Michigan Central cars, had he looked at them; they were in the very train in which he was injured. He might have seen that the draw-bars of the cars he was injured by projected little, if any, beyond the faces of the deadwoods; that to place his arm between the approaching blocks would inevitably result in injury; and that the way to make the coupling safely was to keep his arm

above or below the deadwoods. All these things were before him, and it was the simplest of all his duties to look at them. No youthful inexperience can be offered as an excuse for his failing so to do; and his failure to use his lantern and make such observations, under the undisputed facts and circumstances disclosed in this record, shows unmistakably a degree of negligence on the part of the plaintiff which very largely contributed, if not wholly, to the injury complained of."

In *Thomas v. Missouri P. R. Co., supra,* we find the following: "The occasional or frequent use of such cars on any road, in the ordinary course of business, is one of the ordinary risks an employe assumes. He knows, or is bound to know, that cars from other roads are being constantly hauled over the road whose employe he is. The most ordinary observation will teach him this. He must know these cars may be differently constructed."

In the opinion in the case of *Kohn v. McNulta, supra,* written by Mr. Justice Brewer, it was stated: "It is not pretended that these cars were out of repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods or bumpers of unusual length, to protect the draw-bars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervenor was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to anyone. Under those circumstances he assumed the risk of such an accident as this, and no negligence can be imputed to the employer. (*Tuttle v. Railway Co.*, 122 U. S., 189; 7 Sup. Ct. Rep., 116; *Ladd v. Railroad Co.*, 119 Mass., 412.)"

We must conclude that the company was not negligent in receiving and hauling these cars over its road, and that the risks incident to the coupling were assumed by the defendant in error.

There was some evidence in regard to a coupling-knife and its use on some roads, but there was not evidence sufficient to sustain a finding that the knife was necessary for such couplings as was the one attempted by defendant in error, or that a failure to furnish the knife was an act of negligence which rendered or tended to make plaintiff in error liable for the injury on which this suit is based. It is possible that facts might be shown which would lend force to the position taken in this branch of the case, but they are not in the record before us. (*Hathaway v. Michigan C. R. Co., supra.*)

We will now turn our attention to the examination of the question herein presented, relative to the relief department in regard to the claim that the contract by which the party injured becomes entitled to benefits, if he chooses to take them, is invalid and incapable of enforcement. The question here raised was considered by this court in the case of *Chicago, B. & Q. R. Co. v. Bell*, reported in 44 Neb., 44, and the contract held to be a valid one. We have been furnished with no reasons which seem sufficient to call for a reversal of the views then adopted and announced; hence, we will again approve them herein. (See, also, on this point, *Shaver v. Pennsylvania R. Co.*, 71 Fed. Rep., 931; *Johnson v. Pennsylvania R. Co.*, 29 Atl. Rep. [Pa.], 854; *Owens v. Baltimore & O. R. Co.*, 35 Fed. Rep., 718; *Black v. Baltimore & O. R. Co.*, 36 Fed. Rep., 655; *Donald v. Chicago, B. & Q. R. Co.*, 61 N. W. Rep. [Ia.], 971; *Leas v. Pennsylvania R. Co.*, 37 N. E. Rep. [Ind.], 423; *Ringle v. Pennsylvania R. Co.*, 30 Atl. Rep. [Pa.], 492; *Pittsburgh, C. C. & St. L. R. Co. v. Cox*, 45 N. E. Rep. [O.], 641.) As we have hereinbefore stated, it was pleaded in the reply that "plaintiff further alleges the fact to be that before he could engage in the services of said company he was required and compelled to join said Burlington Voluntary Relief Department and become a regular member thereof." In this it will be noticed there is no direct statement that whatever was done in coercing the defendant in error to join the relief department was by or

for the company, though it is true that it is the inference which must naturally be drawn from the statement, that the requirement was by or for the company; but without regard as to whether this was sufficient, there was no evidence of any undue influence or pressure brought to bear by this company to induce the defendant in error to become a member of the relief department, and with such existent conditions and facts at the time the influence was exerted as must be in order to render the contract invalid or voidable.

There is another question which we will notice. The defendant in error having received benefits or payments under the contract by which he became a member of the relief department, if it be conceded that it was a contract which he could avoid at any time by disaffirming, can he now successfully attack it; or, if he might now be allowed to repudiate it, must he first tender a return of what he has received under and by virtue of it? Such a contract may be either ratified or disaffirmed at the option of the aggrieved party. (Clark, Contracts, 373.) The defendant in error admitted in his reply that he had received benefits under the contract, and, so far as we are informed by the evidence introduced on this branch of the case, there were no facts which would tend to show that his actions in receiving the payments were without full knowledge and information of the effect of such acts on his part, or that they were done by other than his own free will and accord. What may be developed at another trial remains for the future. On the subject of the necessity of the tender of the return of the benefits received it has been said: "A release of a claim for damages for injuries received through negligence, obtained by fraud, is valid until disaffirmed by tendering back the consideration. (*Kreuzen v. Forty-second St., M. & St. M. Ave. R. Co.*, 13 N. Y. Supp., 588.)

The judgment of the district court must be reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

# J. L. BROWNE, APPELLEE, V. J. B. FINLEY, TRUSTEE, APPELLANT, ET AL.

FILED MAY 5, 1897. No. 7290.

1. **Quieting Title:** TAX DEEDS: PAYMENT OF TAXES. In an action by a purchaser of property at tax sale, who had received a county treasurer's deed for the property, to have his title to the property quieted, an answering defendant set up title in himself and asked the cancellation of record of the tax deed and the removal of the cloud created by it from his title. *Held*, That as a condition of granting to such defendant the relief prayed he must pay the taxes justly chargeable against the property which had been paid by the plaintiff.

2. ———: ———: ———: DESCRIPTION: MISTAKE. A party by a letter to a county treasurer desired him to make and forward a statement of taxes due against "Lots 5 and 6, of Hillside No. 1, corner of Burt and Thirtieth streets." *Held*, That the portion of the above description, "Lots 5 and 6, Hillside No. 1," was its more specific and governing part; and that the treasurer or his assistant relied thereon and did not examine to ascertain whether property of such description was at the corner of Burt and Thirtieth streets, but made the requested statement according to the description as to lots in Hillside No. 1, this furnishing him sufficient and complete information on which to proceed, and forwarded the statement; and the applicant for the statement paid the taxes shown thereon, thereby paying taxes on property which did not belong to him, and the taxes which he intended to pay became delinquent and his property was sold for their payment. In an action between the purchaser at the tax sale and the owner of the property which involved his being required to pay the taxes on the property sold, the burden and consequences of the mistaken payment must be borne by the owner of the property and could not be alleged as a mistake of the county treasurer.

3. ———: ———: ———: ———. *Held*, That the same is true of a similar mistake which occurred when the owner of the property was present in the treasurer's office, and by his suggestions or directions caused a mistake to be made in the description of property which he desired to redeem from sale made for delinquent taxes whereby he failed to redeem his own but paid for and received a certificate of redemption for other property.

4. **Tax Sales:** IMPROVEMENTS BY PURCHASER. The value of an improvement made by a purchaser at tax sale *held* not properly presented in this action to constitute it a subject of recovery.

APPEAL from the district court of Douglas county. Heard below before FERGUSON, J. *Modified.*

*John T. Cathers*, for appellant.

*W. A. Saunders* and *Saunders, McFarland & Dickey, contra.*

HARRISON, J.

In this, an action instituted in the district court of Douglas county, the plaintiff sought to have quieted the title to lots 5 and 6, in block 1, of Hillside Addition No. 2 of the city of Omaha, which he had acquired by tax deed issued to him by the county treasurer of Douglas county. It was alleged that plaintiff had purchased the property at private sale, made for the delinquent taxes for the year 1889, and after the usual proceedings in such cases, the property not having been redeemed, a deed was issued by the county treasurer by which it was conveyed to the plaintiff. It was also pleaded that the defendant had or claimed some interest in or to the property. The defendant (hereinafter designated the appellant) answered denying many of the allegations of appellee's petition, and stated affirmatively several reasons why the deed by the treasurer to appellee was void and of no effect; also that prior to the time of appellee's alleged purchase the title to the premises in controversy had been conveyed to appellant by warranty deed executed and delivered by certain named parties, and the ownership and title had at all times since such conveyance continued in the appellant. In regard to the taxes for the year 1889, and some other years, there were in the answer the following allegations: "In answer to the paragraph numbered 7, this defendant says that he was not aware or had no knowledge or information that the said J. L. Browne had a tax certificate for said lots, and says if the treasurer of Douglas county sold said lots, he did so con-

trary to law. This defendant paid all taxes against said lots demanded of him by the city and county treasurer for the year 1889, and received receipts for the same; that he made out a list on the 17th day of October, 1890, of all property owned and controlled by him, in which list was included lots 5 and 6, block 1, in Hillside Addition No. 2, which he gave to the county treasurer and requested him to give him the amount of taxes against said property, which county treasurer did, and this defendant paid him the amount in full and he received receipts for said taxes; that this defendant afterwards learned that said lots had been sold for taxes, and on the 27th day of July, 1892, went to the office of the county treasurer to redeem said property, and paid to the county treasurer the money to redeem said lots and received from the county treasurer a redemption receipt by mistake for lot 1, block 1, Hillside Addition No. 2, which mistake this defendant did not notice at the time. The defendant says that he never owned said lot 1 or had any interest or claim to the same." The answer closed with a prayer that the tax deed be canceled, all claims of the appellee to the property be declared without force, the cloud on the title be removed, and the action of appellee be dismissed.

It appears that at the commencement and during the trial, it was asked for the appellee that an amendment to the petition be allowed by which would be made to appear in detail the several sums of taxes which he claimed to have paid on the property at and subsequent to the time of purchase at the sale by the treasurer. This was not done, but the court received evidence of these amounts, and also of an amount expended by appellee in building a fence on the premises, evidently on the theory that if appellant succeeded and obtained the affirmative relief asked for in his answer, the appellee might recover the amounts he had paid and expended for taxes and improvements on the property. A decree was rendered which, although nothing is stated in it on the subject, or to such effect, plainly proceeded on the theory that

the title of appellant asserted by virtue of the tax deed failed, or did not exist, that the deed was void, and awarded the appellee the aggregate of the sums he had paid in taxes on the property, together with the amount which the fence had cost, and established the total amount as a lien on the property paramount to the rights of appellant thereto. The tax deed to appellee was void. (See *Dickey v. Paterson*, 45 Neb., 848; *Larson v. Dickey*, 39 Neb., 463.) This being settled, should the appellee be allowed to recover the amounts of taxes paid by him? It will be remembered that the appellant asked the affirmative relief of the cancellation of the tax deed and the removal of the cloud from his title to the property; and it has been announced by this court that in order that such relief may be afforded, the party seeking it will be required to pay the taxes justly chargeable against the property, paid by the other party whose claims and rights are to be affected by the decree. (*Dillon v. Merriam*, 22 Neb., 151; *Wygant v. Dahl*, 26 Neb., 562; *Adams v. Osgood*, 42 Neb., 451.) In relation to some of these taxes it is urged that the appellant had paid them, and by mistake of the officer or officers charged with their collections, and who received them, the payments were applied in settlement of the taxes on other property; and further, that the appellant should not and cannot be made to bear and suffer the results of the inattention of the officers; that the payments must be held to have extinguished (when sufficient in amounts) the taxes for the adjustment of which they were made to the officers, and the appellee must be relegated to his action against the county, whose agents the officers were. In this connection we think it proper to quote from the evidence of the appellant, which was as follows:

"On or about the 18th of October, 1889, Thomas K. Sudborough and his wife made, executed, and delivered a deed in fee-simple for two certain lots of land, to-wit, lots 5 and 6, in Hillside No. 2, block 1, of the city of Omaha, Nebraska, to said John B. Finley, trustee, his

heirs, assigns, and legal representatives, and that said deed was subsequently recorded in the proper office for the recording of deeds of Douglas county, Nebraska; all previous taxes and assessments thereon were represented to have been paid, and that at said time I was not aware that there were any taxes or assessments due and unpaid on said lots for either the year 1889 or any other year. * * * Also, on the 17th of October, 1890, I addressed a letter to the county treasurer of Douglas county, Nebraska, desiring to obtain from him a statement of all the taxes and assessments against the property described in said letter, a copy of which is hereto annexed, marked 'A;' that in compliance with said letter the said county treasurer prepared and delivered to me a statement of the aggregate amount of all taxes due and unpaid against the property described in said letter, which amount was paid to him on the same day by my check on the First National Bank of Omaha, Nebraska; that it was my intention to pay all taxes and assessments due against said property, and I fully believed that I had paid all that the treasurer required; that subsequently, on the 27th of June, 1892, while on a visit to Omaha, I discovered that said lots had been sold for the unpaid taxes of 1889, and desiring to have the same redeemed, I called at the office of the county treasurer of Douglas county for that purpose. By mistake a certificate of redemption was made out for a different property from that which was owned by myself, said lot being on Burt street and in the name of J. L. Browne, which led me to the belief, and also the clerk in the treasurer's office, that this property on Burt street was the same that belonged to me, and had been sold to J. L. Browne for unpaid taxes. Accordingly it was redeemed by me, but has been since found not to be the same property that was owned by me and which I had redeemed. A copy of said certificate of redemption, marked 'B,' is hereto annexed. I also present papers marked Exhibits 'C,' 'D,' 'E,' 'F,' and 'G,' being copies of receipts for taxes and assessments paid by me on said

lots to John Rush, city treasurer of Omaha, dated October 14, 15, 1889, and October 28, 1890."

The letter, to a copy of which reference is made in the foregoing as annexed to the evidence, and marked 'A' (the evidence was in form of deposition), contained what it is claimed was intended for a description of the property in controversy, as follows: "Lots 5 and 6 of Hillside No. 1, corner of Burt and Thirtieth streets." To be correct this should have been Hillside No. 2, and not No. 1. Pursuant to the directions of the letter, the county treasurer prepared and delivered to the appellant a statement of the amounts of taxes due against the property therein described, including lots 5 and 6 of Hillside No. 1. It appears that the lots just named were not at the "corner of Burt and Thirtieth streets," and it is urged that if the treasurer or his assistant, the party who made the statement, had looked at a plat or map of the city of Omaha and its additions, it would have been discovered that the lots at the corner of Burt and Thirtieth streets were 5 and 6, Hillside No. 2, and the statement would have been, as to the taxes against the property, the amount of which the appellant desired to know and to pay, and the subsequent payment would have been properly applied; that it was the duty of the officer to make such examination, and he was careless in not doing so, and the appellant blameless. With the foregoing view we do not agree. The description of the property as it appears in the letter was the work of the appellant, and the portion of it which assigned the situation of the property as "Hillside No. 1" was the more specific and particular than that of the "corner of Burt and Thirtieth streets." The officer must necessarily choose one or the other, and we must conclude that he was not careless, nor was it wholly his mistake that he did not ascertain the correct property. The description furnished by the appellant was well calculated to mislead the officer; hence the appellant cannot be held blameless and must suffer the consequences of his own error. When the appellant, on the 27th of June, 1892,

while he was in Omaha, discovered that this property had been sold for taxes, he went to the office of the county treasurer, and, as he states (see his evidence hereinbefore quoted), by mistake, he redeemed another property, a lot which he did not own and which had been sold for taxes; that he was misled by certain facts in respect to the street on which it was situated, and that it had been sold to J. L. Browne, and that he believed it to be his property; that the clerk in the treasurer's office was also misled, and the mistake in the application of the payment and issuance of the redemption certificate for the property other than was appellant's intention ensued. The fair and most natural inference or conclusion to be drawn from this testimony is that the appellant directed the application of the money he paid to the redemption of the lot which was then redeemed, and which did not belong to him, or that he was actively participating in what was done, and by his directions or suggestions in respect to the description of the property he desired to redeem, caused the mistake to be made, or was so far instrumental therein that he must be charged with the consequences and bear the blame and results, rather than the county as represented by its treasurer. This being true, he cannot now successfully assert a right to have the payment shifted and applied to the redemption of the lots in suit as against the rights of the appellee, the purchaser at the tax sale.

In relation to the amount which was adjudged due the appellee for improvement,—the fence which he had caused to be built on the lots,—it must be said that it was not pleaded nor demanded, neither was it claimed under the provisions of chapter 63 of the Compiled Statutes, "the Occupying Claimants' Act." It had no legitimate standing in the suit, and should not have been allowed and must now be rejected. The true amount for which appellee should have been allowed in the decree was $130.82, to which sum the amount adjudged his due will now be changed, and as thus modified the decree will be affirmed.

The appellant will also be awarded a decree here canceling of record the tax deed which was issued to appellee.

JUDGMENT ACCORDINGLY.

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## UNION PACIFIC RAILWAY COMPANY ET AL. V. BENJAMIN F. THORNE.

FILED MAY 5, 1897. No. 7181.

1. **Bill of Exceptions.** An unauthenticated bill of exceptions will be disregarded in this court.
2. **Instructions:** ASSIGNMENTS OF ERROR. Certain instructions given not considered, because not properly called to the attention of the trial court in the motion for a new trial.
3. ———: REVIEW. Instructions refused not reviewed, since the evidence is not before us.

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

*James H. Woolley*, for plaintiffs in error.

*Abbott & Caldwell, contra.*

NORVAL, J.

Plaintiff below sued the defendants for the alleged killing of a bull by a locomotive and train on defendants' road. The petition charges the defendants were negligent in the operation of the cars, and that they neglected to build and maintain a fence as required by statute at the place where the animal was killed. The defendants answered the averments of the petition and plaintiff replied. There was a trial of the issues to a jury. Verdict in favor of plaintiff. A new trial was denied and judgment was rendered on the verdict.

It is insisted that the evidence shows there was no negligence on the part of the defendant companies,

unless it was on account of a failure to fence the track where the bull was struck and killed, and that there was no duty to fence their road at that point imposed by statute. These matters can be determined alone from a consideration of the bill of exceptions, and that document must be disregarded for the reason that it is not authenticated in the manner prescribed by law. It is true there is attached to the transcript a certificate of the clerk of the court below which states "the foregoing to be a true and correct copy of all such pleadings and orders in the above entitled action as are named and indicated in the above index, as the same appears on file and of record in my office." This is insufficient to show that either the original bill of exceptions or a copy thereof is included in the transcript. A bill of exceptions is neither a pleading nor order; hence is not embraced in the certificate of the clerk of the district court. The bill of exceptions must, therefore, be disregarded in this court. (*Felber v. Gooding*, 47 Neb., 38; *German Nat. Bank v. Terry*, 48 Neb., 863.) We must indulge the presumption that the evidence adduced on the trial fully established that it was the duty of the railway companies to fence their tracks at the point at which the bull entered from their right of way, and that they wrongfully failed so to do, or that their servants negligently operated the train at the time of the accident.

Two paragraphs of the court's charge, Nos. 5 and 7, are assailed in the brief filed, but they cannot be reviewed, because improperly assigned for error in the motion for a new trial. The charge consisted of nine consecutively numbered paragraphs, and they were grouped in one assignment in the motion for a new trial. To be available each instruction would have to be bad, under the uniform holding of this court. Instruction No. 6 told the jury that the burden of proof was upon the plaintiff below, and the ninth paragraph of the charge directed the jury that they were the judges of the credibility of the witnesses. Neither of them being

prejudicial to defendants, the assignment as to instructions given must be overruled.

Complaint is made of the refusal of the court to give the following instructions requested by the defendants:

"3. You are instructed that the defendants were not required by law to fence where the injury occurred.

"4. You are instructed to bring in your verdict in favor of the defendants."

The correctness of these requests depends entirely upon the evidence before the jury, which we cannot consider because the bill of exceptions is not authenticated.

No reversible error appearing upon the face of the record, the judgment is

AFFIRMED.

HARRISON, J., not sitting.

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## ASHLAND LAND & LIVE-STOCK COMPANY V. ALFRED MAY.

FILED MAY 5, 1897. No. 7191.

1. **Review:** EVIDENCE. A verdict will not be disturbed merely because it is against the preponderance of the evidence.
2. **Payment:** PLEADING AND PROOF. The question of payment is a matter of defense, which, to be available, the defendant is required to set up in the answer and establish on the trial.
3. ———: ———: INSTRUCTIONS. *Held*, The fourth instruction stated the correct rule as to the burden of proof, and was applicable to the issues made by the pleadings.
4. **Trial:** MISCONDUCT OF ATTORNEY: REVIEW. Remarks of counsel for plaintiff during the examination of a witness for an unsuccessful defendant, over proper objections, that such witness had been "fixed" by defendant's counsel and that said counsel had to depend upon "fixing witnesses," in the absence of evidence of such fact, are grounds for setting aside the verdict.

ERROR from the district court of Saunders county. Tried below before WHEELER, J. *Reversed.*

*Simpson & Sornborger*, for plaintiff in error.

*O. C. Tarpenning, contra.*

NORVAL, J.

Alfred May, plaintiff below, brought this action to recover an alleged balance claimed to be due him from the defendant for work and labor. The petition avers, substantially, that plaintiff, in 1891, entered into a contract with the defendant, by the terms of which May was to act as defendant's manager and veterinary, at the agreed price of $50 per month; that in pursuance of said contract he was in defendant's employ in the years 1891 and 1892, and that defendant is indebted to him therefor, over and above all credits, in the sum of $424.20, for which, with interest, he prays a judgment. The answer consisted of a general denial, and also a counter-claim for $422, composed of the following items:

| | |
|---|---|
| To wintering 21 head of horses from November 22, 1890, to May 1, 1891, at the agreed price of $2.50 per head per month | $287 75 |
| To wintering mare from March 12 to May 1, 1892 | 4 25 |
| To pasturing 22 head of horses from May 1 to October 1, 1892, at agreed price of sixty cents per head per month | 66 00 |
| To feeding and caring for 22 head of horses from October 1, 1891, to November 12, 1891, at agreed price of $1.50 per head each per month | 29 00 |
| To extra corn fed during winter | 25 00 |
| Stallion kept in box stall, attended to and fed from November 22, 1890, to March 30, 1892 | 66 00 |
| Horse with fistula kept in barn different times | 22 00 |
| | $500 00 |
| Credit: By cash | 78 00 |
| | $422 00 |

Plaintiff for reply admitted the making of the contract for the feed of twenty-one head of horses from November 22, 1890, to April 27, 1891, at the agreed price of $2.50 per head per month, and denied each and every other allegation in the answer. There was a trial by jury and a verdict was returned for plaintiff below in the sum of $303.57. From the judgment entered thereon the defendant prosecutes error.

The question as to the sufficiency of the evidence to sustain the finding and the judgment is presented. All that need be said upon that point is that the evidence produced by the plaintiff was ample to establish the contract as alleged by him, and that he was under the employ of the defendant thereunder as the manager of its business for fourteen months, while there was evidence on the other side conducing to show that no such contract was ever made between the parties, but that the plaintiff agreed to work for his board alone. The evidence relating to the various items of the counter-claim, excepting the first, was also conflicting. We think there was sufficient evidence to support the verdict and judgment. The opposite is not claimed, but it is insisted that the finding is contrary to the great weight of the evidence. This, if true, is not alone sufficient to work a reversal.

Another contention is that the court erred in refusing to give the following instruction requested by the defendant: "The jury are instructed that in this case the plaintiff sues upon a contract wherein he claims he was employed by the defendant, Ashland Land & Live-Stock Company, in the winter of 1891, at the agreed price of $50 per month, and that he worked for said company in said employment for a period of fourteen months. Before the plaintiff is entitled to recover in this case he must satisfy you by a preponderance of the evidence that such contract was in fact entered into, that he performed said service under and by virtue of said contract, and that the compensation so agreed to be paid to him, or some of it, has not been paid." This instruction not only failed

to state the correct rule of law applicable to the case, but it was clearly and palpably bad, and it would have been reversible error to have given it, since the burden was not upon the plaintiff to prove by a preponderance of the evidence, or otherwise, in order to make out his case, that any portion of the compensation which he was to receive for his services remained unpaid. On the contrary, the question of payment was a matter of defense which, to be available, the defendant was required to set up in its answer and establish on the trial. (*Magenau v. Bell*, 14 Neb., 17; *Clark v. Mullen*, 16 Neb., 481; *Lamb v. Thompson*, 31 Neb., 448; *Lewis v. Lewis*, 31 Neb., 528; *Hubler v. Pullen*, 9 Ind., 273; *Wolffe v. Nall*, 62 Ala., 24; *Lent v. New York & M. R. Co.*, 130 N. Y., 504.) For the reason stated we approve of the refusal to give defendant's request to charge.

The fourth paragraph of the instructions is criticised by the defendant. It is in this language: "The jury are further instructed that the burden of proof in this class of cases is always upon the party holding the affirmative; and any matter asserted by one party and denied by the other can only be proved in law by a preponderance of the evidence; and in this case, in order for the plaintiff to recover on a contract for work alleged to have been performed thereunder, it is necessary for him to prove such contract and such work to have been performed thereunder by a preponderance of the evidence. And in order for the defendant to recover on its counter-claim it must prove the same, or the items thereof, by a preponderance of the evidence, and would only be entitled to such, if any, as are so proven." The vice imputed to the foregoing by the counsel it that it is inapplicable to the issues in the case. In other words, that the latter part of the instruction, wherein it states that for defendant to recover it must prove its counter-claim, "or the items thereof, by a preponderance of the evidence, and would only be entitled to such, if any, as are so proven," submitted to the jurors for their decision a matter not in

issue, namely, the correctness of the first item of the counter-claim. Had the justness of that item been admitted by the reply, there would be some foundation for the criticism made upon the instruction; but it was not. Plaintiff, by his reply, merely confessed the making of the contract relating to that item, but did not admit there had been any performance by the defendant, hence defendant was required to prove the same by a preponderance of the evidence.

It is insisted that counsel for plaintiff was guilty of misconduct during the progress of the trial in the lower court, in the way of remarks and statements made by him, in the presence and hearing of the jury, of and concerning matters wholly foreign to the record. This criticism is well merited. The conduct of counsel for defendant in that regard was highly reprehensible. He persistently, over objection of defendant, uttered prejudicial remarks;—among others the following is a fair illustration: "He stated to defendant's counsel, 'He [referring to defendant's witness then on the stand] has been to you; of course you fixed him; you have to depend upon fixing witnesses,' "—in the total absence of evidence of such fact. The defendant at the time objected to the improper remarks. In some instances the court sustained the objection, while in others no ruling was made. In no instance did the trial judge rebuke counsel for plaintiff on account of his misconduct, nor was he directed to desist from using improper language, nor was the jury either at the time, or in the instructions, admonished not to be influenced by them. The misconduct of counsel for the prevailing party in this case could not have been otherwise than prejudicial to the defendant, especially in view of the conflicting character of the evidence. (*Stratton v. Nye*, 45 Neb., 619; *Magoon v. Boston & M. R. Co.*, 31 Atl. Rep. [Vt.], 156.) For the error indicated the judgment must be

REVERSED.

## CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. P. R. COX.

FILED MAY 5, 1897. No. 7255.

1. **Railroad Companies: FAILURE TO FENCE TRACK: INJURY TO STOCK.** Under sections 1 and 2, article 1, chapter 72, Compiled Statutes, a railroad company is liable for injuries caused by a moving train to cattle, horses, sheep, or hogs upon its track at a place where it ought to have been, but was not, fenced, although there was no actual collision between the train and the animals injured. *Fremont, E. & M. V. R. Co. v. Pounder*, 36 Neb., 247, followed.

2. ———: ———: ———. *Burlington & M. R. R. Co. v. Shoemaker*, 18 Neb., 369, overruled.

ERROR from the district court of Butler county. Tried below before WHEELER, J. *Affirmed.*

*George P. Sheesley, F. E. Bishop,* and *J. W. Deweese,* for plaintiff in error.

*A. R. Thomson, contra.*

NORVAL, J.

This was an action to recover the value of a horse alleged to have been fatally injured by one of defendant's trains. The evidence adduced on the trial disclosed substantially the following facts: In the daytime of March 26, 1892, plaintiff's horse went upon the defendant's road about ninety rods south of one of its bridges, and at a point where the law made it the duty of the company to build and maintain a fence on each side of its right of way. At the time an engine and train of cars approached from the south at a high rate of speed, and when within forty or fifty rods from the horse, the engineer sounded the alarm whistle of his engine, which, with the rapid approach of the train, frightened the horse, causing him to run north along the track and upon the open bridge, where he fell among the timbers and was so crippled and

injured as to be valueless. The engine and train did not come in contact or collision with the horse, but stopped about one hundred feet before reaching the bridge. The cause was tried by a jury, resulting in a verdict and judgment for the plaintiff. A motion for a new trial was overruled, and the railroad company excepted and brought the record here for review.

A number of rulings of the trial court are assigned as error, but the only point presented for consideration is whether there must have been an actual collision between the train and the horse in order to make the defendant liable. The decision turns upon the construction given sections 1 and 2, article 1, chapter 72, Compiled Statutes.

Section 1, after providing that railroads shall be fenced, declares that "so long as such fences and cattle guards shall be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, is not in sufficiently good repair to accomplish the objects for which the same is herein prescribed, is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines, or trains of any such corporation, or by the locomotives, engines, or trains of any other corporations permitted and running over or upon their said railroad to any cattle, horses, sheep, or hogs thereon."

The next section of the same article reads as follows:

"Sec. 2. Any railroad company hereafter running or operating its road in this state, and failing to fence on both sides thereof, against all live stock running at large at all points, shall be absolutely liable to the owner of any live stock injured, killed, or destroyed by their agents, employes, or engineers, or by the agents, employes, or engines belonging to any other railroad company running over and upon such road, or there being," etc.

In *Fremont, E. & M. V. R. Co. v. Lamb*, 11 Neb., 592, LAKE, J., of the last quoted section, said, *arguendo*, that

"by the law of this state railroad companies are required to fence their track against stock running at large, and, failing to do so, are liable to the owner of any that may be killed or injured in consequence of this omission of duty."

In *Burlington & M. R. R. Co. v. Shoemaker*, 18 Neb., 369, the foregoing statutory provisions were before the court for consideration, and it was held that the injury to stock must result from actual collision or contact with the engines or cars, or through the negligence or willful misconduct of an agent or servant of the company in the course of his employment, in order to create a liability against the corporation. The facts in that case differ from those in the case before us in one respect. There the horse, while on the right of way, was so frightened by a passing train that he ran after the cars and into a bridge on the line of the railroad and was injured, while here he was run into the bridge by the engine and cars.

*Fremont, E. & M. V. R. Co. v. Pounder*, 36 Neb., 247, was decided upon a state of facts quite similar to those in the case before us, and it was ruled that instructions requested by the corporation to the effect that it was not liable for the death or injury of stock caused by a moving train, where there is no actual or direct collision with such train, were properly refused. In the opinion in the Pounder case no reference was made to the two earlier opinions in this court already mentioned.

It is obvious that the three decisions are irreconcilable, and the question confronting us is which one of them properly construed the provisions of the sections copied above. Counsel for the railroad company contend that the statute contemplates a direct collision between the engine or train and the animal injured, and since the horse was not injured by any actual contact with any part of the train, the company is not liable and the plaintiff is without remedy. We cannot adopt this as the true construction. To do so would be to interpolate words into the statute which were not placed there by the lawmaking

body. Section 1 declares that every railroad corporation failing to erect and maintain a fence on both sides of its road "shall be liable for any and all damages which shall be done by the agents, engines or trains * * * to any cattle, horses, sheep, or hogs thereon." Nothing is said about collision on the road or that the stock must be injured or killed by any actual contact, to make the corporation liable. No such idea can be properly drawn from the language quoted. If the contention of the railroad company is well founded, then it logically follows that the latter is not liable for any injury or damage done to live stock by its agents, unless the same resulted from a direct or actual contact with such agent. It is plain that where a horse is injured by being driven into a railroad bridge by a servant of the company in the course of his employment, the latter is liable though the animal was not even touched by the servant; and the rule is the same if the horse is chased into the bridge by an approaching train, although the animal was not injured by any actual contact with the engine or cars. It is negligence for a railroad corporation to fail to fence its track at a place where the law imposes a duty to fence, but such omission alone would not make the company liable for damages received by stock while on its right of way. But to create a liability, in addition to the failure to construct and maintain the fence, the injury must have been occasioned by an agent of the company, or some engine or train of cars. Should an animal which had strayed upon a right of way at a point required to be fenced inflict an injury upon itself, as by running into a bridge on the railroad, and no agent or servant of the company or locomotive or train is near or was in any manner responsible therefor, the corporation could not be made to respond in damages. (*Knight v. New York, L. E. & W. R. Co.*, 99 N. Y., 25.) The true meaning of our statute is that a railroad company is liable for injury to live stock caused by a train upon its unfenced tracks where the law requires it to be fenced, whether such stock was touched by the

train or not. A similar case, which arose in Oregon under a statute substantially like ours, is *Meeker v. Northern P. R. R. Co.*, 21 Ore., 513. The court, after reviewing the authorities upon the question, closes its opinion in this language: "In the case at bar, the mare got on the track for the want of a fence where the duty to fence existed, and, frightened at an approaching train, fled down the track to escape the danger, and in that flight ran into an open trestle and was injured. It was the want of a fence along the track at a place where it ought to have been fenced, that permitted the mare to get on the track; and the injury which resulted to her therefrom was directly caused by a moving train. The want of a fence, therefore, in connection with the moving train was the proximate cause of the injury, and rendered the company liable under the terms of the statute without actual collision." (See *Atchison, T. & S. F. R. Co. v. Jones*, 20 Kan., 527.)

The courts of some of the sister states have held, under statutes not materially different from ours, that there must be an actual collision to give a right of recovery by the owner of injured stock. But the reasons in the opinions assigned for such construction are insufficient to induce us to depart from the rule announced in *Fremont, E. & M. V. R. Co. v. Pounder*, 36 Neb., 247. Under the evidence no other verdict could have been properly returned, and the judgment is accordingly

AFFIRMED.

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JOHN W. HARRIS ET AL. V. WEIR-SHUGART COMPANY.

FILED MAY 5, 1897. No. 7265.

1. **Husband and Wife: AGENCY.** A husband may act as the agent of his wife in the management of her separate trade and business.

2. **——: ——.** Evidence *held* insufficient to sustain the findings of the trial court.

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

*J. J. Buchanan* and *Smith & McCreary*, for plaintiffs in error.

*Charles H. Sloan, contra.*

NORVAL, J.

Weir-Shugart Company obtained a judgment in the county court of Adams county on February 8, 1890, against John W. Harris in the sum of $372.42, besides costs. A certified transcript of the judgment was duly filed and docketed in the district court of Fillmore county, and an execution was issued thereon May 26, 1893, which was returned the next day by the sheriff wholly unsatisfied for want of property of the defendant whereon to make a levy. Whereupon an affidavit in garnishment was filed under the statute by an agent of the plaintiff, a summons in garnishment was issued, which was served upon J. W. Anderson, H. L. Smith, and W. H. Stewart. The garnishees answered, the examination of each disclosing that he had purchased a buggy from the defendant; that the purchase price had not been paid, and he did not know to whom the same belonged. The district court thereupon made an order that the several amounts testified to by the garnishees, amounting in the aggregate to $146, be paid by them into court, to await its further order in the premises. Mary R. Harris, the wife of John W., intervened and claimed the money in controversy as belonging to her in her own right. Issues were formed, and upon the trial thereof to a jury they were determined against Mrs. Harris and in favor of plaintiff, and to the latter the court directed the payment of said $146.

The sole question in the case is, to whom did the money belong? The facts bearing upon the question of ownership, as established by the evidence adduced on the trial,

are as follows: On May 28, 1887, one J. R. Moler sold and, by deed of general warranty, conveyed to Mrs. Clara Harris, at that time the wife of the defendant John W., certain real estate situate in the city of Hastings, which was subsequently occupied by the Harrises as a homestead. On the 25th day of May, 1891, they conveyed the premises to Ellen Harris, an unmarried sister of the said John W. In August of the same year Clara Harris died, and in August, 1892, the said John W. and Mary R. were married. Ellen Harris conveyed the same real estate to the said Mary R. Harris in March, 1893, who shortly thereafter executed and delivered to her husband a power of attorney to transact in her name the business of buying and selling buggies, wagons, etc., to execute deeds and mortgages for her, sign and accept drafts and checks, and do every other thing which would be necessary to the carrying on of the said business. On May 6, 1893, Mr. Harris, in the name of his wife, purchased from the Standard Wagon Company a carload of wagons and buggies for the agreed price of $1,477.50, and the same were consigned to Mary R. Harris, Hastings, Nebraska, the bill of lading giving the right to stop at Fairmont to unload part of the car. The wagons and buggies were paid for out of the money borrowed in the name of Mrs. Harris from A. L. Clark, of the First National Bank of Hastings, which loan was secured by mortgage upon her said real estate. When the car reached Fairmont several of the buggies were unloaded, and thence they were taken to Geneva by Mr. Harris, where a portion of them were sold by him at auction. A plate was on the rear cross-bar of each vehicle containing the words, "Manufactured for M. R. Harris, Hastings, Nebraska." The sale had been previously advertised in her name, and it was at said sale that the garnishees purchased the three buggies on the day that the garnishment proceedings were commenced. Under the foregoing facts, Mrs. Harris requested the court to direct a verdict in her favor, which the court declined to do, and an exception was noted. This instruction

should have been given, and it was error to refuse it. There is not a particle of testimony to be found in the record to show that Mr. Harris ever had any interest in the buggies, or that he contributed to the extent of a penny to the consideration for the real estate which was mortgaged to secure the payment of the money which was paid for the buggies. The statute gave Mrs. Harris the right to carry on business in her own name, and her husband could act as her agent in its management. It is a question of fact to be determined whether the business was in good faith carried on by the husband for the wife for her benefit, or as his own enterprise in her name for the purpose of defrauding his creditors. (*Whitney v. Preston*, 29 Neb., 243; *Walker v. Carrington*, 74 Ill., 446; *Hossfeldt v. Dill*, 28 Minn., 469; *Kutcher v. Williams*, 40 N. J. Eq., 436.) The proofs fail to show any fraud in the transaction, but on the contrary, if the witnesses are truthful, the buggies, and the proceeds arising from their sale, belonged exclusively to Mrs. Harris, and hence are not liable for the payment of her husband's debts. The judgment is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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## J. T. HART V. BANK OF COMMERCE.

FILED MAY 5, 1897. No. 7204.

1. **Payment: EVIDENCE.** The evidence in this case *held* not to show an alleged payment pleaded by the plaintiff in error.
2. **Res Judicata: RECORD OF PROCEEDINGS.** To render the proceedings in a case a bar to a suit on the same cause of action there must in the first be a general finding and a final judgment.
3. ———: ———. Where the record in the first action shows that there were special findings only and that each of these was favorable to plaintiff, except one which showed the action to have been prematurely brought, and upon a recitation of these findings there

was a mere dismissal of the action by the court, *held* that this order of the court amounted to a mere discontinuance of the action and that this in no way operated to bar a subsequent suit on the same cause of action when it matured.

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

*E. Wakeley* and *A. C. Wakeley*, for plaintiff in error.

*E. J. Cornish, contra.*

RYAN, C.

In *Bank of Commerce v. Hart*, 37 Neb., 197, a judgment of the district court of Douglas county in favor of Hart was reversed because, as it was held, the cashier of the bank as such possessed no authority to receive stock of an insurance company in payment of a note of Hart, which by the bank had been rediscounted and was then held in New York, even though by the directors of the bank such payment had afterwards been ratified. Of this cause when remanded there was another trial in which there was a verdict in favor of the bank in accordance with an instruction so to find. In this proceeding to review the judgment entered on the verdict in favor of the bank there is no necessity that the facts of the case should be restated; a reference to our former opinion will supply whatever may be necessary to a complete understanding of the matters hereinafter discussed.

The theory of Mr. Hart on the trial now criticised was that the payment was not claimed as having been made to the bank in the ordinary course of business, but, as shown by his own testimony, Mr. Hart was practically insolvent, and therefore, that the cashier was justified under the unusual stress of circumstances in accepting as payment the insurance company stock transferred to him. In the evidence there is no support for this theory. The stock was purchased by the cashier on his own ac-

count, and after the details had all been arranged Mr. Hart requested that the cash to be paid by the cashier be applied on Mr. Hart's note. Hart was then told that the note was held in New York, and the payment on the note was left to be made by the cashier when Hart's note should be returned. For one-half the par value of its stock the insurance company held Hart's notes, and the payment of these was assumed by the cashier individually as part of the purchase price, and by him they were afterwards taken up. It is not disclosed why Mr. Johnson, the cashier, failed to pay on the note what was due from him to Hart, but it is very clear that his default in this respect was in no way chargeable to the bank of which he was cashier. The plaintiff in error urgently insists that by a former adjudication the right to maintain this action was barred. The promissory note on which both actions were brought was dated April 11, 1887, and by its terms was due one year thereafter. On the 8th day of May, 1888, the first action was brought. The issues joined are sufficiently indicated by the answers to the special interrogatories embodied in the record which is now claimed to amount to a final judgment. This part of the record was in the following language:

"The motion for a new trial having heretofore been overruled herein and the cause coming on to be heard for judgment upon the verdict of the jury, and the jury having found specially as follows:

" 'First, was the note dated April 11, 1887, * * * upon which this action is based, changed after its execution by the insertion therein of the words, "Int. payable quarterly," without the consent or subsequent ratification of the defendant J. T. Hart? Answer: No.

" 'Second—Did the defendant J. T. Hart notify the Bank of Commerce or its cashier, at any time before said note by its face became due, that he desired or would require an extension of the time of payment for one year of the note in pursuance of the agreement relating thereto? Answer: Yes.

"'Third—Did the defendant J. T. Hart and the plaintiff or its cashier accept on or about the 30th day of March, 1888, the sum of $14,105.46 to be applied as a credit upon the note in suit? Answer: No.'

"It is therefore ordered and adjudged that this suit be, and the same is hereby, dismissed."

These interrogatories embraced all the issues presented in the original suit, and from an inspection of them it is clear that the only one which stood in the way of a recovery at that time of a judgment against Hart was that as to the agreement as to the extension of time one year from the maturity of the note then in suit. By its terms, as already indicated, this was due April 11, 1888; the action was begun on May 8, 1888, that is, within the one year extension to which the maker was entitled under the special finding of the jury. There was no final judgment. The order was simply one of dismissal.

In *Taylor v. Larkin*, 12 Mo., 103, it was held that to constitute a former judgment a bar to a subsequent suit it must appear to have been a decision upon the merits of the case, and that as a judgment of nonsuit was not a decision of the merits it was no bar to the second action on the same cause.

In *Estep v. Larsh*, 21 Ind., 190, it was held that a judgment for costs on sustaining a demurrer to a complaint, where the plaintiff declined to amend and his action was therefore dismissed, could not be pleaded as a former recovery in bar of a subsequent action for the same cause, unless the record affirmatively showed that the merits were decided upon a demurrer.

In *Bond v. McNider*, 3 Ir. Law [N. Car.], 440, the entry by the court was "dismissed at the costs of the defendant." This was held not properly to be construed as a retraxit or a judgment upon the merits so as to bar another action for the same cause, but simply as a discontinuance.

In the first paragraph of the syllabus of *Foster v. Busteed*, 100 Mass., 409, is this language: "A petition for the enforcement of a lien on a vessel for labor performed in

its construction is not barred by a general decree dismissing a former petition to enforce the same lien, the answer to which alleged technical defenses against its maintenance, and which was submitted to the judgment of the court on agreed facts conceding the substance of those defenses as well as relating to the general merits of the cause."

In *Andrews v. School District*, 35 Minn., 70, it was held that to constitute a bar to a second action a former suit involving the same subject-matter or cause of action must have been determined upon the merits. This principle was applied where the alleged former adjudication arose upon consideration of a motion for "judgment upon the pleadings and evidence now before the court." This motion was granted and it was accordingly directed that judgment should be entered.

In *Lessee of Lore v. Truman*, 10 O. St., 45, the syllabus is as follows:

"1. Where a judgment or decree is relied on by way of evidence as conclusive *per se* between the parties in a subsequent suit, it must appear by the record of the former suit that the particular controversy sought to be precluded was therein necessarily tried and determined.

"2. Where, in an action at law, a former decree in chancery dismissing a bill generally is relied on as an estoppel *per se* as to matters set up in the said bill, and it appears from the record that the said bill in chancery may well have been dismissed for want of jurisdiction, such decree of general dismissal does not, *per se*, estop the plaintiff therein from proving in the suit at law the matters relied on in the bill as ground for equitable relief."

In *Loudenback v. Collins*, 4 O. St., 251, it was held that to make the dismissal of a bill a bar it must have been upon the merits of the case and not merely for want of jurisdiction.

In *Cheney v. Cooper*, 14 Neb., 415, it was remarked that a "judgment to be conclusive must be final and upon the merits."

In *Slater v. Skirving*, 51 Neb., 108, it was held that where the dismissal in the first action had been on a general finding against the petitioners, each matter pleaded therein being pertinent to the second proceeding, the judgment in the first was conclusive of all matters involved in the second, and this, we take it, is the general rule of which the plaintiff in error seeks to avail himself. There was, however, no general finding in the original action in favor of Hart, neither was there a final judgment. There were special findings, all of which tended to sustain the cause of action described in the petition, except one, and it was merely to the effect that the action was prematurely brought. Under these circumstances the record in the first action showed that the dismissal was because of matter in abatement and not on account of any matter in bar.

As we have illustrated by the authorities cited, when the adjudication is such that there must be a mere discontinuance of the pending action, but not a bar of the cause of action therein described, there exists no reason why a second suit may not be maintained on the same cause of action as was described in the first. In closing his brief plaintiff in error seems to recognize the necessity of a final judgment to sustain the defense of *res judicata*, for he says: "The finding upon the question of payment of the $14,105.46 not being followed by a judgment based thereon, the defendant is not estopped to assist it in this action. This is elementary. (*Hawks v. Truesdell*, 99 Mass., 557.)"

There is found no error in the record and the judgment of the district court is

AFFIRMED.

JENSEN, JUHL & HENSEN V. ABSALOM HALLAM.

FILED MAY 5, 1897. No. 7258.

**Wrongful Attachment:** EXCESSIVE DAMAGES. The evidence in this case considered, and *held* to show that the damages are excessive.

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

*Foster & Boucher*, for plaintiffs in error.

*Gregory, Day & Day, contra.*

RYAN, C.

This action was brought in the district court of Douglas county by the defendant in error for the recovery of damages alleged to have been sustained by the levy of an attachment procured to be issued upon the willfully false affidavit of the plaintiff in error that the defendant had assigned, removed, and disposed of, and was about to dispose of, his property, or a part thereof, with intent to defraud his creditors. The property levied on was a black horse, and it was alleged in the petition that, without any service of summons, and without any appearance for the defendant in the attachment suit, a judgment had been rendered, upon which an order of sale had issued, and that by virtue thereof said horse had been sold. For the value of this horse, laid at $100, a part of the claim for damages in this case was made. The remaining element of damages claimed was in the petition described in this language: "And this plaintiff further alleges that the plaintiff at the time was engaged in the business of representing the National Supply Company of Chicago, and enjoying the confidence, the faith, and esteem of his acquaintances and his employers, and men engaged in business generally, who knew him; that by reason of said false, willful, and malicious state-

ments aforesaid, and the suing out of said attachment, his good name, business integrity, and personal honesty has been brought in question, and he has been put to great trouble and loss of time and expense thereby, and has suffered in his business reputation loss and damage in the sum of $1,000." There was accordingly a prayer for judgment in the sum of $1,100. There was sufficient evidence to justify the jury in finding that the attachment was wrongfully sued out; that the appearance for the purpose of dissolving the attachment was without authority, and that the horse sold was of the value found in the verdict. There was no proof offered as to other damages than the value of the horse, except the testimony of the defendant in error, which was as follows:

Q. Now, Mr. Hallam, with regard to the attachment, you may state whether or not it caused you any annoyance or otherwise.

A. It did.

Q. State in what manner.

A. In the manner that people knew the horse that I was acquainted with; they were always asking me what I had done with my horse; if I had sold him, or what I had done with him; and to tell them that it was taken under an attachment would be very embarrassing, and I didn't want to lie about it, and the consequence was it left me in bad shape, and I had to always try to evade answering as to how I got rid of the horse. Not longer ago than the day before yesterday I was asked, 'What did you do with the little black horse?' and it was very embarrassing for a thing of that kind to slip out of your hands in this way.

Q. In what other respects, if any, did you suffer?

A. Well, the annoyance of attending a suit to defend myself, and to pay out attorney's fees. It is quite an annoyance to a man to spend his time in this way.

Omitting the merely formal parts, the verdict of the jury was in this language:

"We, the jury, duly impaneled and sworn to try the

issue joined between the said parties, do find for said plaintiff and assess the amount of damages due said plaintiff as follows:

| | |
|---|---|
| "For value of horse..... | $75 00 |
| "For int. at 7 per cent on above value from Oct. 6, 1891, to May 1, 1893..... | 8 24 |
| "Total for horse..... | $83 24 |
| "Amount for loss of reputation and humiliation ..... | 500 00 |
| "Total ..... | $583 24 |

"F. M. MARSH, *Foreman.*"

Judgment was rendered for the above aggregate sum of $583.24.

General damages are such as the jury may give when the judge cannot point out any method by which they are to be ascertained, except the opinion and judgment of a reasonable man. (*Bank of Commerce v. Goos*, 39 Neb., 437.) The testimony of Mr. Hallam discloses that he had been frequently annoyed by inquiries as to what he had done with his horse; that it would have been very annoying to answer that it had been seized and sold by virtue of an attachment, and, very properly, he did not want to lie about it. He says these conditions surrounding the question left him in very bad shape, necessitating on his part the giving of an evasive answer. This is all there is of his testimony that bears upon this question, for we understand the observation that "it was very embarrassing for a thing of that kind to slip out of your hands" to refer to something tangible,—perhaps, in this instance, to the horse, for the value of which there was a special finding, followed by a corresponding recognition of a right to recover to that extent. Mr. Hallam did not state how he tried to evade the question as to what he had done with his horse, neither did he say how successful was his attempted evasion. There is no evidence that by reason of this attachment his credit was

injured in any respect whatsoever. While we should feel bound by the verdict of the jury to any reasonable amount of damages in a proper case, it strikes us that the amount allowed for the loss of reputation and humiliation shown in this case was out of all proportion. We cannot arbitrarily fix a figure as that which the jury might have adopted. We shall permit the verdict to stand for the value of the horse and interest thereon as found by the jury if the defendant in error shall elect to accept that amount in full settlement of his entire claim.

In the petition in the district court it was alleged that the defendant was a copartnership. The defendant answered denying that, at the time of filing the answer (June 20, 1892), or at any time since January 1, 1892, it was, or had done business as, a partnership. In argument it is now urged that, since it was shown by the evidence that the firm, after the recovery of its judgment in the attachment case, had dissolved on January 1, 1892, no action arising out of such attachment suit could be subsequently maintained against the partnership. There is nothing in these averments of the answer to take this case out of the general rule laid down in 17 American & English Encyclopedia of Law, page 1137, that "a partnership, notwithstanding its dissolution, continues to exist so far as may be necessary for the winding up of its business."

There is no other question presented by the record. If within forty days from the filing hereof the defendant in error shall file in this court a remittitur of the sum of $500, with such interest as at that time shall have accrued on said $500, the judgment of the district court will be affirmed, otherwise this cause will be reversed and remanded for further proceedings.

JUDGMENT ACCORDINGLY.

## FRANCIS G. HAMER ET AL. V. MCKINLEY-LANNING LOAN & TRUST COMPANY.

FILED MAY 5, 1897. No. 7270.

1. **Judgment Nunc Pro Tunc.** If a judgment in fact was rendered and not recorded, the court at any time afterward, in a proper proceeding and upon a proper showing, is invested with the power to render such judgment *nunc pro tunc*.
2. **Conflicting Evidence: REVIEW.** A finding of fact will not be disturbed when in the trial court it was reached upon consideration of fairly conflicting evidence.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J. *Affirmed.*

*Francis G. Hamer*, for plaintiffs in error.

*Gaslin & Hallowell, contra.*

RYAN, C.

This action was brought by the defendant in error in the district court of Buffalo county for the foreclosure of a mortgage. To vacate a decree rendered *nunc pro tunc* two of the plaintiffs in error, Francis G. Hamer and the Nebraska Land, Stock Growing & Investment Company, have prosecuted error proceedings in this court.

As shown by the affidavit of Mr. Hamer, the aforesaid district court, in its trial docket, on March 9, 1893, made the following entry: "March 9, 1893. Default First National Bank of Broken Bow, Nebraska; Kelly, Maus & Co.; W. H. Lanning; W. H. Lanning, trustee; Thomas Frahm; William H. Carnahan; First National Bank of Kearney, Nebraska. Dismissed as to First National Bank of Poultney, Vermont; First National Bank of Minden, Nebraska; Continental National Bank of Chicago, Illinois; Merchants National Bank of Omaha, Nebraska; Rule Brokerage Company, Chicago; Chicago Lumber

Company, of Ravenna, Nebraska. Leave given Charles O. Norton, C. E. Bates, H. I. Forsythe, W. H. Hunt, and A. G. Galentine to file cross-petition instanter. Due plaintiff from Francis G. Hamer, $5,649.40. Interest, ten per cent from February 14, 1893." The above entries were made by the Honorable Silas A. Holcomb, judge of the district in which this cause was pending.

In the affidavit of William Gaslin, one of the attorneys for the defendant in error, which was introduced in evidence, there was this language: "On the 9th day of March, 1893, it was agreed and stipulated by the said Hamer and this affiant and his partner, Gid. E. Newman, one Ballard, the agent of plaintiff present assenting thereto, that the said Ballard might give his evidence and the court find the amount due, and the other findings in the case, and final decree should be taken on said findings at the June, 1893, term of this court. Affiant further says that on the 29th day of June, 1893, this cause came up in open court with two other cases wherein this plaintiff was plaintiff, against said Hamer and others, and decree was taken and announced by the court on its findings in this case, which does not appear on the findings of this court. Affiant further deposes and says that a stay was filed in said case by the defendants on July 19, 1893." A copy of this request for a stay was embodied in said affidavit and, omitting the merely formal parts, was as follows: "Now comes the defendants, Francis G. Hamer, Rebecca A. Hamer, and the Nebraska Land, Stock Growing & Investment Company, and request a stay of the order of sale for the period of nine months. F. G. Hamer, attorney for the defendants." On the 24th day of March, 1894, there was filed a motion for a decree *nunc pro tunc* as of date June 29, 1893. It is asserted in argument that this motion was passed upon by the court wherein Judge William Neville was presiding. Unfortunately there was no proof of this fact, for the clerk omitted to show by whom the judgments were rendered. The motion was sustained upon

consideration of conflicting evidence as to whether or not a decree was announced on June 29, 1893, and under these circumstances we are bound to assume that there was the announcement indicated. This being true it was proper that a *nunc pro tunc* order should be entered as was done in this case. (*Wachsmuth v. Orient Ins. Co.*, 49 Neb., 590; *Van Etten v. Test*, 49 Neb., 725.)

We have referred to the filing of the request for a stay as tending to indicate that Mr. Hamer understood that a decree was actually rendered on June 29, 1893. He, by affidavit, denied that he knowingly filed this request, and insisted that the filing of a request for a stay in this particular case was accidental. These matters were doubtless duly considered by the trial court, and the importance attached to them we have no means of ascertaining, much less have we the power to correct any undue weight imputed to the filing of this request, if any such there was. The order that a decree be entered as prayed was made on March 24, 1894, and on the same day a motion was made to set aside this decree. In this motion there were set up all the grounds now urged, and these were considered upon conflicting evidence by the court, Judge Holcomb presiding, and this motion was overruled. Under these circumstances the decree must be sustained, and, accordingly, the judgment of the district court is

AFFIRMED.

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## SECURITY NATIONAL BANK OF GRAND ISLAND V. VICTORIAN D. LATIMER.

FILED MAY 5, 1897. No. 7276.

1. **Record for Review.** Matters certified as part of a record cannot be controlled by statements contained in an affidavit.

2. **Pleading: AMENDMENT DURING TRIAL.** An amendment pertinent to plaintiff's cause of action is allowable during a trial, and, subsequently, should not be stricken out on motion merely because in the further course of the trial it is discovered that by reason of

the amendment plaintiff is not confined to only one theory but is entitled to recover on either of two theories, which, for their establishment, are dependent upon practically the same evidence.

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

*R. R. Horth* and *Abbott & Caldwell*, for plaintiff in error.

*W. H. Platt* and *Clark Varnum, contra.*

RYAN, C.

In the early part of the year 1890 certain parties residing in Hall county undertook to organize a bank at Grand Island to be known by the name of the Security National Bank. On March 31, 1890, one of these parties entered into a written contract with R. C. Alden & Co., whereby that firm engaged to sell within thirty days $100,000 of the capital stock of the said bank. The consideration for such services was to be a retainer then paid of $500 and two and a half per cent of the amount which, through the agency of Alden & Co., should be disposed of. This contract was signed by J. M. Marsh, one of the promoters of the scheme, as "cashier Security National Bank (organizing)." The proposed organization was afterwards completed and Marsh, for a considerable length of time, was cashier of the bank while it was in active operation. During the summer of 1890 there arose a misunderstanding between Alden & Co. and the officers of the bank with reference to the compensation to be paid Alden & Co. The evidence does not show the exact nature of the trouble. It seems never to have been adjusted, and probably to this fact is traceable the litigation with which we are now called upon to deal. Alden & Co. retained the entire amounts which that firm collected on subscriptions of stock procured by it and refused to pay any of these amounts to the bank until there should be had a settlement of the commissions claimed to be due. Among the subscriptions of stock

procured by Alden & Co. were two made by Victorian D. Latimer for an amount in the aggregate of $1,500. In various installments the entire sum named was paid to Alden & Co., which firm, during all the time covered by the payments, was recognized as an authorized agent for the bank for the purpose of procuring subscriptions for its stock. When the stock of Latimer had been fully paid for, he was desirous of receiving certificates evidencing his ownership of stock, but these the officers of the bank refused to issue. This action was thereupon brought to recover the amount which he had paid for the stock of the bank, with interest thereon from the time of payment. There was a verdict and judgment conformably with the prayer of Latimer.

It is urged by the bank that the original petition was framed on the theory that the subscription of the defendant in error had been obtained by fraudulent representations, and that, during the trial, leave to amend the petition was obtained upon the assurance of counsel for the defendant in error that the amendment was merely formal in its character. Without postponement of the trial this amendment, it is said, was made so as to incorporate into the petition after the allegation that "defendant [the bank] has never delivered any of said stock to plaintiff or offered so to do," the additional words, "but has refused, and still does refuse, so to do." It is admitted by the counsel for the plaintiff in error that after the above amendment had been incorporated into the petition there was an amendment made of the answer, by which the allegation made by amendment of the petition was admitted to be true. It is insisted, notwithstanding these conceded facts, that there was error in the refusal of the court, on motion, to strike out the aforesaid amendment from the petition. In the first place we cannot sustain this contention, for the reason that the clerk of the district court has certified that the petition and answer were filed in the condition in which we now find them. To sustain the contention of counsel would

be to concede that a certified transcript of the record might be controlled and modified by matters shown by affidavit. In the second place, if we should assume that the facts are as stated in the affidavit, there would appear nothing more serious than the allowance of an amendment which the counsel for the plaintiff practically concedes was very important. By section 144 of the Code of Civil Procedure it is provided that the court may, either before or after judgment, in furtherance of justice, and, on such terms as may be proper, amend any pleading, process, or proceeding in certain respects, among which is that against which plaintiff in error is making this objection. There was a consent to this amendment and an admission that the averment thereby made was true. Under these circumstances there can exist no doubt that the amendment was properly permitted without the imposition of terms. From the fact that it was thereafter developed that, in addition to fraud as a ground for relief, there was pleaded by the amendment a refusal to deliver that for which payment had been made, as an independent substantive fact, it did not necessarily result that the amendment in question should have been stricken out of the petition. Indeed, if the amendment in advance had been objected to for the reason now urged against it, we could not say there would have been error in permitting such amendment to be made,—certainly there exists no good reason for holding that when made and its correctness of averment as to facts conceded it should on motion have been stricken out.

There are no special objections made to the instructions or to any ruling made in the course of the trial. Such objections as are made in a general way would, perhaps, be entitled to consideration if this case had been tried on the theory alone that the plaintiff's money had been obtained by fraudulent representations. There was no question possible on the evidence that the firm of

Alden & Co. was duly authorized to canvass for and obtain subscriptions to stock, and there was no objection made that the firm was not authorized to receive payment for stock thus procured to be subscribed. As already stated, it was admitted by the bank in its answer that there existed a continued refusal on the part of the bank to issue the stock so subscribed and paid for. Under these circumstances it is scarcely necessary to say that there was sufficient evidence to sustain the verdict of the jury. As there has been pointed out or discovered no error in the record, the judgment of the district court is

AFFIRMED.

HARRISON, J., not sitting.

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## D. M. OSBORNE COMPANY ET AL. V. PLANO MANUFACTURING COMPANY.

FILED MAY 5, 1897. No. 7130.

1. **Conditional Sales.** The contract between the parties set out in the opinion and *held* not an absolute contract of bargain and sale, not a contract of agency, but a contract of conditional sale.
2. **Joint Motion for New Trial: REVIEW.** A motion for a new trial is indivisible, and when made jointly by two or more parties, if it cannot be sustained as to all it must be overruled as to all.
3. **Bona Fide Purchasers.** Section 26, chapter 32, Compiled Statutes, applicable to contracts of conditional sales, protects only good faith purchasers and judgment and attaching creditors without notice.
4. **Conversion.** All are principals in conversion, and every person who knowingly aids and abets another in the conversion of the property of a third person is liable to such third person for the value of the property so converted.

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

*A. R. Talbot* and *Stewart & Munger*, for plaintiffs in error.

*Stevens, Love & Cochran* and *George W. Cooper, contra.*

RAGAN, C.

In the district court of Lancaster county the Plano Manufacturing Company brought suit against the D. M. Osborne Company, C. L. Wyman, Henry Strathman, and George Yule, to recover the value of certain binding twine which the plaintiff alleged belonged to it, and which the defendants had converted to their own use. The plaintiff below had a verdict and judgment and the defendants below have prosecuted here a petition in error.

The property made the subject of this suit was delivered by the defendant in error to the plaintiff in error, C. L. Wyman, in pursuance of a written contract between said parties dated the 13th day of March, 1890. This contract was actually signed by one William Brown, but the evidence is undisputed that Brown, to use his own language, was a mere "figurehead" for Wyman, and that the latter was the party beneficially interested in the contract with the Plano Company. The contract, so far as material here, was as follows:

"The party of the first part [the Plano Manufacturing Company], for and in consideration of the covenants and agreements hereinafter contained to be kept and performed by the party of the second part [C. L. Wyman], has this day appointed the party of the second part its agent for the sale of twine at Elwood and vicinity.

"It is expressly understood and agreed by the party of the second part that an obligation is accepted by them or him to pay for all twine ordered in this contract and for any additional order that may be made and accepted by the party of the first part, the second party agreeing not to use the net proceeds of sales in his or their own business or for his or their own use, benefit, or accom-

modation, but to collect, receive, keep, and hold the same until paid over to the said party of the first part, solely as its agent and not otherwise, and for its sole use and benefit, and for the commission hereinafter specified the second party agrees to do all the business pertaining to selling said twine, to receive the same, pay freight charges, keep the same insured from loss by fire for at least two-thirds of the contract price therefor in the name of the first party, and pay all the taxes assessed on same while in his or their possession, keep the same well housed and in good order during the entire season or until sold, and to pay all damages to such property caused by neglect to properly insure, store, and care for the same.

"In furtherance of this contract the party of the first part agrees to furnish the party of the second part 1,500 pounds hemp at sixteen cents per pound, 1,500 pounds Sisal at seventeen cents per pound, to be shipped between January 1 and August 1, 1890, and allow and pay —— cents per pound commission on all twine sold when the proceeds are paid over, netting the party of the first part 11½ cents per pound on hemp twine, 14½ cents per pound on Sisal twine. The said twine to be sold for cash only and full settlement made in cash by said second party not later than September 1, 1890, unpaid balances to draw interest after September 1, 1890, at the rate of —— per cent per annum.

"It is further agreed and understood that until sold or settled for by the party of the second part the sole and exclusive ownership and title in and to all twine shipped to or held by the said party of the second part under this contract is and shall be and remain in the said party of the first part, and the same, or all net proceeds derived from the sale thereof, shall be at all times held for its account and subject to its order, the party of the first part reserving the right to rescind this contract if from fire or other cause it becomes impracticable for the first party to supply such twine," etc.

The evidence tends to show that in pursuance of the terms of this contract the Plano Manufacturing Company, in the spring of 1890, shipped to Wyman the amount of hemp and Sisal twine therein mentioned; that at the time of making this contract Wyman was handling the twine of the D. M. Osborne Company, and desiring to conceal from it that he was also handling the twine of the Plano Company, he caused the contract just quoted to be signed by Brown for him, Wyman; that about the last of August, 1890, Wyman was indebted to the D. M. Osborne Company for goods purchased of them, or for goods which he had sold of theirs and not accounted for; that at that time the plaintiff in error Yule was the agent of the D. M. Osborne Company; that at that time Wyman had on hand the twine sued for in this action, and which had been shipped to him in pursuance of the contract between him and the Plano Company quoted above. About this date Yule went to Elwood and, with knowledge or notice of the relation existing between Wyman and the Plano Manufacturing Company, induced Wyman to ship the twine sued for here to the plaintiff in error Strathman at Grand Island. Strathman executed his note to Yule for the value of the twine received and subsequently paid the note, and the proceeds, or a part of them at least, were applied by Yule or by Wyman to discharge the debt which the latter owed the D. M. Osborne Company; in other words, the evidence leads irresistibly to the conclusion that Yule and Wyman conspired together to pay a debt which Wyman owed the D. M. Osborne Company with the twine of the Plano Manufacturing Company then in Wyman's possession, and that the proceeds of said twine did go towards the discharging of said debt. It is to be remarked here that the evidence in the record is sufficient to show that Strathman, at the time he accepted this twine and gave his note for it, was in possession of sufficient facts to put him upon inquiry as to Yule and Wyman's title to the twine. As to the part taken in the transaction by the D. M. Osborne Com-

pany, it, being a corporation, could act only through, and did act through, its agent, Yule; but it received the benefit of his fraudulent transaction and has not repudiated it.

The plaintiffs in error contend that the contract quoted above was an unconditional contract of sale between the Plano Company and Wyman, and that when the twine was delivered by the Plano Company to Wyman it became his property, and that since they purchased the twine of Wyman, they are not liable in this action. They claim that *Mack v. Drummond Tobacco Co.*, 48 Neb., 397, controls the case at bar. On the other hand, the defendant in error claims that the contract quoted above was not a contract of sale, but one of agency merely; that Wyman simply held the twine as agent to sell for the Plano Company on commission; and that, having no title to the twine, if the plaintiffs in error bought from him, they took no title and are therefore liable. The defendant in error also claims that *National Cordage Co. v. Sims*, 44 Neb., 148, controls the construction of the contract in suit decisively in favor of its contention here. But neither of these cases is in point here. The contract construed in the National Cordage Company case was a contract of agency; it was not a contract of sale, either absolute or conditional. By the contract construed in that case the cordage company furnished its agent twine for sale at a specified commission. But the agent by the contract did not agree to pay for all twine received by him, but to endeavor, if possible, to sell all the twine received and to remit the proceeds of such sale. In the Drummond Tobacco case, Mack & Co., by the contract, guarantied the payment of all tobacco received under the contract, and executed their notes to the tobacco company for the invoice price of the goods received; and it was held that that contract was an absolute contract of bargain and sale, and that the title to all tobacco received by Mack & Co. under the contract vested in them upon its receipt. In the contract in the case at bar Wy-

man expressly agrees to pay for all twine shipped to him under the contract; to make a settlement with the company not later than September 1, 1890, and to pay interest on any balance then due; and the contract further expressly provides that the title and ownership of the twine shipped shall remain in the Plano Manufacturing Company until it is paid for. The contract under consideration, then, is not an absolute contract of bargain and sale. It is not a contract of agency. It is one of conditional sale. It is the species of contract contemplated by section 26, chapter 32, Compiled Statutes.

We have carefully examined all the complaints made by the plaintiffs in error as to the rulings of the district court. It would subserve no useful purpose here to review these assignments, as we have reached the conclusion that under no view of the case is there any error in the record prejudicial to Yule. All the plaintiffs in error made a joint motion for a new trial and have filed here a joint petition in error, and since the judgment of the district court is not erroneous as to Yule, it is good as to all the plaintiffs in error, the rule of this court being that a motion for a new trial is indivisible, and when made jointly by two or more parties, if it cannot be allowed as to all, it must be overruled as to all. (See *Minick v. Huff*, 41 Neb., 516, and cases there cited.) This conditional contract of sale between Wyman and the Plano Company was a valid one as between them, and the title to the property remained in the Plano Company until it was paid for. Wyman, therefore, had no title to the property, as he had not paid for it; and but for the provisions of the statute, said section 26, chapter 32, anyone acquiring this property from Wyman or a lien upon it would take no greater title than Wyman had. (*Campbell Printing Press & Mfg. Co. v. Dyer*, 46 Neb., 830.) But the statute has made an exception in favor of parties dealing with such property by which good-faith purchasers of property in the possession of a conditional vendee thereof, and the judgment and at-

taching creditors of such vendee without notice are protected. (*Peterson v. Tufts*, 34 Neb., 8.) Neither Yule, Strathman, nor the D. M. Osborne Company was a judgment or attaching creditor of Wyman, nor was either one of said parties a good-faith purchaser of this property from Wyman, as they and each of them knew, or were in possession of sufficient facts from which they should have known, that Wyman was a conditional vendee of the property and not the absolute owner of it. There are no accessories in conversion,—all are principals; and every person who knowingly aids and abets another in the conversion of the property of a third person renders himself liable to such third person for the value of the property so converted. Yule, with full knowledge that Wyman was a conditional vendee of the twine in suit, and that he had no title to this twine as against the Plano Company, assisted Wyman not only to convert this twine to his own use, but he did this for the express purpose of depriving the Plano Manufacturing Company of the twine or its proceeds. The judgment rendered against Yule is the only one that could have been rightly rendered under the evidence in the record, and the judgment against all the plaintiffs in error is therefore

AFFIRMED.

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OMAHA LOAN & TRUST COMPANY, APPELLEE, V. GEORGE E. BERTRAND, APPELLANT.

FILED MAY 5, 1897. No. 7262.

1. **Judicial Sales:** MASTER-COMMISSIONERS. A district court has power to appoint a person other than the sheriff of the county special master to make a sale of real estate ordered to be sold in pursuance of its decree.

2. **Special Master Commissioner.** A special master so appointed is not an officer within the meaning of section 1, chapter 10, Compiled Statutes, 1895.

3. ———: BOND. No statute of this state requires a person appointed such special master to take and file an oath or to give a bond; but the district court is invested with authority, and it should require this of a person appointed special master before entering upon the performance of his duties.

4. **Judicial Sales: OBJECTION TO APPRAISEMENT.** Objection that property sold under a decree in equity was appraised too low comes too late when made for the first time after the sale.

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

*Guy R. C. Read*, for appellant.

*Francis A. Brogan, contra.*

RAGAN, C.

This is an appeal from an order made by the district court of Douglas county confirming a judicial sale of real estate made by a special master commissioner appointed by the court for that purpose. The appellant urges here the following arguments:

1. That the district court was without authority to authorize the sale to be made by any person other than the sheriff of the county. A district court has power to appoint a proper and disinterested person other than the sheriff of the county as commissioner to make sale of real estate ordered to be sold in pursuance of a decree of the court. (Code of Civil Procedure, sec. 852; *American Investment Co. v. Nye*, 40 Neb., 720.)

2. A second argument is that the special master so appointed by the court did not take and file an oath nor execute a bond. Under this head it is insisted that a special master appointed by a court of equity to make a sale is an officer within the meaning of section 1, chapter 10, Compiled Statutes, 1895. We do not think he is. The district court has authority independent of the statute, and it should require of a person appointed special master to take and file an oath and to give a bond to faithfully perform his duties, before entering upon the

performance thereof. But we know of no statute that requires a special master either to take an oath or to give a bond. Again, there is nothing in the record before us which shows or tends to show that the special master did not give a bond and did not take an oath; and if such bond and oath were essential to confer jurisdiction upon him to make this sale then, in the condition in which this record is, we will presume that such bond was filed and such oath taken. (*Atchison & N. R. Co. v. Washburn*, 5 Neb., 117; *Dayton v. Johnson*, 69 N. Y., 419.)

3. The third and fourth arguments are that the appraisers were not sworn, and that the appraisers did not view or inspect the real estate at or before the time of appraising it. The report of the special master in the record recites that the appraisers were duly sworn to appraise the real estate ordered to be sold and that it was appraised upon actual view thereof. There is no showing in the record to controvert this report of the special master, and his report must, therefore, be conclusively presumed correct.

4. Finally, it is insisted that the appraisement made of the property was too low. No objection was made and filed in the case to this appraisement before the sale of the property, and the objection that the property was appraised too low comes too late when made for the first time after the sale. The judgment of the district court is

AFFIRMED.

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HENRY M. PORTER, APPELLANT, V. ADAM OURADA ET AL., APPELLEES.

FILED MAY 5, 1897. NO. 7285.

1. **Mortgages: ASSIGNMENT: PAYMENT: AGENCY: SUBROGATION.** Ourada gave his note to Toncray, due in five years, payable to his order, and secured the same by real estate mortgage. Toncray sold and delivered the note and mortgage before their maturity to Porter, but he did not record the mortgage assignment. Afterwards a

trust company took a mortgage from Ourada on the real estate to secure its loan of $1,700 to him. Instead of paying the money to Ourada the trust company retained it and promised therewith to pay off the Toncray mortgage debt, having then two years to run. The trust company paid the Toncray mortgage debt to him and caused him to release his mortgage of record without notice that such mortgage debt was then owned by Porter. Toncray was not Porter's agent, and embezzled the money. After the recording of the Toncray release and the trust company's mortgage, Stibal, in good faith, purchased, subject to the trust company's mortgage, the real estate, and parted with a valuable consideration therefor without notice, actual or constructive, of Porter's ownership of the Toncray mortgage debt or that his release of said mortgage was unauthorized. Porter then brought suit to foreclose the Toncray mortgage, making Stibal and the trust company defendants. *Held*, (1) That Stibal's title was not incumbered with the Porter mortgage (*Whipple v. Fowler*, 41 Neb., 675, followed); (2) that the record of the Toncray mortgage was notice to the trust company that it secured a debt evidenced by negotiable paper, and that it paid this debt to Toncray at its peril without receiving from him at the time the surrender of such paper; (3) that the promise made by the trust company to Ourada to pay the Toncray mortgage was a promise made for the benefit of the legal owner and holder of the debt secured by such mortgage; (4) that Porter was entitled to be subrogated to the lien which the trust company had on the land to the extent of the amount due and unpaid on the mortgage purchased by him of Toncray.

2. ———: ———: ———: ———. The mere fact that a mortgagee has been in the habit of collecting interest from the mortgagor and remitting it to an assignee of the mortgage is not alone sufficient to authorize the conclusion that the mortgagee's agency was such as to authorize him to collect the entire unmatured mortgage debt. (*Stark v. Olsen*, 44 Neb., 646.)

3. Maxim. Where one of two innocent parties must suffer a loss, he whose negligence caused the injury should bear it.

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

*Loomis & Abbott*, for appellant.

*Phelps & Sabin, contra.*

RAGAN, C.

This is an appeal by Henry M. Porter from a decree of the district court of Colfax county dismissing his suit brought to foreclose a real estate mortgage.

There is little, if any, conflict in the evidence. The material facts are as follows: In January, 1887, Adam Ourada owned certain real estate in Colfax county. On the 31st day of January of said year Ourada became indebted to one C. H. Toncray in the sum of $850. As an evidence of said debt Ourada and his wife executed and delivered to Toncray a note for said sum of money, payable to the order of said Toncray at a bank in Fremont, Nebraska, where Toncray resided. This note matured on the 1st day of February, 1892, and drew interest at the rate of seven per cent per annum from February 1, 1887, until maturity, such interest payable semi-annually and evidenced by ten interest notes or coupons of $29.75 attached thereto, each payable to Toncray and at the same place of payment as the principal note. The principal bond and the coupons were secured by a real estate mortgage executed by Ourada and wife on the 31st day of January, 1887, and duly recorded in the office of the register of deeds of said Colfax county on the 8th day of February, 1887. Soon after the recording of this mortgage Toncray sold, indorsed, and delivered in the usual course of business the principal note and interest notes to Henry M. Porter and delivered to him the mortgage securing the same. It does not appear that Toncray ever executed any formal assignment in writing of the mortgage securing these notes; at all events, if such an assignment was executed, it was never filed of record in the office of the register of deeds of Colfax county. Until May, 1890, Ourada appears to have made his interest payments as they matured to Toncray, and he appears to have remitted them to Porter's agent. In May, 1890, Ourada made application to the appellee, the Central Loan & Trust Company (hereinafter called the trust company), for a loan upon this land. The trust company agreed to and did make Ourada a loan of $1,700, and to secure the same took a mortgage from Ourada and wife upon this land. By agreement between Ourada and the trust company the latter, instead of paying to Ourada the $1,700,

undertook therewith to pay off and discharge all liens upon the land prior to its own mortgage. It paid off several liens on the land and paid to Toncray the principal of his loan, $850, not due until February, 1892, and paid the matured interest thereon, and caused Toncray to release his mortgage. It appears that Toncray failed to remit this money to Porter, who then owned and held the Toncray mortgage and the debt which it was given to secure. At the time the trust company took its $1,700 mortgage from Ourada it caused an abstract of title to be made of the property on which abstract appeared the mortgage made by Ourada to Toncray. When the trust company made the payment to Toncray it had no knowledge or notice of the fact that Porter then owned and held the debt which such mortgage was given to secure. In April, 1891, the appellee, John Stibal, purchased of Ourada and wife the real estate in controversy here, paid a valuable consideration for the same, and in his deed assumed and agreed to pay the $1,700 mortgage held by the trust company, it then being of record in Colfax county. Before Stibal purchased the land he caused the public records of Colfax county to be examined, and they disclosed the mortgage made by Ourada and wife to Toncray, the release of that mortgage by Toncray, and the $1,700 mortgage made by Ourada and wife in May, 1890, to the trust company. Stibal, at the time he purchased the land, had neither actual nor constructive notice that Porter owned or had ever owned the debt secured by the Toncray mortgage, and he purchased the land of Ourada believing that said mortgage had been paid in full and rightfully discharged of record. On the 15th day of December, 1892, Henry M. Porter brought this suit in the district court of Colfax county to foreclose the mortgage which had been transferred to him by Toncray, making the trust company and Stibal, among others, defendants to the action. Stibal answered alleging that he was the owner of the real estate; that he purchased it for a valuable consideration, relying upon

the notice afforded by the records of Colfax county that the mortgage sought to be foreclosed by Porter had been paid and released. The trust company answered, claiming also to be an innocent mortgagee of the property, and prayed for the foreclosure of its mortgage, and that it might be declared a first lien upon the real estate.

In view of these established facts, what are the rights, liabilities, and equities of Porter, the trust company, and Stibal? Stibal, having purchased and paid for this real estate a valuable consideration after the entry of the satisfaction of the mortgage by Toncray, the original mortgagee, without notice, actual or constructive, that the Toncray mortgage had been assigned and remained unpaid, and that the release thereof was unauthorized, he is entitled to protection as against the Toncray mortgage now sought to be foreclosed by Porter. (*Whipple v. Fowler*, 41 Neb., 675.) The principle upon which that case rests is that where one of two innocent parties must suffer a loss, he whose negligence caused the injury should bear it. Although Porter is an innocent holder of the debt and mortgage, yet he might have protected himself by taking a formal assignment in writing from Toncray of the mortgage purchased by him and caused it to be recorded in the office of the register of deeds of Colfax county. (*Eggert v. Beyer*, 43 Neb., 711.) And if his neglect to do this has caused the loss which either he or Stibal must bear, then, as between those two parties, the loss should fall on Porter. Stibal's title, then, to the real estate in controversy, so far as this record discloses, is subject only to the lien of the mortgage of the trust company. The trust company is not an innocent mortgagee of the real estate in question. At the time it took its mortgage the Toncray mortgage stood of record and the debt which it secured had two years to run. By the agreement with Ourada the trust company was to pay off the Toncray mortgage out of the loan it had made to Ourada. It paid this mortgage to Toncray, but Toncray had no authority to receive such payment. He did not

own the paper, nor was it in his possession, nor was he Porter's agent for the collection of this mortgage debt. The mere fact that Toncray had been in the habit of collecting from Ourada interest and remitting it is not alone sufficient to authorize the inference or conclusion that his agency was such as to authorize him to collect the entire unmatured mortgage debt. (*Stark v. Olsen*, 44 Neb., 646; *Richards v. Waller*, 49 Neb., 639.) When the trust company paid the mortgage to Toncray it knew, or must have known, from the records that the mortgage secured a debt evidenced by negotiable paper, and it paid this debt to Toncray at its peril without receiving from him at the time the surrender of the negotiable notes. (*Eggert v. Beyer*, 43 Neb., 711.) The promise made by the trust company to Ourada to pay the Toncray mortgage was a promise made to Ourada for the benefit of the legal owner and holder of the debt secured by the Toncray mortgage, and the mortgage of the trust company upon this land should be charged with the amount due Porter on the Toncray mortgage; in other words, Porter is entitled to be subrogated to the lien which the trust company has on this land to the extent of the amount due and unpaid on the mortgage purchased of Toncray.

The decree appealed from is reversed and the cause remanded to the district court with instructions (1) to take an account of the amount due Porter on the Toncray mortgage; (2) the amount due the trust company on its mortgage, and to enter a decree giving Porter a first lien upon the premises for the amount due upon his mortgage, and to give the trust company a second lien for the amount found due on its mortgage, after deducting from such amount the amount found due Porter, the costs in this entire proceeding to be taxed to the trust company and Porter in such proportion as the district court may deem just.

REVERSED AND REMANDED.

## NEBRASKA LAND, STOCK-GROWING & INVESTMENT COMPANY V. FIRST NATIONAL BANK OF MINDEN ET AL.

FILED MAY 5, 1897. No. 7292.

**Review:** JUDGMENT. The record examined and the conclusion reached that the verdict and judgment complained of were the only ones that could have been correctly returned and rendered on the undisputed evidence in the case.

ERROR from the district court of Kearney county. Tried below before BEALL, J. *Affirmed.*

*Francis G. Hamer*, for plaintiff in error.

*J. L. McPheely* and *G. L. Godfrey, contra.*

RAGAN, C.

In the district court of Kearney county the Nebraska Land, Stock-Growing & Investment Company brought this action in replevin for some live stock against the First National Bank of Minden and others. The trial resulted in a verdict and judgment in favor of the defendants below, and the stock company prosecutes here a petition in error.

We have carefully examined the pleadings, the evidence, and the instructions of the court and reached the conclusion that the record contains no error prejudicial to the parties complaining here. Indeed, the verdict and judgment returned and rendered are the only ones that could have been rightfully returned and rendered under the undisputed evidence in the case. The district court, when the plaintiff below rested its case, should have instructed the jury to return a verdict for the bank. The record presents no question of law, and the judgment of the district court is

AFFIRMED.

## CHARLES MYERS V. STATE OF NEBRASKA.

FILED MAY 5, 1897. No. 8932.

1. **Rape: EVIDENCE.** In a prosecution for rape, certain evidence, set out in the opinion, *held* to be irrelevant to the issues and prejudicial to the accused.

2. **Trial: CROSS-EXAMINATION: CONTRADICTIONS.** When a witness is cross-examined on a matter collateral to the issue he cannot, as to his answer, be contradicted by the party putting the question. (*Johnston v. Spencer*, 51 Neb., 198.)

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

*R. S. Norval* and *George W. Lowley*, for plaintiff in error.

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

IRVINE, C.

Myers was convicted of rape upon the body of a girl within the statutory age of consent, and sentenced to imprisonment in the penitentiary for three years. The judgment must be reversed on account of errors in the admission of evidence.

The prosecutrix was, at the time of the alleged offense, somewhat more than seventeen years old. She was the adopted daughter of Mr. and Mrs. Richman, and dwelt with them on their farm in Seward county. The defendant, Myers, a youth of twenty, taught school in the neighborhood and boarded with the Richmans. The general nature of the testimony of the prosecutrix was that on the night of December 3, 1895, as she was about to retire, the defendant entered her room, and after some resistance on her part, accomplished his purpose; that thereafter until the 5th of April, 1896, he several times visited her room after she had retired, and on each occasion intercourse took place. The defendant took the stand on

his own behalf, and squarely and emphatically denied all the charges against him, and denied that there had ever been the slightest improper conduct between them. The prosecutrix's testimony was to the effect that on no occasion, except when he visited her room, had Myers ever, by word or act, exhibited the slightest undue familiarity or made any attempt in that direction; that even during those visits he used no words of endearment, and never kissed her or caressed her in any manner. The circumstances corroborating the prosecutrix's testimony were slight. They really went no further than to establish that the opportunity existed between these persons, and that they were so situated that her story might be true, and that she was not known to have any male associates whom she met under circumstances permitting improper conduct. The *corpus delicti* was proved beyond a doubt. The girl was under eighteen, and she gave birth to a child. This being established, the case called for close scrutiny of the evidence connecting the defendant with the crime, and the testimony of the only two persons having absolute knowledge was of such a character that it was perhaps unusually necessary to guard against the intrusion into the case of immaterial evidence which might improperly influence the jury.

One Phena Thams was called as a witness for the defense, and testified in chief that on one occasion she had observed a neighbor taking improper liberties with the prosecutrix. On cross-examination she was asked in regard to her acquaintance with one Miles Thompson, a negro. Then followed such questions as the following:

"Q. I will ask you if it is not a fact that you were discharged from the Windsor Hotel because you and he were found embracing each other?

"Q. Is it not a fact that Mr. France discharged you because you and Miles Thompson, the colored porter at the Windsor Hotel, had been found on several occasions, previous to your discharge, embracing each other and kissing each other?

"Q. I will ask you if Billy Royer did not, immediately preceding the time you left the Windsor Hotel, find you and one Miles Thompson, the colored porter there, embracing each other in one of the halls?

"Q. I will ask you if Tena Frahm did not find you and Miles Thompson, the colored porter at the Windsor Hotel, immediately before you left there, before your discharge, find you and Miles Thompson embracing each other and caressing each other?

"Q. Did not Emma France, immediately before your discharge from the Windsor Hotel, find you and Miles Thompson, the colored porter, embracing each other in one of the halls of the hotel?

"Q. I will ask you if you was not overtaken, or caught, in the Windsor Hotel, embracing Miles Thompson, immediately before your discharge from the hotel?

"Q. I will ask you if Frank Cross did not overtake you, or find you, and one Charles Burnham on the public highway, right north of Utica, embracing each other?

Each of these questions was objected to and the witness required to answer. She denied each of the charges. This evidence was wholly collateral, tended in nowise to prove the issue and in no legal manner to impeach the witness; but the effect upon the jury of permitting these repeated insinuations of immoral conduct between the witness and a colored man must have been highly prejudicial, and the error was augmented by permitting the state to call Frank Cross in rebuttal and prove by him the substance of the charge contained in the last question. Even if the testimony was proper on cross-examination, it was collateral, and the state was bound by the witness's answers. (*Johnston v. Spencer*, 51 Neb., 198.)

Mrs. Richman was called to testify on behalf of the state in chief, and among other things, she was asked regarding the prosecutrix: "Q. You may go ahead now and state what was the girl's demeanor towards you and Mr. Richman during the time she has lived, and whether she has been truthful or otherwise, whether she has been

obedient or otherwise, whether she has been given to vulgarity and obscenity, and what her general character has been since she has lived with you?" This was objected to, and the witness answered: "She has always been an affectionate child, a truthful child, and I never had any trouble with her any more than a mother would have with any child." Every portion of this question was highly objectionable. As a part of the state's case in chief it had no right to support the testimony of its witnesses by proof of their general truthful character, and if this could have been done, the rule is familiar that it must be by proof of general reputation, and not the witness' opinion as to her actual conduct. So, too, whether or not she had been an obedient child was wholly foreign to the case, and whether or not she was given to vulgarity or obscenity tended in no way to prove the defendant's guilt. Almost immediately afterwards the following question was answered over defendant's objection: Q. State whether she has been refined or coarse in her nature or conduct since she has been living with you?" The witness answered: "Refined." No comment is required to show the immateriality of this line of examination.

From certain questions asked the prosecutrix in cross-examination it appeared probable that the defense would undertake to show illicit relations about the time in controversy between the prosecutrix and a colored man living at the Richman house. By a series of questions, not necessary to repeat, but all of which were properly objected to, the state was permitted to prove, as a part of its case in chief, that this colored man was a man of good character, temperate, industrious, and not given to the use of obscene language. In many other particulars evidence was permitted entirely beyond the realm of facts in any way connected with the issue to be proved, and much of it was of such a character as that we have quoted manifestly tending to create a bias or prejudice in the minds of the jurors favorable to the prosecutrix or adverse to the defendant and his witnesses.

Without discussing other questions, the judgment must be reversed for the errors referred to.

REVERSED AND REMANDED.

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## GRAND ISLAND & WYOMING CENTRAL RAILROAD COMPANY V. SAMUEL SWINBANK ET AL.

FILED MAY 5, 1897. No. 7230.

1. **Rulings on Evidence:** REVIEW. Errors in the admission and rejection of evidence cannot be reviewed unless the particular rulings complained of are pointed out in the petition in error.
2. **Assignment of Cause of Action.** Evidence *held* sufficient to warrant a finding that there had been an absolute assignment of a cause of action to the plaintiff.
3. **Statutes:** AMENDMENTS: RAILROAD COMPANIES: FENCES. Session Laws, 1877, page 60, purporting to amend section 2 of the act relating to the liability of railroad companies for live stock injured where no lawful fence has been constructed, is in conflict with the constitution and inoperative because it did not repeal the section amended. *City of South Omaha v. Taxpayers' League*, 42 Neb., 671, followed.
4. **Railroad Companies:** INJURY TO STOCK: EVIDENCE. Therefore, the notice provided for by the original section is incompetent evidence for the purpose of establishing the value of live stock killed or injured.
5. **Pleading:** DEFAULT: PERMISSION TO ANSWER. Permitting a defendant in default to file an answer is a matter resting largely in the discretion of the trial court, and a judgment will not be reversed because the defendant was permitted to answer out of time unless the record affirmatively discloses an abuse of discretion.
6. **Railroad Companies:** INJURY TO STOCK: DAMAGES. That part of the statute relating to the liability of railway companies for live stock injured which gives the owner of live stock double the value of his property, is void. *Atchison & N. R. Co. v. Baty*, 6 Neb., 37, reaffirmed.

ERROR from the district court of Dawes county. Tried below before KINKAID, J. *Affirmed conditionally.*

*J. W. Deweese, A. W. Crites,* and *F. E. Bishop,* for plaintiff in error.

*Allen G. Fisher* and *A. V. Harris, contra.*

IRVINE, C.

Samuel Swinbank and William Swinbank, partners as Swinbank Bros., brought this action against the Grand Island & Wyoming Central Railroad Company to recover damages for live stock killed by the trains of the railroad company at points where the tracks remained unfenced in violation of the statute. They recovered judgment for $515, and both parties prosecute error.

We will consider in the first place the petition in error of the defendant railroad company. The petition is in four counts; the first alleging the killing of four horses belonging to plaintiffs; the second alleging the killing of a mare belonging to one Collins, and the assignment of the cause of action to plaintiffs; the third alleging the killing of a heifer belonging to Rosenberg Bros., and the assignment of the cause of action to plaintiffs; the fourth alleging the killing of a cow belonging to plaintiffs. The matters complained of in the brief, and to which the argument is entirely directed, may best be considered in the order in which they are stated in a general résumé at the close of the brief.

1. Error in admitting in evidence certain notices and affidavits of loss made and served upon the railroad company in accordance with the provisions of section 2, chapter 72, Compiled Statutes, relating to the liability of railway companies for stock killed when the track is not properly fenced. We cannot consider this question, because the admission of the evidence is not assigned in the petition in error.

2. That the assignment of the second and third causes of action to the plaintiff are not established by the evidence, and that as to those counts the plaintiffs are not

the real parties in interest. In support of this contention the defendant invokes the rule established in *Hoagland v. Van Etten*, 22 Neb., 681, to the effect that a mere assignee, having no interest in the result, but who obtains an assignment upon a promise to pay the assignor the amount he may derive from the action, is not the real party in interest under section 29 of the Code of Civil Procedure, and cannot maintain an action. We find, however, in the evidence sufficient to warrant the jury in finding that in each case there was an absolute assignment conveying a beneficial interest to the plaintiffs. As to the third count, this evidence is quite distinct and satisfactory. As to the second it is by no means conclusive, but it would be without profit to set out here all the evidence bearing on the issue. Suffice it to say that there was evidence tending to prove that the conditions of the assignment were that, in case of recovery, plaintiffs were to pay the owner $125; if no recovery should be had, they were to pay, in any event, the value of the horse. The *bona fides* of this transaction and the character of the assignment, as to whether or not it was an actual and absolute sale, were submitted to the jury by appropriate instructions not complained of in the briefs, and the jury resolved the question in favor of the plaintiffs.

3. That the damages assessed on the third and fourth causes of action are unsupported by competent evidence of value. As to the fourth cause of action there is no assignment relating thereto in the petition in error and no general assignment covering the question. As to the third cause of action there is an appropriate assignment and it is well taken. We find no evidence in the record as to the value of the cow described in the third count except the notice of loss and affidavit served on the company. As before stated, these notices and affidavits were made and served in compliance with section 2, chapter 72, Compiled Statutes. By the first section of that act it is made the duty of railroad companies, under certain limitations, to provide fences and cattle-guards, and they

are made liable for all damages inflicted by agents, engines, or trains running upon the track, upon cattle, horses, sheep, or hogs thereon, where the statute is not complied with. Section 2 originally read as follows: "Any railroad company hereafter running or operating its road in this state, and failing to fence on both sides thereof, against all live stock running at large at all points, shall be absolutely liable to the owner of any live stock injured, killed, or destroyed by their agents, employes or engines, or by the agents, employes or engines belonging to any other railroad company, running over and upon such road, or there being: Provided, That in case the railroad company liable under the provisions of this section, shall neglect or refuse to pay the value of any property so injured or destroyed, after thirty days' notice in writing given, accompanied by an affidavit of the injury or destruction of said property, to any officer of the company, or any station agent, or ticket agent, or conductor employed in the management of its business in the county where the injury complained of shall have been committed, such railroad company, their agents and employes, shall, in an action brought to recover damages therefor, be held and they are hereby declared to be liable to pay double the value of the property so injured, killed or destroyed as aforesaid." (General Statutes, 202.) By an act of 1877 it was attempted to amend this section by adding the following: "*Provided further*, That if the railroad company do not object to the value of the property so injured or destroyed, as set forth in the notice aforesaid, within ten days, it shall be considered and taken as the true value, but if the said railroad company are dissatisfied with the value as set forth in said notice, they shall, within ten days, leave a written notice to that effect at the residence or place of business of the owner of the stock so injured or destroyed, and the value shall then be ascertained and determined in accordance with the provisions of section 5 of the general herd law." (Session Laws, 1877, p. 60.) This, however, was by an act

which by its title, form, and effect was purely and simply amendatory of the original act, and it contained no clause repealing the original section. It was, therefore, unconstitutional. (*City of South Omaha v. Taxpayers' League*, 42 Neb., 671, and cases there cited.) It was only by this proviso that the notice was constituted evidence of value, and, at least in the absence of a statute so providing, the evidence was clearly not competent for that purpose.

4. That the court erred in overruling defendant's motion for a verdict when plaintiff rested his case. This was not assigned in the petition in error, nor is there any general assignment of the insufficiency of the evidence which presents it for consideration.

5. We now take up the cross-petition in error of the plaintiffs. On this the first argument advanced is that there was error in permitting the defendant to answer after the evidence had been introduced, and in refusing to enter defendant's default. The record shows the filing of an answer before the trial, but it also discloses that at the close of the evidence the plaintiff asked to have a default entered and that the court ordered the answer to be filed as of a prior date. The reason for this action does not appear. If no answer had yet been filed, the parties had nevertheless tried the case on the theory that the whole petition was in issue, and the plaintiffs were not prejudiced by permitting the answer to be filed. Such matters rest largely within the discretion of the trial court, and an abuse of discretion must affirmatively appear to justify a reversal on such a ground.

6. After the verdict the plaintiffs asked leave to amend their petition so as to claim a judgment for twice the value of the stock, as found by the jury. This was refused, and upon that order the plaintiffs base an assignment in their cross-petition in error. We are asked in this connection to reconsider and overrule *Atchison & N. R. Co. v. Baty*, 6 Neb., 37, holding that portion of the statute already quoted to be in contravention of the constitution in so far as it attempts to confer a right to

double damages. Without entering into an extended discussion of the question, we are content to say that we are not at this time disposed to reinvestigate the correctness of a decision which has stood unquestioned for twenty years and which had the effect of practically removing a portion of the statute from the books. To overrule that decision would be to judicially reinstate an obsolete statute, and would savor greatly of legislation. If such a course would be at all permissible it would only be where the reasons for revising the former ruling were of the most cogent, convincing, and urgent character. While one reason given in the opinion for the decision there reached has since been disapproved (*Graham v. Kibble*, 9 Neb., 182), we cannot regard the case in its essentials as having been overruled or its authority even shaken. The chief reason for holding the so-called double damage portion of the act bad was that it took from one litigant property and gave it to another, not in compensation for any wrong sustained, but by way of punishing the defendant; that this was contrary to the rights of property secured by the constitution. The same view and the same policy have been followed repeatedly since in denying the right to punitive damages, and we are satisfied that those reasons are well founded. The so-called penal statute discussed in *Graham v. Kibble, supra*, was sustained as being a provision for liquidated damages. It related to a case where the actual damages are difficult, if not impossible, of ascertainment; whereas the statute we are considering requires the actual damages to be admeasured, and then arbitrarily requires the defendant to pay the plaintiff twice that sum. As said by an eminent court with regard to exemplary damages, such a procedure is "a sort of hybrid between a display of ethical indignation and the imposition of a criminal fine." (*Haines v. Schultz*, 50 N. J. Law, 481.)

From what has been said it follows that the judgment must be reversed on the petition in error of the railroad company, unless the plaintiffs below, within forty days,

file a remittitur as of the date of the judgment for the value of the heifer described in the third cause of action as found by the jury, less nominal damages on account thereof, to-wit, the sum of $19.95. If such remittitur be entered the judgment will be affirmed for the residue.

JUDGMENT ACCORDINGLY.

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## EFFIE E. THOMPSON, ADMINISTRATRIX, V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED MAY 5, 1897. No. 7256.

1. **Nonsuit:** DIRECTING VERDICT. Under our Code a trial court has no authority to enter an involuntary nonsuit and judgment of dismissal because the plaintiff by his evidence fails to establish his cause of action. In such case the proper practice is to instruct the jury to return a verdict for the defendant. But where the evidence entitles the defendant to have a verdict so directed, it is error without prejudice to the plaintiff to enter the nonsuit. (*Zittle v. Schlesinger*, 46 Neb., 844, followed.

2. **Master and Servant:** DEFECTIVE APPLIANCES: RISKS OF EMPLOYMENT. If the machinery, tools, or appliances furnished a servant by his master are obviously defective and dangerous, and the servant, notwithstanding, continues in the service, he thereby assumes the risks of any injury which he may sustain by reason of such defective appliances. *Missouri P. R. Co. v. Baxter*, 42 Neb., 793, followed.

3. ———: ———: ———. While there are certain exceptions to this general rule they do not apply to a case where a brakeman is injured by a defective coupling on a car which he has habitually handled for a long period of time with knowledge of the defect and without protest on his part or promise to repair on the part of his master.

4. **Railroad Companies:** COUPLERS. The act requiring railway companies to equip their cars with automatic couplers (Session Laws, 1891, ch. 19) permitted railway companies to use cars not so equipped until January 1, 1895, and prior to that it forbade only the originally putting in use in this state of a new car not so equipped, or of a car which had been in the shops for general repairs or for repairs necessitating a new drawbar, after the passage of the act.

5. ———: DEATH OF BRAKEMAN: NEGLIGENCE IN CONSTRUCTING CAR: QUESTION FOR JURY. The evidence tended to show that plaintiff's intestate, a brakeman, undertook to couple a freight car equipped with link and pin coupler to a coach equipped with a Miller hook; the coupling bars slipped by one another leaving a space of about twelve inches between the ends of the cars; that there was on the freight car a bolt projecting several inches from the end of the car and beyond the end of the nut. Plaintiff's intestate was killed by the collision. The only wounds due immediately to the collision were a bruise over the heart the size of a silver dollar, and a smaller bruise on the back opposite the first. The bolt was so situated that as he stood between the cars it would strike him about where the wound was found. *Held*, That the case should have been submitted to the jury on the question of negligence in the construction of the car with reference to the bolt and as to this being the proximate cause of his death, the car not being one with which he was familiar, and it not being shown that such a construction was common among the cars he habitually handled.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J. *Reversed.*

*Matthew Gering*, for plaintiff in error.

*B. P. Waggener, James W. Orr*, and *A. N. Sullivan, contra.*

IRVINE, C.

This was an action under Lord Campbell's act by Effie E. Thompson, as administratrix of the estate of Amos Thompson, deceased, to recover from the Missouri Pacific Railway Company on account of the death of her intestate, alleged to have been caused by the negligence of the defendant. Issues were joined and a trial to a jury begun. When the plaintiff rested, the court, on defendant's motion, granted what is frequently, but somewhat loosely, styled an "involuntary nonsuit," by discharging the jury from further consideration of the case and then entering an order of dismissal. To reverse this the plaintiff brings the case here by proceedings in error.

The order discharging the jury because of the insufficiency of plaintiff's evidence, and dismissing the case, was erroneous. Since the trial of the case in the district

court this court has had occasion to consider the propriety of the procedure resorted to, and it has been held that under our Code a trial court has no authority to enter an involuntary nonsuit and judgment of dismissal because the plaintiff by his evidence fails to establish his cause of action. In such case the proper practice is to instruct the jury to return a verdict for the defendant. (*Zittle v. Schlesinger*, 46 Neb., 844.) But in that case it was also held that a judgment so entered is error without prejudice to the plaintiff, when the evidence was of such a character that the court should have directed the jury to return a verdict for the defendant. We are, therefore, required to examine the evidence in the case before us and ascertain whether it should have been submitted to the jury. If so, the judgment must be reversed.

Amos Thompson, a man thirty-four years of age, of sound health and normal mental faculties, was in February, 1892, employed as a brakeman by the railway company. He had previously had one year's experience as a brakeman on another railway. On the 28th of October, 1892, he was killed while making a coupling at Union, Nebraska. He was at the time, and had for some months been, regularly engaged in assisting to operate a freight train running between Union and Omaha. This train regularly carried a car for the conveyance of passengers, described by one witness as a "Missouri Pacific standard coach," but elsewhere referred to as a "combination car." It was provided with what is known as a Miller coupler, being the hook-like device usually found on passenger trains. It would seem that this coupling apparatus was defective, or else that in its construction it is not adapted to coupling to the ordinary link and pin draw-bar commonly in use on freight cars, because in making couplings it quite frequently "slipped by," as the witnesses say, that is, the Miller hook on this car failed to meet the draw-bar of other cars, but passed to one side, thus preventing a coupling and crowding the cars more closely together than is proper. One witness says that it had

slipped by one hundred times, and the evidence is uncontradicted that several times it had so slipped by when Thompson was making a coupling, and that he for a long time had been fully aware of its defective character. There is no evidence of any complaint made by him on this matter, or any promise on the part of the company to remedy the defect. There is also evidence tending to show that a metallic guard, designed to hold the coupler up to its proper position, had become loose, and that the hook was thereby permitted to drop a short distance below its normal position. This, also, was a defect as apparent to Thompson as to any other employe; perhaps more so, as his duties required him constantly to handle the coupler. On the day of the accident the train had been separated at a highway crossing at Union, the passenger coach standing to the south side of the highway and the remainder of the train to the north. Thompson, acting under directions from the conductor of the train, signalled the engineer to back the train to the coach, and as the cars approached he stepped between them to make the coupling. The car to which it became necessary to couple the coach was a Missouri Pacific freight car, provided with the ordinary link and pin coupler. The couplers failed to connect, the cars were forced together, Thompson was caught between them and instantly, or almost instantly, killed. So far as we have stated the evidence, we think it tends in nowise to disclose a cause of action. It falls clearly within the rule that if the machinery, tools, or appliances furnished a servant by his master are obviously defective and dangerous, and the servant, notwithstanding, continues in the service, he thereby assumes the risks of any injury which he may sustain by reason of such defective appliances. (*Missouri P. R. Co. v. Baxter*, 42 Neb., 793; *Dehning v. Detroit Bridge & Iron Works*, 46 Neb., 556; *Malm v. Thelin*, 47 Neb., 686; *Chicago, B. & Q. R. Co. v. McGinnis*, 49 Neb., 649.) Nor is there any evidence bringing the case within any of the exceptions to this rule. The defect was well known to

Thompson, and similar accidents had several times occurred within his observation. It must be taken that the risk was one which he had assumed.

A strenuous effort was made by counsel for the plaintiff to show that the Miller hook slipped by, not laterally, but below the draw-bar. From this postulate it is argued, in the first place, that the accident was caused, not by the generally defective character of the hook, but by the looseness of the metal guard; and secondly, that, slipping under, the cars were brought much nearer together than would have been the case had it slipped by laterally, because in the latter case the first contact would be between the end of the hook and the dead-head of the front car, which would leave a space of about twelve inches free. As already indicated, the defect in the guard was also an obvious defect, at least as open to Thompson's observation as to that of any other person, and in the next place, the evidence wholly fails to sustain the theory that the hook slipped under. All the witnesses testify to dinges on the dead-heads or bumpers of the cars, so situated that the evidence discloses nothing which could have caused them except a lateral slipping-by of the couplers. Moreover, the only injuries observed on the upper part of Thompson's body were two small bruises, one upon his chest, the other upon his back; and had the hook slipped under the draw-bar, the evidence as to the condition of the cars shows that they would have come so much nearer together that a further and more extended crushing of Thompson's body would almost inevitably have taken place. This circumstance is of great importance in the consideration of another feature of the case. We think that so far as the plaintiff rested her case upon the condition of the couplers, it was wholly without merit.

It was also pleaded that the cars had been generally repaired subsequent to the 1st day of August, 1891, and not provided with automatic couplers as required by the act of the legislature which went into effect July 9, 1891. (Session Laws, 1891, ch. 19.) This theory is casually re-

ferred to in the briefs. It is stated by the defendant in error that it was disclaimed in open court before the trial began; but the record does not show this. There is some evidence tending to show that the front car was constructed after the time referred to. However, we do not see how the plaintiff can claim anything under this act. The act, by its first section, provides that it shall be unlawful to put into use in this state any new cars, or cars that have been sent into the shop for general repairs or whose draft rigging has to be repaired, that are not equipped with safety or automatic couplers or draw-bars, etc. By the second section it is provided that after January 1, 1895, it shall be unlawful for any corporation operating a railroad "to have upon any railroad in Nebraska for use in transportation of freight or passengers" any car not so equipped. Taking these two sections together, it is found that the object of the first section was to prohibit, from the time the act took effect, the putting in use in this state of new cars or newly repaired cars not so equipped; but, by the second section, cars not so equipped might be used in the state until January 1, 1895, which was after the accident. The distinction made in the two sections between using a car and putting it in use indicates that the language of the first section is confined to originating the use of a car. Until January 1, 1895, the company might use cars in this state not so equipped, but could not for the first time in this state send out for use such a car. When considered in connection with the acts of congress on the subject, there was an obvious reason for this distinction. There is no evidence that the car in question was put into use in this state contrary to the statute. These remarks are made wholly with reference to the construction of the statute, and without considering the questions raised as to its validity in view of the federal powers over interstate commerce and the acts of congress on the subject.

It is also alleged that the track at the point referred to was defective because of improper ballast; but there

is no evidence to show that the method of ballasting employed was improper, or that it increased the hazard to employes; nor is it shown that the accident to Thompson was caused or contributed to in any way by the condition of the track.

Finally, it was alleged that the freight car was defectively constructed, by reason of a bolt of unusual length which projected from the end of the car, and which, it is alleged, struck Thompson and caused his death. Several witnesses testify to the existence of this bolt. Their testimony places it at such a point on the end of the car that it might strike a person standing as Thompson did to make the coupling. One witness says that it extended out the width of four or five burrs, and perhaps more than half an inch from the burr. This leaves it a little uncertain as to whether there were four or five burrs on the bolt and a projection of half an inch beyond the outer one, or whether the latter statement was intended to limit and correct the former. Another witness says that he measured the bolt, and it was four and a half inches long and extended about half an inch from the end. How the rest of the space was occupied does not appear. Another witness grasped the bolt with his hands, and by that method estimated that it projected an inch and a half to two inches from the end of the nut. We have already mentioned the wounds found on Thompson's body. His legs were somewhat injured, presumably from being dragged along the track after the cars struck. The only other marks or injuries discovered were two small bruises,—one in front, about over the heart and about the size of a silver dollar; the other a smaller bruise on the back, almost opposite the first. The witnesses who observed the bolt testify as to its location in such a way as to justify a fair inference that the bruise over the heart was caused by the end of this bolt. As already stated, if the Miller hook slipped by laterally it would strike the dead-head of the front car in such a way as to leave a space of about twelve inches where Thompson was stand-

ing. Thompson was five feet eight inches high, and weighed 150 pounds. A man of this size standing between the cars might, under the circumstances, have escaped injury, or at least serious injury; but if the bolt projected as far as some witnesses say it projected beyond the nut, the fatal result might have been due to the bolt alone. We think in this aspect of the case, and this only, there was evidence which should have gone to the jury as justifying an inference that the construction of the car with the bolt so projecting was a negligent construction, and the proximate cause of Thompson's death. This car was not one habitually used by him, and there is nothing to show that he had ever seen it before or had any knowledge of its condition. There is nothing to show that such a method of construction was common to the cars hauled on defendant's road. It was not such an obvious and apparent source of danger that Thompson's undertaking once to handle the car operated as an assumption of the risk on his part.

REVERSED AND REMANDED.

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NEBRASKA LOAN & BUILDING ASSOCIATION, APPELLEE, V. JOHN J. MARSHALL ET AL., APPELLANTS.

FILED MAY 5, 1897. No. 7272.

1. **Sheriffs' Sales:** DEPUTY SHERIFFS. When a decree of foreclosure directs that a sale shall be made by the sheriff, his deputy may act for him in appraising the property.
2. ———: APPRAISEMENT: REVIEW. Evidence *held* to sustain the district court in refusing to set aside an appraisement on the ground that it was too low.

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

*Henry W. Pennock*, for appellants.

*James W. Carr, contra.*

IRVINE, C.

This is an appeal from an order confirming a sale of real estate under a decree of foreclosure. Two points are relied on: First, that the appraisement was made by the deputy sheriff, it being claimed that he was without authority in the premises; and second, that the appraisement was too low. These points were both preserved by a motion to set aside the appraisement filed before the sale. (*Vought v. Foxworthy*, 38 Neb., 790.)

The decree directed that the sale should be made by the sheriff, and the first objection raises the question as to whether in such case the deputy may act in making the appraisement. We do not understand that the deputy's authority to act in matters other than the appraisement is questioned, but the argument is that the appraisement is a judicial act to be performed by the officer in conjunction with two freeholders appointed for that purpose, and that therefore the officer's authority cannot be delegated to his deputy. The question is one of statutory construction. Chapter 24 of the Compiled Statutes relates to deputies, and the first six sections embrace an act originally passed in 1858, entitled "An act providing for the appointment of deputies." (Session Laws, 1858, p. 217.) By the first section it is provided that certain officers may appoint deputies, and the manner of their appointment and removal is specified. Section 2 is as follows: "In the absence or disability of the principal the deputy shall perform the duties of his principal pertaining to his own office, but when an officer is required to act in conjunction with or in place of another officer his deputy cannot supply his place." Section 893 of the Code of Civil Procedure is as follows: "Any duty enjoined by this Code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy." This section was also enacted with the

Code in 1858. (Session Laws, 1858, p. 211, sec. 611.) It was passed subsequently to the statute relating to deputies, but we do not think that the two provisions are in conflict, and the legislature which enacted both undoubtedly intended that they should stand and be construed together. As a matter of principle the construction does not seem difficult. Section 2, chapter 24, Compiled Statutes, was not intended to provide generally the powers of deputies. Were it so intended it would deprive the deputy of all power to act except during the absence or disability of his principal. The general purpose of providing deputies to officers is not to provide an officer who may act during the absence or disability of the principal, but it is to provide the principal with necessary assistance. The deputy acts in the name of the principal, and his acts bind the principal, and this whether or not the principal is present. It seems clear that the statute referred to had for its object the extension of the deputy's powers so as to enable him to take charge of the office and act as the principal during the latter's absence or disability. So construed the provision that he may not supply the place of his principal when the latter is required to act in conjunction with another officer is limited by the main purpose of the section. Many of the officers named in the first section are *ex officio* members of boards upon which the performance of special duties are enjoined, and the legislature for some reason deemed it wise to permit only the principal to act in such matters, and should he be absent or be incapacitated from acting, the deputy, who generally supplies his place and becomes for the time being the principal officer, is prohibited by this limitation from occupying the *ex officio* office on the board. Section 893 of the Code generally empowers deputies to do any acts which the law requires or permits the officer to do, providing he be a ministerial officer. Section 491*a*, and the following sections of the Code of Civil Procedure, provide for the appraisal of lands levied on upon execution, and are ex-

tended by construction so as to apply to sales under decrees of foreclosure. They require the officer levying the execution to call an inquest of two disinterested freeholders and the officer and the freeholders together make the appraisement. By section 852 of the Code foreclosure sales "shall be made by a sheriff or some other person authorized by the court," and where the sheriff shall make such sale he acts in his official capacity by the express terms of the statute. It follows that the duty of executing such a decree is an official duty of the sheriff, and that under section 893 it may be performed by his deputy, unless the fact that the appraisers act judicially forbids the application of that section. It is true that this court has many times held that the appraisers act judicially. They are not, however, a court, nor are they judges, and when this court has said that they act judicially, we take it that it has meant merely that to them is committed the exercise of judgment and discretion in making the appraisement, and that their determination of the matter is final unless seasonably and regularly set aside. The execution of a decree of foreclosure is in its nature a ministerial act and certainly the officer performing that act is a ministerial officer within the meaning of section 893. He is none the less a ministerial officer and his acts are none the less ministerial, as that term is generally used, because at one stage of the proceeding there is committed to him the exercise of a discretionary power requiring a decision of facts. It is impossible to entirely separate so-called ministerial and judicial functions. If it were not that the exercise of judgment and discretion are frequently required in the performance of ministerial duties, a considerable saving of human energy, if not money, might be effected by manufacturing machines which would perform such duties as well as men. For the reasons indicated we think that the statutes taken and construed together in the light of principle permit a deputy to make the appraisement.

The determination of the question is, however, ren-

dered somewhat difficult from the fact that the act of 1858, with regard to deputies, was evidently modelled upon a statute of Iowa to the same effect. Our statute is not a copy of the Iowa statute, but it is a somewhat close paraphrase thereof, and section 2 appears verbatim in the Iowa act. Construing this act in 1853, the supreme court of Iowa held that the section corresponding to our section 2 forbade a deputy sheriff to act in conjunction with the county judge in correcting a jury list; that is, it placed upon the exception in section 2 a broad construction applying to all acts and not limited merely to those performed during the absence or disability of the principal where the deputy acts as principal and not merely as deputy. (*Dutell v. State*, 4 G. Greene [Ia.], 125.) This construction was followed as late as 1875 in *State v. Brandt*, 41 Ia., 593. The first case having been decided before our statute was adopted, a familiar rule of construction would require us to follow that decision here regardless of our own views as to the meaning of the statute. But we do not find from any of the decisions referred to in Iowa, or from an examination of the Code of that state, that there existed there any general provision corresponding to section 893 of our Code. Two provisions having been enacted by the same legislature, the force of the rule whereby the judicial construction placed upon one of them by another state is presumed to have been in the mind of the legislature largely fails. The effect of section 893 was to indicate a legislative intent to restrict section 2 of chapter 24 to cases of the absence or disability of the principal, and in view of the enactment of section 893, we think that this logical construction should be given the other section. We are the more ready to depart from the apparent authority of the early Iowa case because of the fact that in *Moore v. McKinley*, 60 Ia., 367, the Iowa court reconsidered the statute corresponding to our chapter 24, and placed upon it precisely the construction which we have indicated, at the same time holding that a deputy clerk might, in the pres-

ence of the principal, approve a stay bond. That court also held, construing the same act, that a deputy clerk might take the acknowledgement of a deed. (*Abrams v. Ervin*, 9 Ia., 87.) It would seem as if the taking of such an acknowledgement and the determination of the sufficiency of a stay bond were as much judicial in their character as the making of an appraisement.

In support of the second contention of appellant, there were introduced in evidence in the district court some sixteen affidavits as to the value of the property, placing it considerably higher than the appraisement. There were no counter-affidavits, but it must be remembered that the burden was upon the appellants to set aside the appraisement; that the appraisers themselves acted upon oath, and that the appraisement was itself equivalent to the oaths of three witnesses as to value. While the preponderance of the evidence ascertained merely by count of witnesses was in favor of the appellants, we think there was such a conflict of the evidence that we should not disturb the finding of the district court. The whole matter was one of opinion, and every case of this character brought to this court serves to show how little dependence can be placed upon the opinions of witnesses as to the value of land, especially when expressed in the form of voluntary affidavits without opportunity for cross-examination.

AFFIRMED.

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## CULBERTSON IRRIGATING & WATER POWER COMPANY V. FRANK OLANDER.

FILED MAY 18, 1897. No. 7300.

1. **Public Lands:** HOMESTEAD ENTRY: TITLE OF ENTRYMAN. A settler who has entered public lands under the provisions of the United States homestead law has from the date of such entry an inchoate title, which is in a legal sense property and subject to defeat only

by his failure to comply with the conditions imposed by the act of congress.

2. ———: ———: ———: TRESPASS. Such title will support an action by the settler for trespass committed after entry and before his right to a patent becomes absolute.

3. Verdict: SPECIAL FINDING: CONFLICT: REVIEW. A general verdict will be set aside if in irreconcilable conflict with a special finding of fact material to the issues in the same case.

ERROR from the district court of Hitchcock county. Tried below before WELTY, J. *Reversed.*

*F. I. Foss, L. H. Blackledge,* and *W. R. Matson,* for plaintiff in error.

*William O. Woolman, contra.*

POST, C. J.

The defendant in error, Frank Olander, as plaintiff, in the district court of Hitchcock county recovered judgment against the Culbertson Irrigating & Water Power Company on account of the unauthorized construction by the latter of an irrigating ditch upon his, plaintiff's, land.

In this proceeding to review the judgment mentioned we will first notice the contention that the plaintiff below failed to show such a title to the land described as will authorize him to recover for the alleged trespass. It was charged in the petition that the plaintiff therein entered said premises as a homestead under the laws of the United States in the month of October, 1888, and that he had continued in possession thereof until the commencement of the action, to-wit, October 17, 1892, and that the defendant company, in the years 1891 and 1892, without permission of the plaintiff and against his express command, dug and constructed the ditch aforesaid over and across said land, to his damage, etc. The aforesaid allegations, although put in issue by the answer, were sustained by the undisputed evidence, and disclose a title in the plaintiff below which entitles him to recover for the wrongs complained of. The actual

*bona fide* possession of land under a claim of right is such a title as will support an action for trespass against one not shown to be in privity with a better title. The rule thus stated was in *Keith v. Tilford*, 12 Neb., 271, applied to a pre-emptor of public lands after the time within which he was by law authorized to complete his purchase. In *Red River & L. W. R. Co. v. Strue*, 32 Minn., 95, it was held that a settler who has entered public lands of the United States, under the provisions of the homestead law, has from the date of such entry an inchoate title, which is, in a legal sense, property, subject to defeat only by his failure to comply with the conditions imposed by the act of congress, and that as against such title the defendant railroad company acquired no rights under the act of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." And in *Carner v. Chicago, St. P., M. & O. R. Co.*, 43 Minn., 375, the plaintiff, who had entered land under the "Timber Culture Act," was held entitled to recover for trespass committed during the term required to perfect his right to a patent. It was also held that his right of action was not affected by the subsequent surrender of his claim. The cases cited by plaintiff in error, with the exception of *Flint & P. M. R. Co. v. Gordon*, 41 Mich., 420, involve the rights of claimants of public lands as against the government, and are, accordingly, not in point. Of the case last mentioned it is sufficient that it is opposed to the doctrine asserted by this court in *Keith v. Tilford, supra*, with which we are, from a re-examination of the subject, entirely satisfied.

Exception was taken to the giving and refusing of certain instructions relating to the measure of damage, but which, in view of the special verdict rendered, do not require notice in this connection. In addition to the general verdict for the plaintiff below, in the sum of $200, the jury found as follows:

"1. Do you find from the evidence that the defendant wrongfully entered upon the lands in the possession of the plaintiff? Answer: Yes. * * *

"4. If you find that plaintiff was damaged in his possession of said premises by the wrongful act of the defendant, what amount in dollars do you find was the value of such injury to the plaintiff's possession? Answer: $200.

"5. If you find an amount as the value of such injury to plaintiff's possession, what amount, if any, is included in said sum as compensation or pay for the land occupied by said ditch? Answer: None."

Aside from the value of the land actually taken, estimated at fourteen acres, worth $12.50 per acre, there was no proof whatever of substantial damage. There was, it is true, evidence tending to establish the foundation for special damage, but the effort was in every instance abandoned, voluntarily by the plaintiff, or upon the adverse ruling of the court, short of the actual proof of damage. It is to be regretted, on account of the obvious merit of defendant in error's claim, that the district court failed to direct a verdict in his favor for the value of so much of his land as was appropriated for the purpose of the ditch; but the jury having found specially against him as to the only issue upon which he was, upon the evidence, entitled to recover, it follows that such special finding will control the general verdict in his favor. It follows, too, that the judgment must be reversed and the cause remanded to the district court.

REVERSED.

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## FRANK E. TEEL ET AL. V. NELLIE E. MILES.

FILED MAY 18, 1897. No. 7333.

1. **Trespass by Officer Executing Writ: PLAINTIFF'S LIABILITY.** One who delivers to an officer a valid writ without direction as to the manner of its service will not, except in case of subsequent ratification, be liable for torts committed by such officer while engaged in the execution thereof. (*Murray v. Mace*, 41 Neb., 60.)

2. Replevin: DAMAGES. The successful party to an action of replevin should recover therein all damage which he has actually sustained by reason of the unlawful detention of the property in controversy.

3. ———: ———: RES JUDICATA. A defendant who has in an action of replevin recovered judgment for the return of the property and his damage for the wrongful detention thereof cannot thereafter maintain an action against the plaintiff for damage on account of depreciation in the value of such property while in possession of the latter.

ERROR from the district court of Frontier county. Tried below before WELTY, J. *Reversed.*

*Hastings, McGintie & Sands*, for plaintiffs in error.

*L. M. Graham* and *W. R. Starr, contra.*

POST, C. J.

This was an action by the defendant in error, Nellie E. Miles, as plaintiff, in the district court for Frontier county, in which the defendants therein, Frank E. Teel and A. S. Sands, were jointly charged (1) with the wrongful and forcible entering of the plaintiff's premises and the driving away of thirty-two head of horned cattle and nine horses, to the plaintiff's damage in the sum of $40; (2) the breaking down and destroying of plaintiff's fence, to her damage in the sum of $35; (3) the failure to properly feed and care for the stock so wrongfully taken while in defendants' possession, to-wit, for the period of eight weeks, to plaintiff's damage in the sum of $200. The defendants answered jointly, admitting the taking, by the defendant Teel, of certain cattle and horses from the plaintiff's premises and possession as charged, but alleging that in taking said property said Teel acted in his official capacity as sheriff of Frontier county, in the execution of a certain order of replevin, issued out of the county court for said county, in an action therein pending, wherein the defendant Sands was plaintiff and the said plaintiff, Nellie E. Miles, was defendant. It was further alleged that, previous to commencement of this

action, final judgment was rendered in the replevin suit in favor of the said Nellie E. Miles, as defendant, for a return of the property taken under and by virtue of the aforesaid order, and for the sum of $5 damage for the wrongful detention of said property, and that said judgment had been satisfied by the payment in full of the damage and costs so awarded and the return of said property, except one horse and one cow, for which full settlement had been made by the plaintiff therein, Sands. The answer also contains a denial in general terms of the other allegations of the petition. The reply was a general denial. There was a trial of the issues thus joined, resulting in a verdict for the defendant Teel, and a verdict and judgment against Sands in the sum of $100, from which the latter prosecutes error.

It is first argued that there is in the record no foundation for the theory upon which the action was prosecuted to judgment, viz., that the defendants below were joint trespassers being engaged in the abuse of the writ held by Teel. That proposition, so far as it applies to the taking of the property and alleged destruction of defendant in error's fences and consequent damage, is undoubtedly sound. The action is to that extent, at least, one sounding in tort, and in order to render the plaintiff in error liable for the alleged wrongs it must be made to appear that he was a party thereto. It was held in *Murray v. Mace*, 41 Neb., 60, that one who, with knowledge of the facts, advises the abuse of process by an officer, or who, being a party to such process, subsequently ratifies unlawful acts committed in its execution, will be deemed a wrong-doer from the beginning; but one who merely delivers to an officer a valid writ, without direction as to the manner of its service, will not, in the absence of a ratification, be held liable for torts committed in the execution thereof. There is in this case an entire failure of the proof to connect plaintiff in error with the acts of the sheriff in the execution of the writ; hence there was, as regards that issue, no question for submission to the jury.

It is next contended that the judgment in the replevin suit is a bar to the claim on account of plaintiff in error's alleged failure to properly feed and care for the stock described while in his possession. The measure of damage in actions of replevin has been the occasion of much controversy and diversity of opinion. It may, however, be asserted, as the result of adjudications under statutes substantially similar to our own, that in every action of replevin the plaintiff or defendant, as the case may be, should recover all damages which he has actually sustained by reason of the wrongful detention of the property in controversy. Section 191 of the Code provides: "In all cases where the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only, at the commencement of the suit, and if they find either in his favor they shall assess such damages as they think right and proper for the defendant." Section 191*a* (5754, Compiled Statutes, 1895) provides: "The judgment * * * mentioned in sections 190 and 191 and 1041 of said Code, shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property, and costs of suit." And section 192 provides as follows: "In all cases, when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff, on an issue joined, or on an inquiry of damages upon a judgment by default, they shall assess adequate damages to the plaintiff for the illegal detention of the property; for which, with costs of suit, the court shall render judgment for the defendant [plaintiff]." These provisions, it would seem, contemplate the assessment in the replevin action of all damage resulting from the unlawful detention of the property, including its use, and the depreciation thereof in value while so detained. (*Hooker v. Hammill*, 7 Neb., 231; *Moore v. Kepner*, 7 Neb., 291; *Morris v. Baker*, 5 Wis.,

389; *Wadleigh v. Buckingham*, 80 Wis., 230; *Brewster v. Silliman*, 38 N. Y., 423; *Allen v. Fox*, 51 N. Y., 562.) The unlawful detention in such case is, in contemplation of statute, a single cause of action in favor of the successful party, whether plaintiff or defendant, and the remedy therefor is exhausted by a single recovery.

The plea of *res judicata* was sustained by the record of the former judgment. It follows, therefore, that the district court erred in submitting the cause to the jury and in refusing to set aside the verdict rendered, for which the judgment is reversed and the cause remanded.

REVERSED.

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NEBRASKA NATIONAL BANK, APPELLEE, V. BROOKS R. JOHNSON ET AL., APPELLANTS.

FILED MAY 18, 1897. No. 7074.

1. **Action for Proceeds of Stolen Property: EVIDENCE.** 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.
2. **Trusts: BANKS: PROCEEDS OF MONEY STOLEN BY JANITOR.** Equity will, as against a servant charged with the care of the offices of the plaintiff, a banking corporation, and the preservation of the property therein, declare a trust in favor of the latter with respect to the proceeds of money stolen from it by the former while in the discharge of his said duty.
3. ———: **EQUITY: JURISDICTION.** The conventional relation of trustee and *cestui que trust*, or other fiduciary relation, is not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to the property stolen from the beneficial owner.
4. ———. Evidence *held* to support the decree appealed from.

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

The opinion contains a statement of the case.

*Clinton N. Powell* and *Howard B. Smith*, for appellants:

Johnson did not sustain a fiduciary relation to the bank in any sense contemplated in the doctrine of trusts. (*Central Nat. Bank v. Connecticut Mutual Ins. Co.*, 104 U. S., 70; *Dillon v. Connecticut Mutual Ins. Co.*, 44 Md., 386.)

The proof wholly fails to show that Johnson stole the gold, or that he purchased the real estate in question with gold, except as to a small proportion of it, and as a question of law, even if he had stolen the gold and purchased the property with it, no trust can ever arise in property purchased with stolen funds. (*Hawthorne v. Brown*, 3 Sneed [Tenn.], 462; *Ensley v. Balentine*, 4 Humph. [Tenn.], 233; *Campbell v. Drake*, 4 Ired. Eq. [N. Car.], 94; *Pascoag Bank v. Hunt*, 3 Edw. Ch. [N. Y.], 583; *Doyle v. Murphy*, 22 Ill., 508; *Steele v. Clark*, 77 Ill., 475; *Taylor v. Turner*, 87 Ill., 302; *Weer v. Gand*, 88 Ill., 490.)

Not a dollar of any gold that may have been spent by Johnson has been identified as gold lost by the Nebraska National Bank. Without such identification, clearly made, no trust can be established in any case. (*Falsken v. Harkendorf*, 11 Neb., 86; *Baker v. Vining*, 30 Me., 128; *Clarke v. Quackenbos*, 27 Ill., 260; *Brawner v. Staup*, 21 Md., 337; *Parmalee v. Sloan*, 37 Ind., 470; *Shepard v. Pratt*, 32 Ia., 298; *Childs v. Griswold*, 19 Ia., 363; *Stall v. City of Cincinnati*, 16 O. St., 169; *Higgins v. Higgins*, 14 Abb. N. C. [N. Y.], 24; *Taylor v. Plumer*, 3 M. & S. [Eng.], 574; *Harford v. Lloyd*, 20 Beav. [Eng.], 310; *Getty v. Campbell*, 2 Rob. [N. Y.], 666.)

To create a preponderance of evidence in a civil case where a crime is imputed to one party, the other party assumes the burden of not only overcoming the evidence of his opponent, but also the presumption of law in favor of innocence. (*Hills v. Goodyear*, 72 Tenn., 233; *Knowles v. Scribner*, 57 Me., 497; *Ellis v. Buzzell*, 60 Me., 209; *Bradish v. Bliss*, 35 Vt., 326; *Sprague v. Dodge*, 48 Ill., 142; *Decker v. Somerset Ins. Co.*, 66 Me., 408; *Jones v. Greaves*, 26 O. St., 2.)

*J. C. Cowin, contra.*

POST, C. J.

This was an action in the district court for Douglas county, whereby it was sought to impress with a trust in favor of the plaintiff, the Nebraska National Bank, certain property, to-wit, lots 3 and 4 of block 3, Willis Park Place Addition to the city of Omaha, the legal title of which was held by the defendant, Brooks R. Johnson. The cause of action alleged is, in substance, that the defendant above named was, during the month of August, 1890, and for a long time prior thereto, in the employ of the plaintiff bank, his duties being, for a fixed compensation, to sweep the bank's offices, to arrange and care for the furniture therein, and, while in the discharge of his said duties, to watch over, guard, and preserve, to the extent of his ability, all property of the bank, including moneys, notes, and papers; that the said defendant, on the 13th day of August, 1890, while in the discharge of his said duties, and in violation of the trust imposed in him by the plaintiff, wrongfully took, carried away, and appropriated to his own use the sum of $5,000 in gold coin, the property of the said plaintiff; that the said defendant thereafter purchased and improved the property above described with plaintiff's said money so wrongfully taken and converted by him, and that said property is now and has for a long time been occupied and claimed as a homestead by the said defendant and his wife, Ellen Johnson. It was further charged that the said Brooks R. Johnson is wholly insolvent, having no property whatever aside from the real estate here in controversy. The prayer was that the defendants might be adjudged to hold said property in trust for the plaintiff, for a decree confirming the title of the latter, and for general relief. The defendants answered admitting that the said Brooks R. Johnson was employed by the plaintiff as a janitor, in which capacity, and no other, he was acting at the time of the alleged conversion, and denying each and

every other allegation of the petition. A final hearing resulted in a finding for the plaintiff and a decree in accordance with the prayer of the petition, except that the defendant Brooks R. Johnson was found to have contributed the sum of $185 of his own funds to the purchase and improvement of said property, and which sum the plaintiff was required to pay to said defendant as a condition to the granting of the relief sought, and from which judgment and decree the defendants have prosecuted an appeal to this court.

The first proposition argued on this appeal is that inasmuch as plaintiff's right of action depends upon the alleged criminal conversion by the defendant, the same degree of proof is required in order to establish the commission of such act as would be necessary to sustain a conviction upon an indictment or information therefor. That the authorities bearing upon the subject are not altogether harmonious we must confess. It is, for instance, said in 2 Greenleaf, Evidence, section 408, on the authority of *Thurtell v. Beaumont*, 1 Bing. [Eng.], 339, that "where in an action on a policy of insurance the defense is that the property was willfully burned by the plaintiff himself, the crime must be as fully and satisfactorily proved to the jury as would warrant them in finding him guilty on an indictment for the same offense." It is, however, observed in a note to the thirteenth edition of that work that the doctrine of the text above quoted, if supported by the case cited, has been very generally disapproved. There are, it is conceded, American cases which tend to support the contention of counsel, although opposed to the overwhelming weight of authority in this country, and this is particularly true of recent utterances on the subject. As illustrating the trend of judicial opinion upon the question may be cited *Welch v. Jugenheimer*, 56 Ia., 11, in which it is said, referring to an earlier case in the same court: "A more careful examination of the books satisfies us that, whatever may be the rule in actions of slander or libel, where a crime is charged, and a

justification is pleaded, the rule in *Barton v. Thompson* is in conflict with the weight of authority and cannot be sustained on principle, and is therefore overruled." And in *Kane v. Hibernia Ins. Co.*, 39 N. J. Law, 697, the court of errors and appeals, in reversing the judgment of the supreme court, declare that the decision in *Thurtell v. Beaumont, supra*, was made without much consideration, and has never received approval in the English courts. (See also, *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich., 238; *Finley v. Widner*, 70 N. W. Rep. [Mich.], 433; *Thorson v. Northwestern Nat. Ins. Co.*, 29 Minn., 107; *United States Express Co. v. Jenkins*, 73 Wis., 471; 2 Wharton, Evidence, sec. 1246; Cooley, Torts, 208.) The evidence of the plaintiff, although mainly circumstantial, certainly tends to support the allegations of the petition, and is, we think, ample for that purpose. Respecting the loss of money and the opportunity of defendant to take and appropriate it, there can, upon the record, be no room for controversy. Johnson, the defendant, appears to have been financially embarrassed, and on one occasion or more asked for and secured the payment in advance of his wages, to-wit, $50 per month. He is also shown to have pleaded poverty and to have solicited gratuities in the way of cast-off clothing; yet, notwithstanding that fact, he is shown to have paid out on the lots in controversy, from August 22, 1890, to January 14, 1891, covering a period of less than five months, the sum of $1,635, a large per cent of which was in gold, in addition to which there was evidence tending to prove the expenditure by him within a few months thereafter of the remainder of the $5,000 in question. True, there was evidence offered explanatory in character, and which, had it been credited, would have resulted in a decree for the defendant; but, as already intimated, the finding of the court adverse to his contention must be accepted as conclusive for the purpose of this proceeding.

The other questions discussed are (1) whether the relation of the parties toward each other was a fiduciary one in the sense in which that term is understood and em-

ployed by courts of equity; (2) whether, assuming, as claimed, that the evidence fails to establish any such relation of trust and confidence, will equity interfere for the purpose of declaring in favor of the injured party a trust with respect to property purchased by a thief with the fruits of his larceny. The propositions implied from the foregoing inquiries, although separately treated by counsel for defendants, are in fact so nearly akin that they may with propriety be discussed together. It has been held that no trust results in favor of the owner with respect to the proceeds of property stolen by a mere servant, and that the master is in such case restricted in his remedy to an action for damage, and to a prosecution of the thief in a court of criminal jurisdiction. A review of the cases tending to support that view will not be attempted in this connection. It is sufficient that the doctrine therein asserted is, in our judgment, indefensible on authority and opposed to the enlightened policy of modern equity jurisprudence. The doctrine of constructive trusts as developed by courts of equity was intended primarily as a remedy for fraud in cases where the established rules had proved wholly inadequate, and larceny under the circumstances here disclosed is none the less a fraud upon the owner of the property stolen because committed by a servant instead of one who is, in the technical sense of the term, a trustee. Speaking on that subject, it is said in a recent valuable work: "The subject of constructive trusts is intimately connected with that of frauds; indeed, the basis of all such trusts is fraud, either actual or presumed. Rightly understood, a constructive trust is only a mode by which courts of equity work out equity and prevent or circumvent fraud and overreaching. There are, therefore, two well defined classes of constructive trusts, corresponding with the two classes of fraud, viz.; (1) Those which are raised in cases of actual fraud, and (2) those raised in cases of presumed or constructive fraud. Those of the first class are commonly called trusts *ex maleficio.*" (1 Beach, Modern Equity

Jurisprudence, sec. 226.) And in Fetter, Equity (1895), 187, the rule is thus formulated: "When, on the grounds of justice and good conscience, without reference to the intention of the parties, equity considers the holder of the legal estate to be not entitled to enjoy the equitable or beneficial interest, it treats him as a trustee." (See, also, 2 Pomeroy, Equity Jurisprudence, sec. 1053.) In *Newton v. Porter*, 5 Lans. [N. Y.], 416, which was an action in equity to compel the defendants to account for the proceeds of certain stolen bonds acquired by them with notice of the plaintiff's rights, Miller, P. J., said in reversing the decree below dismissing the complaint: "No exception is made in favor of a person who occupies no fiduciary relation to another, and the elementary books generally do not notice any exception from the rule where the money or property has been obtained by means of a felony. It would certainly be an anomaly in the history of legal proceedings, and a grave reflection upon the administration of justice, if a felon could invest the fruits of his crime, or dispose of them in such manner as to place them beyond the reach of the law." In the same case Balcom, J., after a review of the authorities, said: "The court should not refuse to allow a party to recover the avails of property stolen from him on any technical grounds when the merits of the case clearly require that he should recover, and the court should jump all technicalities and be as astute in discovering a remedy for upholding the rights of such a party as the thief is in contriving ways and means to cheat him out of his property, and the avails of it, by changing the same from one kind to another and placing it in the hands of third persons." And the court of appeals, in affirming the judgment of the supreme court, use language equally emphatic as that above quoted. (*Newton v. Porter*, 69 N. Y., 133.) It will be observed from an examination of the cases cited in support of the opposing view that they depend, with few exceptions, upon *Pascoag Bank v. Hunt*, 3 Edw. Ch. [N. Y.], 583, but which, as remarked by IRVINE, C., in *Tecumseh*

*Nat. Bank v. Russell*, 50 Neb., 281, "is directly contrary to the ruling of the same vice chancellor in *Bank of America v. Pollock*, 4 Edw. Ch. [N. Y.], 215, and * * * opposed to the well settled principles governing similar cases."

We are, from an examination of the entire record in this case, unable to perceive any ground for interference with the decree of the district court, which is accordingly

AFFIRMED.

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STATE OF NEBRASKA, EX REL. M. H. SIMONS, V. JOHN F. CORNELL, AUDITOR OF PUBLIC ACCOUNTS.

FILED MAY 18, 1897. No. 9124.

1. **Claims Against State: VOUCHERS: STATUTE.** The act of April 8, 1895, entitled "An act to provide for a uniform system of vouchers * * * and for the affixing of an oath or affirmation thereto by the claimant," etc., applies to acts which by their terms appropriate a definite amount or so much thereof as may be required for a designated purpose.

2. ———: ———: ———. The sufficiency of section 4 of said act to require verification by affidavit of claims against the state, being conceded by relator, is not determined.

ORIGINAL application for *mandamus* to compel the auditor of public accounts to issue a warrant for the salary due the assistant clerk of the state banking board upon a voucher not verified by affidavit. *Writ denied.*

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

*William B. Price, contra.*

POST, C. J.

This is an original application by the relator, M. H. Simons, for a writ of *mandamus* commanding the respondent, John F. Cornell, as auditor of public accounts, to

issue to the said relator a warrant upon the state treasury in the sum of $250, on account of his salary as assistant clerk of the state banking board for the first quarter of 1897, at the rate of $1,000 per year. From the stipulation of the parties it appears that the respondent bases his refusal to issue the relator's warrant as demanded upon the sole ground that the latter has failed to comply with the provisions of the act approved April 8, 1895, entitled "An act to provide for a uniform system for vouchers for use for all disbursements of state funds through the auditing and treasury departments of the state, and to provide for the affixing of an oath, or affirmation, thereto by the claimant," etc. Section 1 of the act above mentioned requires the auditor of public accounts, within thirty days after the passage and approval thereof, to prepare blank forms of vouchers for use in all of the state's departments, and for the use of all manner of claimants against the state, etc. By section 2 it is provided: "All claims against the state to be paid as hereinbefore provided shall be extended in full on the voucher and fully and carefully itemized, and accompanied, in all instances where possible with the original bill or item of expense. Said bills or items or each of them shall give the exact date of purchase or service rendered, quantity purchased, name of article or service, price per item and total, and shall be properly signed by the party to whom the claim is payable, or his or its agent or attorney, or a member of the firm, and shall be signed in full by the name of the claimant, and where the same may be a firm or corporation, after the name of such firm or corporation, the person so signing such firm or corporate name shall sign his or her name." Section 3 provides that all original vouchers shall have printed thereon the following oath:

"THE STATE OF NEBRASKA, }
COUNTY OF ———, } ss.

"I, ———, do hereby solemnly swear that the above and foregoing account and voucher is a true, correct and

complete statement of the account of ——— for supplies, or services for the state of Nebraska, as therein recited, and that the items, or services therein, were fully delivered or rendered to said state and that the charges therein made are the legal, just and usual charges for said supplies, or services; and that said bill nor any part thereof has not been paid heretofore by the state, but that the same is now wholly due and unpaid; and that I am the ——— of the firm or corporation signing said voucher and that I am fully conversant with the items charged herein and that in all manner and things this is a true, just and correct charge and item of indebtedness against the state of Nebraska.

"_____ _____

"_____ _____"

It is by section 4 provided: "The foregoing oath or affirmation shall be complete in every instance and the claimant, his agent or attorney so subscribe and swear to said claim as in section 3 provided and the same shall be acknowledged by an officer having a seal," while by section 5, the making of a false oath or affirmation to any material thing in said act provided for is declared to be perjury and punishable accordingly.

The relator admits that he has neglected and refused to verify or prove his account against the state by affidavit or otherwise, but justifies his said refusal upon the ground that the legislature has appropriated a fixed and definite sum for his salary, and that it is the duty of the respondent to take notice of his claim to pay the same when due without proof of any character. That it is the right and duty of the respondent as auditor of public accounts, under the provisions of section 9, article 9, of the constitution, to examine into, and, in case of doubt, to require proof of, any claim for which a definite appropriation has not been made, certainly cannot be denied. (*State v. Moore*, 40 Neb., 854.) It is, aside from the exceptional cases mentioned in *State v. Moore, supra*, extremely probable that the auditor of public accounts

might, in his discretion, independent of the statute, require each claimant against the state to verify his account by affidavit, as a condition precedent to the drawing of a warrant therefor. There is, too, it should be observed, room to doubt whether in view of the exceedingly vague and equivocal language employed in section 4, above quoted, the act of 1895 can be said to have added anything to the law of the subject. That question is, however, foreign to the present controversy, since the parties have, by their stipulation, narrowed the field of investigation to a single inquiry, viz., whether the statute mentioned was intended to apply to acts which, like that here involved, appropriate a definite sum, or so much thereof as may be required for a particular purpose. Section 1 of chapter 87, Laws, 1895, provides: "That the following sums of money, or so much thereof as may be necessary, are hereby appropriated out of any moneys in the state treasury not otherwise appropriated, for the payment of salaries of officers of the state government: * * * Department of Banking—Salary of one assistant clerk, one thousand ($1,000) dollars; two thousand dollars." There is, aside from the foregoing, no statutory mention of the assistant clerk of the banking board. The respondent is not, so far as we are advised, charged with notice of the selection of this class of officers, the terms of their employment, or the amount or value of their services, which lends support to respondent's contention that the primary purpose of the act quoted was to protect the state against fraud in claims of the class of that here involved. And if from the operation of the statute is to be excluded this class of cases, then it is indeed entirely nugatory, since it is impossible to conceive of any case to which it can be held to apply. These considerations lead to a conclusion adverse to the relator, and the writ is accordingly denied.

WRIT DENIED.

# JAPHTHA A. HUDELSON ET AL. V. FIRST NATIONAL BANK OF TOBIAS ET AL.

FILED MAY 18, 1897. No. 7280.

1. **Replevin:** AFFIDAVIT. In an action of replevin commenced in the district court, where the affidavit filed contains no statement that the property is wrongfully detained by the defendant, if there is a duly verified petition on file in which there appears such statement, it is sufficient to give jurisdiction to issue the writ, and the writ, if issued, will not be void but voidable.

2. ———: ———. A statement in an affidavit of replevin that the plaintiffs "are entitled to the possession of said property," being in the present tense, means that they are entitled to the instant possession, and the affidavit is not insufficient for the reason that the word "immediate" was not used therein in connection with possession.

3. ———: ———: CONSTRUCTION. Where a statement of an affidavit may be read so as to give it a meaning which will make the affidavit defective, but may also be read so as to give it a signification which will support the affidavit, the latter will be adopted, especially where it is a less strained and technical reading than the former.

4. **Affidavits:** WAIVER OF DEFECTS. Where an affidavit has defects in form or substance which might be amendable, if the parties in the case who might interpose objections to the affidavit appear, answer to the merits of the action, and go to trial without making objections to the affidavit, they waive the defects.

5. **Pleading:** SUFFICIENCY OF PETITION. If a petition fails to state a cause of action, it will not support a judgment, and it may be attacked on account of such infirmity at any stage of the proceedings in the action.

6. **Replevin:** PLEADING. A petition in an action of replevin commenced in a district court is the basis of the action, and must be sufficient within and of itself. The affidavit in the suit cannot be resorted to to aid the petition in essential allegations in jurisdictions where both affidavit and petition are filed in actions of replevin.

7. ———: ———. A breach of the promise on which the action is predicated must be pleaded in the petition.

8. ———: ———. In an action of replevin wherein the plaintiff claims the right to possession of property by virtue of a special ownership conferred by chattel mortgage thereon in his favor, the petition filed must contain allegations which show that the debt se-

cured by the mortgage has matured, and also that it is unpaid, and if claimed by virtue of a clause in the mortgage by which the mortgagee may take possession at any time if he feels unsafe or insecure, the petition must also contain an allegation that the debt secured remains unpaid.

9. ———: BOND: WAIVER OF OBJECTION. In this, a replevin action, a bond was given by the plaintiff before the property taken under the writ was delivered to him. The bond was imperfect or defective. On motion of defendant a new bond was required by the court, which was given. The defendant filed answer, issues were joined, and a trial had in which the defendant participated. *Held*, That the right to further object to the bonds was waived.

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

*Hastings & McGintie* and *Willard E. Stewart*, for plaintiffs in error.

*Bartlett, Baldrige & De Bord, F. I. Foss*, and *W. R. Matson, contra.*

HARRISON, J.

It appears that on July 18, 1893, there was being, and had been for some time prior thereto, conducted a lumber yard and coal business in Tobias, Nebraska, under the name and style of H. C. Larsen & Co. Whether owned and operated by C. W. Lyman and H. C. Larsen as partners, or the individual property of C. W. Lyman, and H. C. Larsen was the manager of the business without ownership or other interest in the business or property connected therewith, was one of the material contested issues of the trial. On July 18, 1893, notes and chattel mortgages evidencing the indebtedness of H. C. Larsen & Co. to the defendants in error, respectively, were executed to them by H. C. Larsen in the name of H. C. Larsen & Co., and duly delivered. The property described in these chattel mortgages included the stock of lumber and coal, all office fixtures, etc., of the business of H. C. Larsen & Co., at Tobias. At the same time, all promissory notes and book accounts of various parties in

favor of H. C. Larsen & Co. were assigned to defendants in error, and it was claimed that immediate possession of the mortgaged chattels was surrendered by Larsen and assumed by or for defendants in error. This last was disputed by the plaintiffs in error and became one of the issuable points in the controversy. On July 23, 1893, a writ of attachment issued in a suit, in which Japhtha A. Hudelson was plaintiff and C. W. Lyman defendant, was levied on the mortgaged property, and possession of it taken by the sheriff, as the individual property of C. W. Lyman, and on August 17, 1893, it was replevied at the instance of defendants in error, by virtue of the writ of replevin issued in the present suit. Defendants in error were successful in a trial of the issues, and the defeated parties ask of this court a review of the proceedings in the district court.

It is urged that the affidavit in replevin is fatally defective, in that it is claimed there was a failure to state in it that plaintiffs were entitled to the immediate possession of the property described; also, that the wrongful detention of the property by the defendants was not alleged, nor was it set forth that the property was not taken in execution on any order or judgment, etc. It is required by section 182 of the Code of Civil Procedure, among other things, that in an affidavit made and filed to obtain an order of delivery to issue in an action of replevin, there shall appear statements that plaintiff is entitled to the immediate possession of the property; "that the property is wrongfully detained by the defendant; that it was not taken in execution on any order or judgment against said plaintiff, or for the payment of any fine, tax, or amercement assessed against him, or by virtue of an order of delivery issued under this chapter, or any other *mesne* or final process issued against him." The affidavit in this case contained statements by which it was sought to establish the special ownership of the defendants in error of the property to be taken under the writ for which application was made, and further,

"that said plaintiffs are entitled to possession of said property; that it was not taken in execution, on any judgment or order against said plaintiff, for the payment of any fine, tax, or amercement assessed against them, or by virtue of an order of delivery in chapter providing for the replevin of property, or any other *mesne* or final process issued against the plaintiffs." In the portion of the foregoing which refers to the right to possession, the word "immediate" was not used, but the statement was made in the present tense, and claimed the right to possession then, at the time, which we think was sufficient. Its meaning was that right to instant possession existed. In the clause in reference to the property not being taken in execution, etc., which we have quoted from the affidavit, the word "or," as used in the section of the Code of Civil Procedure to which we have hereinbefore directed attention, between the words "plaintiff" and "for" was omitted, and it is claimed that this changed the sense so that it did not express what it should to fulfill the requirements of the Code. If read without a pause after the word "plaintiff," it is subject to the criticism made, but if read with a pause after such word, it conveys the proper idea; and we think we must adopt the latter method as the more natural and less strained, and as consonant to the rule of the Code in regard to liberal reading and construction of pleadings, and to avoid unnecessary technicality. It will no doubt have been noticed that there was an entire absence of any statement, either in the words of the Code or in their equivalents, or of facts which showed the wrongful, or any, detention of the property by the plaintiffs in error. This was a fatal defect. An allegation of unlawful detention is essential. (Cobbey, Replevin, sec. 542.) But this was an action in district court, and the petition, duly verified and on file, contained the statement of the wrongful detention of the property, and this was sufficient to give jurisdiction to issue the writ, and it was not void but voidable; and had the writ and affidavit been attacked by proper plea, the

court might on application have allowed the affidavit to be amended. (*Commercial State Bank v. Ketcham*, 46 Neb., 568; *Lewis v. Connolly*, 29 Neb., 222.) No objections were made to either the form or substance of the affidavit in the district court, nor was the validity of the writ of replevin questioned, so far as the record presented here discloses. By appearing and answering to the merits and going to trial without making such objections, the parties waived defects in the affidavit.

It is claimed that the petition herein was insufficient, that it did not state a cause of action, for the reason that it was not alleged that the defendants in error were entitled to the immediate possession of the property, neither as a conclusion nor by facts pleaded, from which such right appeared or could even be inferred. The petition was as follows:

"The plaintiffs, the First National Bank of Tobias, Nebraska, a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska, the K. S. Newcomb Lumber Company, and Stanley Larsen complain of the defendants and say as a

"First Cause of Action.—That the plaintiffs, the First National Bank of Tobias, Nebraska, and K. S. Newcomb Lumber Company, and Stanley Larsen, have a special ownership in the following described goods and chattels, to-wit: All the stock of lumber, lime, timber, shingles, lath, sash, doors, moulding, cement, and merchandise of any kind and nature whatever in the lumber yard of H. C. Larsen & Co., of Tobias, Nebraska, on lots 14, 15, 16, 17, 18, and 19, in block 5, First Addition to Castor; also all office furniture and improvements on said lots; also coal house and coal on the Nebraska and Colorado Railway right of way at Castor, known as Tobias, in Saline county, Nebraska.

"And the said plaintiff, the First National Bank of Tobias, Nebraska, says that on the 18th day of July, 1893, H. C. Larsen & Co., then the owners of said property, exe-

cuted their promissory note to said plaintiffs in the words and figures following, to-wit:

" '$1,696.75. TOBIAS, NEB., July 18, 1893.

On demand, after date, I or we promise to pay to the order of the First National Bank of Tobias, Nebraska, sixteen hundred ninety-six and 75-100 dollars, for value received, at ten per cent per annum from maturity until paid. Interest payable annually. All sureties and indorsers on this note hereby waive protest, demand, notice of protest, extension of time given to the maker, or any of them, and guaranty payment of the same.

" 'P. O. Tobias. No. 11719. H. C. LARSEN & Co.'

"3. To secure the payment of said note they executed and delivered to said plaintiff a chattel mortgage upon the above described property, a copy of which chattel mortgage is hereto attached and marked Exhibit 'A.'

"4. Second Cause of Action.—And the plaintiff the S. K. Newcomb Lumber Company complain of the defendants for that on the 18th day of July, 1893, H. C. Larsen & Co. made and delivered to said plaintiff their promissory note, in writing, in the words and figures following:

" '$1,128.60. TOBIAS, NEB., July 18, 1893.

" 'On demand, after date, for value received, I or we promise to pay to the order of S. K. Newcomb Lumber Co. eleven hundred twenty-eight and 60-100 dollars, at the First National Bank of Tobias, with interest at ten per cent per annum from date until paid.

" 'H. C. LARSEN & Co.'

"5. To secure the payment of said note, the said H. C. Larsen & Co. made and delivered to said plaintiff a chattel mortgage on the goods and chattels described above in first cause of action, copy of which is hereto attached and marked Exhibit 'B.'

"6. Third Cause of Action.—The plaintiff Stanley Larsen complains of the defendants and says that on the 18th day of July, 1893, H. C. Larsen & Co. made and delivered

to him their promissory note, in writing, in the words and figures following, to-wit:

" '$600. TOBIAS, NEB., July 18, 1893.

" 'On demand, after date, for value received, I or we promise to pay to the order of Stanley Larsen six hundred dollars, at the First National Bank of Tobias, with interest at ten per cent per annum from date until paid.

" 'H. C. LARSEN & Co.'

"7. To secure the payment of said note the said H. C. Larsen & Co. made and delivered to said Stanley Larsen a chattel mortgage on the goods and chattels described in the first cause of action in this petition, copy of which is hereto attached and marked Exhibit 'C.'

"8. The plaintiffs say that the firm of H. C. Larsen & Co. was composed of Hans C. Larsen and Charles W. Lyman.

"9. The defendants wrongfully detain said goods and chattels from the possession of the plaintiffs, and have wrongfully detained the same since the 22d day of July, 1893, to plaintiffs' damage in the sum of $300.

"10. The plaintiffs further say that John Barton is the duly elected, qualified, and acting sheriff of Saline county, Nebraska."

It is urged for defendants in error that inasmuch as the notes secured by the chattel mortgages were payable on demand, they were due when given, and hence there were defaults, and at the same time, by virtue of the clauses in the mortgages in relation to payment of the notes when due, the right to foreclose each at once arose, including the right to immediate possession. To ascertain what clauses were contained in the mortgages necessitated a reference to them, as none of the conditions are stated in the petition, unless it be said that merely attaching to a pleading, as an exhibit, a copy of an instrument, the execution and delivery of which is asserted in the pleading, constituted it a substantive part of the pleading, to be read, construed, and considered therewith,

its statements to be treated as statements of issuable facts. It has been said by this court on this subject that "the facts on which a plaintiff bases his right to recover should be stated in a systematic and orderly manner, and not by making a mere exhibit a part of the petition. An exhibit, however, if made a part of a petition, is to be considered, and if the facts therein stated, in connection with those in the petition proper, show a liability of the defendant to the plaintiff, a demurrer that the facts stated therein are not sufficient cannot be sustained." (*Pefley v. Johnson*, 30 Neb., 529.) In the petition in the case from the decision of which we have just quoted, the copy of the instrument was made a part of the pleading in the following terms, after reference to the contract, "a copy of which contract is hereto attached, marked Exhibit A, and made a part hereof;" but conceding, by way of argument, as we need not decide it, that these mortgages were parts of the petition, and to be read and construed with it, were there statements which showed a right to immediate possession in the parties for whom it was filed?

It is argued for the plaintiffs in error that the notes being due on demand, it was necessary to plead a demand; if not, no default would appear in their payment. It may be said that the authorities on the subject of the time at which a note payable on demand matures are not in harmony, but, as we view the conditions arising from the pleading under consideration, a settlement of this particular question is not a necessity,—is unnecessary. It is nowhere stated in terms in the pleading, nor can it be gathered or even inferred, that the indebtedness evidenced by the notes and mortgages had not been paid. The petition should have contained an allegation or allegations showing the non-payment of the notes and mortgages; to establish an affirmative right in the mortgagees to take immediate possession of the property without such statement or statements it was insufficient. There was a clause in each of the mortgages herein involved by which it was lawful for the mortgagee, if he at any

time should feel unsafe or insecure, to take immediate possession of the property; but in order to claim under this clause it would further be necessary that it should appear that the debt had not been paid; hence, as the petition lacked a statement that the debt was unpaid, the clause of each of the mortgages to which we have last referred could not be invoked as awarding effective claim to possession. To require that facts should have been pleaded which disclosed that the debts evidenced by the notes set up in the petition had not been paid is but enforcing the rule that a breach of the promise on which action is based should be shown in the petition. "The declaration ought to show a breach of the covenant, promise, etc., on which the action is founded." (6 Comyn, Digest, title "Pleader," C. 44.) It is the breach of the contract, and not the contract itself, that gives the right of action. (*Tracy v. Tracy*, 12 N. Y. Supp., 665; *Lent v. New York & M. R. Co.*, 130 N. Y., 504.)

We are not unmindful of, nor do we in the foregoing conflict with, the doctrine which has been often announced and was by this court stated in an opinion filed May 5 of this year in the case of *Ashland Land & Live Stock Co. v. May*, 51 Neb., 474, as follows: "The question of payment is a matter of defense which, to be available, the defendant is required to set up in the answer and establish on the trial." There is no conflict; the one is but requiring the pleader to show the breach or default, without which there would be no cause of action; the other exacting of a party who relies on payment or affirmative matter of defense to claim it,—plead and prove it.

In the decision in the case of *Lent v. New York & M. R. Co.*, *supra*, appears the following, which we approve: "It remains to consider the question whether, giving to the word 'entered' the interpretation that we have, the complaint states a cause of action. The effect of the recording of the order was to create a debt against the defendant, and in that respect its liability is analogous to a liability arising upon the maturity of a contract for the

payment of money, and the question is presented whether an allegation of non-payment is essential and material to the cause of action. The Code (section 481) provides that a complaint must contain a plain and concise statement of the facts constituting the cause of action, and the general rule deduced therefrom is that whatever facts are essential to be proven to entitle the plaintiff to recover upon the trial must be alleged in the complaint. It does not admit of controversy that, upon an ordinary contract for the payment of money, non-payment is a fact which constitutes the breach of the contract and is the essence of the cause of action, and, being such, within the rule of the Code it should be alleged in the complaint. It is said, however, that payment is always an affirmative defense, which must be pleaded to be available, and hence non-payment need not be alleged, as it is not a fact put in issue by a general denial. (*Salisbury v. Stinson*, 10 Hun [N. Y.], 242.) The rule that payment is an affirmative defense is not one embodied in the Code, but had its origin under the common-law practice in the plea of non-assumpsit; and the reason for it was that in assumpsit the allegation in the declaration and the traverse in the plea were in the past tense, and, under the rule which excluded all proof not strictly within the issue, no evidence was admissable except such as had a tendency to show that the defendant never had made the promise. It was never applied in the action of debt, the allegation in that form of action being in the present tense, and, under the plea of *nil debet*, any fact tending to show that there was no indebtedness on the part of the defendant was admissible. The history of the rule is set forth in Judge Seldon's opinion in *McKyring v. Bull*, 16 N. Y., 297, and need not be referred to here. Following the rule thus established under the former practice, the courts have uniformly held, since the adoption of the Code, that payment must be pleaded, and cannot be proven under the general issue. While the effect of these decisions is to modify somewhat the rule embodied in section 500 of

the Code, their tendency is to simplify pleading, as under their application the plaintiff is informed of the precise defense intended to be made, and thus unnecessary preparation is obviated and surprise on the trial avoided. But there is no need to further extend the rule and hold that, because payment as a defense must be pleaded, the breach of the agreement need not be alleged in the complaint. That would have the contrary effect, and lead to embarrassments that are avoided when the plain provisions of the Code are followed. No authority exists, so far as I am able to find, except the case of *Salisbury v. Stinson*, holding that a breach of the contract need not be pleaded, but all text writers and reported cases hold to the contrary. (1 Chitty, Pleading & Practice, pp. 325-359; 6 Comyn, Digest, title 'Pleader,' C. 44; 2 Wait, Law & Practice, p. 318; 1 Wait, Actions & Defenses, pp. 394, 395, and cases cited; *Witherhead v. Allen*, 4 Abb. Dec. [N. Y.], 628; *Tracy v. Tracy*, 12 N. Y. Supp., 665; *Van Giesen v. Van Giesen*, 10 N. Y., 316; *Krower v. Reynolds*, 99 N. Y., 245.) *Witherhead v. Allen* arose upon a demurrer to a complaint. The opinion states the rule as follows: 'When the action is founded upon the contract obligation or duty of the defendant, the very gist and essence of the cause of action is the breach thereof by the defendant, and unless a breach is alleged no cause of action is shown.' In *Van Giesen v. Van Giesen*, 10 N. Y., 316, is is said: 'The material allegations of the complaint in this case are the making by the defendants of the promissory note, the transfer of it to the plaintiff, and the non-payment by the defendants. Each of them is material, for without the concurrence of all of them the complaint would not show a cause of action.' To the same effect is *Keteltas v. Myers*, 19 N. Y., 231. (See, also, Code, secs. 534, 1213, subdiv. 2.) In *Krower v. Reynolds* it was held, in an action on a covenant to pay a mortgage, that it was necessary to allege that the mortgage had not been paid, or that the defendant had failed to perform his covenant, and without such allegation the complaint was demurrable. And

in numerous cases, which need not be cited, but of which *Allen v. Patterson*, 7 N. Y., 476, is a type, the rule is recognized by implication, but the complaints were held good because of an allegation of indebtedness by the defendant to the plaintiff. This rule is further recognized in section 534 of the Code, which provides a simple form of pleading on an instrument for the payment of money only, but requires the plaintiff to state the sum which he claims to be due to him thereon. * * * It cannot be said that where the breach consists in non-payment of an agreed sum that it is not an issuable fact, because payment cannot be proven under general denial. The most that can be said is that that form of denial does not put that fact in issue, and to that extent the rule that payment must be pleaded must be deemed to modify the rule of pleading under the Code in reference to a general denial. But no reason is apparent how it can justify the omission from the complaint of a fact material to the plaintiff's cause of action, and essential to be proved to entitle the plaintiff to a judgment. Such facts, under the Code, must be pleaded. No presumption can be indulged in that a defendant has failed in his duty or omitted to perform his contract obligation. There was no allegation in the complaint in this action that the defendant had failed or omitted to pay the award, and no allegation of indebtedness, and without such no cause of action was stated."

The petition in the case at bar did not allege a breach of the promises, did not plead a default; hence, did not state a cause of action. No question of the sufficiency of the petition was raised or presented in the district court, but is made for the first time here, and we have not been unmindful of the rule that where the sufficiency of a petition is made the subject of objection for the first time after a trial of the cause, it must be liberally construed, and, if possible, sustained; but it is also true that if, when viewed in the light of the foregoing rule, the petition fails to state a cause of action, it will not sustain

a judgment. We cannot turn to the affidavit in this case to aid the petition, for in the district court the petition in a suit of replevin is the basis of the action, and in jurisdictions where both petition and affidavit are used the petition cannot be aided in essential allegations by the affidavit. (Cobbey, Replevin, sec. 598; *Wilhite v. Williams*, 21 Pac. Rep. [Kan.], 256.)

It is claimed that no undertaking was filed. The facts in regard to this are that a bond was taken and approved by the coroner, who served the writ, the sheriff being a party to the action; but counsel for plaintiffs in error say in their brief that it was not signed by any one. Counsel for defendants in error state that the parties to the bond signed it in the body and not at the close. This we cannot determine, as we have a copy and not the original before us. The bond was imperfect or defective in other particulars than the one to which we have just alluded. A motion was interposed for plaintiffs in error by which the court was asked to require the defendants in error to file a new and sufficient bond. This motion seems to have been sustained; whether so or not does not appear from the record, but after it was filed the defendants in error furnished and caused to be filed a new bond. This evidently was satisfactory, at least no further objections were made to the bonds. Issues were joined and a trial had, in which the parties all participated. It is too late, after the finding of the court and judgment on the merits, to further object to the bond. (Cobbey, Replevin, sec. 695.)

As the judgment must be reversed and the cause remanded, probably for a new trial, we will not now discuss the evidence or the question of its sufficiency to sustain the finding and judgment of the trial court.

REVERSED AND REMANDED.

BAY STATE LIVE-STOCK COMPANY, APPELLANT, V. CHARLES C. BING ET AL., APPELLEES.

FILED MAY 18, 1897. No. 7282.

1. **Schools and School Districts:** COUNTY SUPERINTENDENT. "Each organized county not already divided into school districts, or any part of such counties not so divided, shall be divided by the county superintendent into as many school districts as may be necessary." (Compiled Statutes, ch. 79, subd. 1, sec. 3.)

2. ———: ———. **The foregoing section confers on the officer named exclusive original jurisdiction of the designated subject-matter, and the jurisdiction is not dependent upon or affected by the presentation of a petition or other expression of the will or desire of the resident voters of the territory to be organized into a school district, nor is any prior notice of the proposed action of the officer necessary.**

APPEAL from the district court of Kimball county. Heard below before NEVILLE, J. *Affirmed.*

*George W. Heist* and *Henry St. Rayner*, for appellant.

*H. D. Rhea, contra.*

HARRISON, J.

March 20, 1893, the county superintendent of Kimball county made an order that a designated portion of the county be school district No. 18. This order was to establish the organization of a new district, or was of territory which theretofore had not been a school district or any part of it a part or parts of a district or districts. From the order an appeal was taken by the appellant herein to the district court, where the order was in all things affirmed. The defeated party has prosecuted a further appeal to this court.

It is complained that a petition presented to the county superintendent praying the establishment of the district, notice of its presentment, and certain affidavits in reference to the notice, and also an affidavit in regard to the legal voters residing within the territory sought

to be included in the projected district were insufficient, some in form and some in substance. Whether these were as claimed or not could not affect the proceedings in this matter, for in the organization of school districts from territory not previously the subject of any such action, the jurisdiction of the county superintendent does not depend on any petition or notice, or any assent or dissent expressed or unexpressed of the legal voters, residents of the quarter to be affected. Exclusive original jurisdiction of the subject-matter has been by law committed to the superintendent, and the question of the necessity of the organization is one controlled by and within the discretion of the county superintendent. The governing statute, as it formerly existed, was as follows: "That each organized county shall be divided by the county superintendent into as many school districts as may, from time to time, be found necessary." (General Statutes, ch. 68, sec. 1.) As enacted during the legislative session of 1881, and now in force, it is, "Each organized county not already divided into school districts, or any part of such counties not so divided, shall be divided by the county superintendent into as many school districts as may be necessary." (Compiled Statutes, 1895, ch. 79, subd. 1, sec. 3.) When the formation of a school district is sought, and the action to be taken will affect an existing district or districts, or would cause changes in boundary lines of an existing district or of organized districts, then, primarily, the control is with the voters of the district or districts, and the movement for changes must originate, must have their inception, with such voters and their will be expressed in the form of petition and its presentment, and the proceedings be with and pursuant to the prescribed notice and formalities. (*Cowles v. School District*, 23 Neb., 655; Compiled Statutes, ch. 79, subd. 1, sec. 4.) But these do not apply in the organization by the county superintendent of school districts from portions of the county not previously divided or organized into districts.

A question is raised of the organization of the district being void by reason of the time at which the order was made. It is provided in the statute that "No new district shall be formed between the first Tuesday of April and the first day of October." (Compiled Statutes, ch. 79, subd. 1, sec. 4, subd. 6.) It may be, as claimed, that the order forming the district was not written in the record by the county superintendent until at some date in April, 1893, but the order was made and the district formed, as clearly appears, March 20, 1893. The mere copying of the order into a record cannot govern as to the time it became effectual.

No available errors have been pointed out in the formation of the district; hence the judgment of the district court and the order of the county superintendent will be

AFFIRMED.

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## GEORGE KELLY V. STATE OF NEBRASKA.

FILED MAY 18, 1897. No. 9002.

1. **Rejection of Cumulative Testimony:** REVIEW. The action of the trial court in excluding testimony merely cumulative, *held* not prejudicial, if erroneous.
2. **Criminal Law:** WITNESSES: REBUTTAL. A witness whose name was not indorsed on the information may be called on rebuttal and give testimony which is obviously and purely rebuttal, or on a subject first brought into the case in the evidence of the defense and which is in rebuttal of and made necessary by such evidence introduced by the defense, but may not give testimony which is not directly and plainly rebuttal or which tends to prove the commission of the crime and might properly have been introduced on the part of the state as of its evidence in chief.
3. ———: LARCENY: INSTRUCTIONS. The action of the trial court in refusing to give certain instructions examined and approved.

ERROR to the district court for Burt county. Tried below before POWELL, J. *Reversed.*

*H. E. Carter*, for plaintiff in error.

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

HARRISON, J.

The plaintiff in error was prosecuted in the district court of Burt county, under the provisions of chapter 77 of the Session Laws enacted during the session of the legislature of 1895, for the alleged crime of stealing one steer of the value of $20, the property of one Henry C. Sawtell, was convicted, and sentenced to confinement in the penitentiary. The case has been removed to this court for review of the proceedings of the trial court.

The first assignment of error to which our attention is directed by the brief of counsel is that the trial court excluded certain of the evidence which it was sought to elicit from Ed Taylor, when he appeared as a witness on the part of plaintiff in error. The steer the plaintiff in error was charged with stealing was sold by him in Blencoe, Iowa, September 29, 1895, and the testimony which was excluded was of the fact that the witness had been requested by the plaintiff in error to go to the wagon in which the steer had been hauled to Blencoe, and in which it was then standing, to look at it with a view to its purchase, the object of the evidence being to show that the plaintiff in error was openly offering the animal for sale in the market and observing no secrecy in regard to it. The main fact had been proved by other witnesses and was not disputed; hence the rights of plaintiff in error were not prejudiced by the exclusion of the testimony, and there was no available error.

During the progress of the trial it became material to determine the identity of the steer. Whether the one sold by plaintiff in error at Blencoe was the one which had been missed from the herd of Mr. Sawtell was made a material issue, and on this subject there was testimony that the one which Sawtell claimed had been stolen was

branded, but the brand had become or was so dim as to be scarcely discernible. Sawtell testified that the animal had been branded immediately "behind its left shoulder;" that the brand was a straight bar two or three inches in length, and in answer to the question as to how plainly it was to be seen, that (quoting his words) "It was a very light brand. Unless I should have known that there should have been a brand there I would not have supposed there was one there;" and further, that he knew it was there, "because our cattle were all branded when we bought them." On the part of the defense it was shown that there existed no mark or brand on the animal which was sold by the accused at Blencoe. Among the witnesses who stated this last to be true were the two men who slaughtered the steer at Blencoe, and who further testified that they examined to ascertain as to the existence or nonexistence of a brand on the animal at the time it was killed and dressed by them. On rebuttal there was called a witness, whose name was not indorsed on the information, who testified in regard to branding animals, and that where the branding iron touches the animal lightly, and does not burn the flesh, it makes a mark which is known as a "hair brand," which may disappear, or almost so, in a short time. The counsel for the accused objected to this witness testifying, on the grounds that the testimony was not proper rebuttal, and that the name of the witness had not been indorsed on the information. Where it becomes necessary to call persons to testify in rebuttal of testimony introduced on behalf of an accused in his defense, or if it is rendered necessary by a material issue raised for the first time in the case by the evidence for the defense, and the evidence sought to be introduced on rebuttal is obviously and purely rebuttal in its nature, it may be given by witnesses whose names were not indorsed on the information. (*Goldsby v. United States*, 16 Sup. Ct. Rep., 216; *State v. Parish*, 22 Ia., 284; *State v. Ruthven*, 58 Ia., 121; *State v. Huckins*, 23 Neb., 309; *Fager v. State*, 49 Neb., 439.) Where, a

in this case, the testimony thus introduced is not directly and plainly rebuttal in its character, but is in support of the main case, and would have been proper testimony in chief for the state on a material question first brought into the case for and by the state, and not rendered necessary by an issue first tendered by the accused in his defense, it is error to allow the witness to testify over the proper objections such as were here interposed; and this is true although the testimony may rebut some of that introduced for the defense. (See *People v. Quick*, 25 N. W. Rep. [Mich.], 302, wherein it is observed: "In the present case, however, the witnesses who were received as rebutting witnesses were not such. They were called to prove what belonged to the people's case in chief. Cases may sometimes arise where testimony which could not be had in the opening may be let in upon good cause shown thereafter. But it is not proper to divide up the testimony on which the people propose to rest their case, and nothing which tends to prove the commission of the crime itself, or its immediate surroundings, can be classed as rebutting evidence under ordinary circumstances, if at all.")

It is urged that the court erred in refusing to give in its charge to the jury instructions numbered 5, 6, 9, and 10 of those prepared and requested for the accused. Of these, 5, 9, and 10 were in relation to the steer having been an estray, and to inform the jury that if it came into the possession of the accused as an estray, his subsequent conversion of it to his own use would not be larceny unless he had the intent so to do when he first took possession of it. Whether these instructions properly expressed a rule of law we need not now discuss or decide. While there was testimony to show that the animal alleged to have been stolen escaped from the pasture and possession of its owner, and was not afterwards discovered or returned thereto, and also testimony which might have warranted an inference that it strayed into the pasture of the accused, there was no testimony that the ac-

cused ever saw it or knew it as an estray; indeed, the whole of the evidence on the part of the defense negatived any such idea or theory; hence the court did not err in its refusal to give instructions on the subject. By the instruction numbered 6, of the refusal to give which complaint is made, it was sought to present to the attention of the jury that if the accused, at the time he took the steer and sold it, believed it to belong to his father and sold it pursuant to directions in that regard given him by his father, he was not guilty as charged. There was testimony in the record which probably might have warranted the giving of an instruction on the subject, but the one proffered would have further informed the jury that unless the testimony showed beyond reasonable doubt that the accused knew at the time he took the steer that it was the property of Mr. Sawtell, who was alleged in the complaint to have been at the time its owner, the accused must be acquitted. This last would have been erroneous; hence the court did right in refusing to read the instruction in its charge to the jury.

There are further assignments of error, but of such a nature that we do not deem their discussion or decision essential at this time. The judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

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## JOHN ROONEY V. STATE OF NEBRASKA.

FILED MAY 18, 1897. No. 9144.

1. **Larceny: EVIDENCE.** To sustain a conviction of larceny there must be proof of the value of the property by competent evidence.
2. ———: ———. Evidence herein *held* insufficient to support the verdict.

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

*J. W. Eighmy*, for plaintiff in error.

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

HARRISON, J.

The plaintiff in error was tried in the district court of Douglas county on the charge of grand larceny, was convicted and sentenced to a term of imprisonment in the penitentiary, and error proceedings in his behalf have been prosecuted to this court.

The only assignment of error which we deem necessary to examine and determine is that the evidence is insufficient to sustain the verdict. This complaint is based on the proposition that there was no competent evidence to support the finding of the jury of the value of the property, the following named articles: One silver watch, one lady's neck chain, one pair of opera glasses, one pearl ring, and one shirt stud, with the stealing of which the plaintiff in error was charged. The evidence on this subject was as follows:

Mrs. Downey was interrogated and answered:

Q. Do you know the reasonable value of this chain, Exhibit 1?

A. Thirty-six dollars is the value of it.

Q. Do you know the value of this ring, Exhibit 2?

A. That is $20.

Q. Do you know the value of the opera glasses, Exhibit 3?

A. Five dollars.

Q. Do you know the value of the watch?

A. Eight dollars.

Q. Do you know the value of the shirt stud?

A. Three dollars.

Her evidence in cross-examination on this branch of the case was:

Q. How long have you owned this ring, Exhibit 2?

A. Well, about twenty years. It is one that I never wear because I am afraid of losing the stones, and I have never had it out of the box only on special occasions.

Q. What means have you of knowing the valuation of it?

A. Because that is what it cost.

Q. You mean twenty years ago that cost how much?

A. Twenty-five dollars was paid for it.

Q. You do not know what it is worth now?

A. Well, I have not asked any jeweler, of course not.

Q. Then you cannot say what it is worth to-day.

A. I think it is worth that. Pearls are just about the same value.

Q. Do you know what it is all worth to-day in the market to be sold?

A. No, sir; I do not.

Q. How long have you owned this chain?

A. About ten years.

Q. Did you purchase it ten years ago?

A. Yes, sir.

Q. What did you pay for it then?

A. Thirty-six dollars. It is like the ring, we have not worn it much.

Q. What means have you of knowing its actual value?

A. I was offered the same price for it.

Q. What do you know——

A. I do not know. I have not had occasion to take it to anybody to sell it to know.

Q. And the opera glasses, how long have you owned these?

A. About two years.

Q. Do you know the price of opera glasses in Omaha?

A. No, sir; I have not been inquiring the prices of them.

Q. Then you do not really know the value of this property, what it would be worth to sell to-day in the market?

A. No, sir; I have had no occasion to inquire.

Mr. C. S. Raymond, who was called as a witness for

the defense, stated that he was a jeweler, had been in the business twenty-five years, and further as follows:

Q. You are acquainted with such articles, gold chains, as that, of the value of them?

A. I do not know.

Q. Please examine Exhibit No. 1. What is the fair value of that?

A. I could not tell.

Q. To the best of your judgment?

A. I could not tell; I do not know.

Q. Well, you are a jeweler; you must have some knowledge.

Objected to as cross-examination.

Q. Examine that ring, Mr. Raymond. What do you think the fair value of that ring is; do you know what the value of that is?

A. No, I could not tell you. You ought to send down and get a pawn-broker, or a second-hand man; they deal in those things and I do not. All that would be worth to me would be old gold.

Q. That is what I am trying to prove.

The court: If he does not know the fair market value he does not know——

Mr. Eighmy: Q. Are you acquainted with the value of opera glasses?

A. If you had a new pair, just imported, I could tell you exactly.

Q. Examine these and state, if you can, what you think is a fair market value on them.

A. They are a class of glass. I do not know anything about them at all.

Mr. A. Mandelberg, a witness on the part of plaintiff in error, testified that he was a jeweler and engaged in the jewelry business, and further as follows:

Q. Are you acquainted with the value of property of this character and description?

A. Well, we are acquainted with the value of such goods as these, but we are unable to tell unless we test

them and weigh them. At a glance, looking at anything like that, we are unable to tell.

Q. Can you give anything like what would be a fair value of that from your examination of it now?

Objected to, as incompetent. Objection sustained.

Q. Examine this ring.

A. That is a solid gold ring set with pearls.

Q. Are you acquainted with the value of such rings?

A. Such goods as these, I am candid to tell you, it is only worth what it is worth in old gold to us.

Mr. Winter: Q. To anybody?

A. To any jeweler to melt up in old gold.

Counsel for the state moves to strike the answer out, as not responsive. Motion sustained.

The Court: Q. What is the market value of that as it is? That is the question.

Mr. Eighmy: Q. Do you think it has any market value?

A. Oh, yes, it has.

Objected to.

Q. What would be the fair market value of that ring?

A. A ring like that would be worth about $15.

Q. What would be the fair market value of the chain?

A. The chain is only by guess work. It could be used for old gold, nothing else. Probably to the owner it would be more valuable. According to what it weighs is what it would bring. That is about all, and that I could not tell.

Counsel for the state moves to strike out the answer, as not responsive. Motion sustained.

Q. Are you acquainted with the value of opera glasses?

A. Yes, sir.

Q. Look at those and see what you think. See if you can say what would be the fair value of those.

A. That is something I do not handle anything like. It is a cheap pair of glasses. I could not tell you the value of these.

Counsel for the state moves to strike the answer out, as not responsive. Motion sustained.

In the case of *Edmonds v. State*, 42 Neb., 684, wherein the plaintiff in error had been prosecuted and convicted of the crime of grand larceny, the question for adjudication was in regard to the proof of the value of the property alleged to have been stolen, and the testimony on the subject as quoted in the opinion shows that it was very similar to the testimony in the case at bar. It was held: "In a prosecution for larceny, proof of the value of the property stolen must be made by at least one witness affirmatively shown to possess knowledge of the value concerning which he is called upon to give evidence." See, also, *Engster v. State*, 11 Neb., 539, wherein it was observed: "A party who is permitted to testify as to the value of property must show by his testimony that he possesses knowledge as to such value, otherwise his testimony is mere conjecture and is wholly unreliable. In an indictment where the value of the property must be or exceed $35 to constitute a felony, such value must be proved, like any other fact upon which a conviction depends, beyond a reasonable doubt. This is a material fact, without proof of which the prosecution must fail." Viewed in the light of these rules, it is apparent that there was no competent evidence before the jury to sustain a finding of the value of the property such as it made, viz., $66, or in the sum of $35 or more; hence the verdict was in this particular or element not supported by the evidence. The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

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## HENRY BOLLN V. STATE OF NEBRASKA.

FILED MAY 18, 1897. No. 8508.

1. **Prosecution by Information.** Chapter 54 of the Criminal Code authorizes prosecutions of felonies by information filed by the public prosecutor of the proper county.

2. **Plea in Abatement:** DENIAL OF JURY TRIAL: REVIEW. A denial of a jury trial upon an issue of fact tendered by a plea in abatement is not reversible error, since the record fails to disclose that the prisoner was in some manner prejudiced thereby.

3. **Information:** FORM. It is not essential to the validity of an information that it should conclude "against the peace and dignity of the state."

4. **Jurors:** COMPETENCY. An opinion formed by a juror does not affect his competency or afford cause for challenge, unless it is unqualified as to the guilt or innocence of the accused of the offense charged. *Basye v. State*, 45 Neb., 261, followed.

5. ———: ———: OPINIONS. An opinion based upon rumor and newspaper reports alone does not afford cause for challenge, where it is shown that such opinion will not interfere with the juror's rendering a fair and impartial verdict upon the evidence under the instructions of the court.

6. **Embezzlement:** EVIDENCE. Under section 124 of the Criminal Code the failure of any public officer to account to, or make settlement of his official accounts with, the proper legal authority within reasonable time after notice so to do, as well as the refusal of such officer to promptly pay over to his successor any public moneys or securities on the legal requirement of any authorized officer, is made *prima facie* evidence of embezzlement.

7. ———: INSTRUCTIONS. *Held*, That the accused was not prejudiced upon the trial by the giving of the fifteenth and sixteenth paragraphs of the charge of the court.

8. ———: EVIDENCE. Evidence examined, and *held* sufficient to warrant a conviction for embezzlement of public moneys.

9. ———: ———: INFORMATION. Under an information against a public officer charging embezzlement on a certain date, evidence of a continuous series of conversions of money by the defendant at different times and in different amounts before that date will support a verdict finding the aggregate sum as the amount of a single embezzlement.

10. ———: CITY TREASURER. The disbursement of public funds by a city treasurer, except upon a warrant drawn by the proper authority, constitutes embezzlement.

11. ———: CUSTOM CONTRARY TO STATUTE. A custom or usage repugnant to the commands of a statute will not prevail against such statute.

12. **Criminal Law:** TRIAL: PRESENCE OF DEFENDANT. In a criminal prosecution, the presence of the defendant at the trial being once shown by the record, will be presumed to have continued to the end, where the contrary is not made to appear.

ERROR to the district court for Douglas county. Tried below before BAKER, J. *Affirmed.*

*Joel W. West* and *John M. Macfarland*, for plaintiff in error.

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

NORVAL, J.

Henry Bolln was prosecuted in the district court of Douglas county upon an information filed by the county attorney charging him with the embezzlement of public moneys. The information was in sixteen counts, a part of which charging the defendant with embezzlement of certain moneys of the city of Omaha, and the remaining counts were for the embezzlement of certain moneys belonging to the school district of the city of Omaha. A motion to quash the information was made, which was overruled by the court. A plea in abatement was filed, to which the county attorney interposed a demurrer, which was overruled as to the ninth ground of the plea and sustained as to the other seventeen grounds therein set forth. The state replied to the ninth paragraph of the plea in abatement, and the accused demanded a jury trial upon said paragraph of his plea, which was denied; and upon a trial to the court, it overruled the plea in abatement. The defendant demurred to the several counts of the information, which the court promptly overruled, and the accused, when called upon to plead to the information, having stood mute, the court entered a plea of not guilty for him. The county attorney, by leave of court, entered a *nolle prosequi* as to the fifth and tenth counts of the information, and upon the trial the accused was found guilty as charged in the fourth, ninth, and eleventh counts, but was acquitted as to all the others upon which he was tried. From the denying of his motion for a new trial, the defendant has brought this writ of error.

While we are confronted with a record of over 1,000 pages, and a petition in error containing 279 assignments, the questions to be determined are not numerous, since most of the assignments are not discussed in the brief of defendant below. The familiar rule that assignments not relied on the briefs are deemed waived will be adhered to in this case.

The first contention of counsel for the accused, and which was raised by the motion to quash the information, plea in abatement, and by demurrer, is that there is no authority in this state for the prosecutions of crimes by information. The power of the legislature to provide by appropriate enactment for the trial of criminal cases in the district court upon informations filed by the public prosecutor, or county attorney, instead of indictments, is not and doubtless could not be successfully questioned, in view of section 10, article 1 of the state constitution, which declares, *inter alia*, "that the legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law abolish, limit, change, amend, or otherwise regulate the grand jury system." Certainly the language quoted is broad enough to justify the law-making body to provide for prosecution of offenses by information alone. The argument of the prisoner's counsel is that the legislature of this state has not, as yet, so enacted, at least by express, plain, and unequivocal language. In 1885 a law was passed, which received executive approval, entitled, "An act to provide for prosecuting offenses on information and to dispense with the calling of grand juries except by order of the district judges." (Criminal Code, ch. 54.) If said act has not by plain and apt words made suitable provision for the prosecutions of offenses against the penal laws of the state by information, clearly it is not the fault of the title of the law to which reference has just been had. Language which would have more definitely or appropriately designated such a purpose could not easily have been chosen.

But it is argued that there is nothing in the title to indicate that the law was intended to provide for the prosecution of felonies by information. This position is not tenable. The title indicates a purpose to provide for the "prosecution of offenses on information," and the word offenses in the sense it is used embraces all infractions of the Criminal Code of the grade of felonies. In *Miller v. State*, 29 Neb., 437, it was held that a prosecution for murder may be by information. The object indicated by the title to the act under consideration is clearly enough expressed in the body of the law, as an examination of its several provisions will disclose. The first section (sec. 578, ch. 54) provides: "That the several courts of this state shall possess and may exercise the same power and jurisdiction to hear, try, and determine prosecutions upon information, for crimes, misdemeanors, and offenses, to issue writs and process, and do all other acts therein, as they possess and may exercise in cases of like prosecutions upon indictments." By this the same jurisdiction was conferred upon the courts to hear, try, and determine prosecutions for crimes, misdemeanors, and offenses upon information as theretofore existed and had been exercised in like prosecutions upon indictments found by a grand jury. The subsequent sections of the act, in connection with the one quoted above, not only give authority for the prosecution by information, but point out the procedure as well. Section 2 requires all informations to be filed in term time in the court having jurisdiction of the particular offense by the prosecuting attorney of the proper county, provides that he shall subscribe his name thereto and indorse thereon the names of witnesses. The next section provides for the verifications of all informations, and for joining of different offenses and different degrees of the same offense in one information in like manner as could be joined in one indictment. The sixth section empowers the court to direct the prosecuting attorney to file the proper information in certain instances. We do not entertain the shadow of a doubt

that the statute in question is ample to authorize a county attorney to file informations for felonies in proper cases, and to prosecute the accused thereunder. (*State v. Miller*, 43 Neb., 860; *Korth v. State*, 46 Neb., 631.) The trial of the accused upon the information of the county attorney did not contravene section 3, article 1, of the constitution, which declares that "No person shall be deprived of life, liberty, or property without due process of law," since under and in pursuance of section 10 of the same article the legislature has authorized prosecution of offenses by information.

The ninth paragraph of the defendant's plea in abatement alleged that he had not had a preliminary examination touching the offenses charged in the information, and that he had not waived the same. To this averment the state replied, admitting that the defendant did not have a preliminary examination, denying each and every other allegation in said paragraph of the plea, and averring that the accused waived his right to a preliminary examination. The defendant demanded a trial by jury upon the issue tendered by the ninth paragraph of the plea in abatement, which was overruled, and the trial court found that the defendant had waived a preliminary examination before the examining magistrate, and accordingly overruled said paragraph of the plea in abatement. The denial of a trial by jury to determine whether the right to a preliminary examination had been waived by the prisoner is assigned for error. Conceding, for the purposes of this case, that the accused was entitled to have this question passed upon by a jury, yet the refusal of his request did not work a reversal of the judgment of conviction. Doubtless he could have waived the calling of a jury to pass upon that proposition had he so desired, since the statute does not specify how it shall be determined. It follows that the denial of a jury trial upon the issue in question was unimportant, as the defendant was in no manner prejudiced thereby. Suppose the uncontradicted testimony before the trial court had

shown that a preliminary examination upon the crimes charged in the information has been waived by the defendant, he would not have been injuriously affected by the refusal of a jury to pass upon that portion of his plea, for had one been called the verdict must necessarily have been the same as the finding of the court. Error cannot be presumed, but must appear affirmatively to justify a reversal of a cause. The testimony adduced relating to the plea in abatement was not brought into the record by a bill of exceptions, nor is the transcript of the proceedings in the magistrate's court before us, therefore we are unable to determine whether the court below erred in denying the accused a trial of his plea in abatement by a jury. The issue of fact joined on this plea in abatement, involving as it did the question of a record in the case at bar, could be properly determined by the court without the intervention of a jury. This view is not in conflict with *Arnold v. State*, 38 Neb., 752, and *Smith v. State*, 42 Neb., 356, in which cases it was ruled that the trial of an issue of fact tendered by a plea in bar can only be tried by a jury. Those cases lack analogy. They were predicated upon section 449 of the Criminal Code, relating to pleas in bar, which in express language requires the issues raised by such pleas to be determined by a jury. The provision of said section is mandatory, and the right thereby accorded the prisoner cannot be waived by him, while the statute and constitution alike are wholly silent as regards the trial of an issue of fact joined upon a plea in abatement.

Error is predicated upon the refusal of the trial court to sustain the defendant's motion to quash the several counts of the information. It is insisted that each count, except the last one, is bad because it did not conclude with the words "against the peace and dignity of the state of Nebraska." The rule sanctioned by long usage has been to conclude each count of an indictment or information with the words above quoted, but we have in this state no constitution or statute requiring it. In some

of the states, under a constitutional provision defining what an indictment shall contain, indictments have been held defective which omitted the usual formal concluding words. In the language of Clark, J., in considering the same question in *State v. Kirkman*, 104 N. Car., 911: "The conclusion 'against the peace and dignity of the king,' was held in England to be necessary in all indictments. No reason was assigned for it except that it had been customary. It furnished no light to the defendant, and its employment was not required by any statute. As every criminal offense is, in its nature, 'against the peace' its use is tautology, and, doubtless, originated in the rhetorical flourish of some ancient and forgotten pleader." By section 412 of our Criminal Code it is provided: "No indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected: First—By the omission of the words 'with force and arms,' or any words of similar import; or, Second—By omitting to charge any offense to have been contrary to a statute or statutes; or, Third—For the omission of the words, 'as appears by the record,' nor for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense; nor for stating the time imperfectly; nor for want of a statement of the value or price of any matter or thing, or the amount of damages, or injury, in any case where the value or price, or the amount of damages, or injury, is not of the essence of the offense; nor for the want of an allegation of the time or place of any material fact, when the time and place have once been stated in the indictment; nor that dates and numbers are represented by figures; nor for an omission to allege that the grand jurors were impaneled, sworn, or charged; nor for any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime or person charged; nor for want of the averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend

to the prejudice of the substantial rights of the defendant upon the merits." The object of the legislature in passing the foregoing was to prevent the administration of justice in criminal prosecutions from being hampered or impeded by useless technicalities or nice refinements. The statute has declared that no indictment shall be deemed invalid for any defect which does not tend to the prejudice of the substantial rights of the accused on the merits, nor for the omission "to charge any offense to be contrary to a statute or statutes." It is obvious that the omission from the several counts of the information of the usual formal conclusions does not render them bad. (*Smith v. State*, 4 Neb., 277; *State v. Kirkman*, 104 N. Car., 911; *Peters v. State*, 12 S. E. Rep. [N. Car.], 74; *People v. Fowler*, 25 Pac. Rep. [Tex.], 1110; *Alexander v. State*, 11 S. W. Rep. [Tex.], 628; *Stebbins v. State*, 20 S. W. Rep. [Tex.], 552.)

It is argued that the court erred in not sustaining the defendant's challenge for cause to the juror Charles Bentley. The *voir dire* examination of Mr. Bentley is in the record before us, which discloses that he had an opinion as to the guilt or innocence of the defendant, formed solely upon mere rumors and the reading of newspaper comments upon the crimes; that such opinion was not a settled or fixed one, but was conditional upon the truth of what he had heard and read; and, notwithstanding such opinion, he could render a fair and impartial verdict in the case, based solely on the law and the evidence. No substantial cause for the challenge of Mr. Bentley existed, since the opinion he entertained was not unqualified as to the guilt or innocence of the accused. (*Basye v. State*, 45 Neb., 261.) We now reiterate what was said in passing upon a similar question in that case: "If upon the whole examination of the juror it is manifest that the opinion formed by him from reading newspaper accounts of the alleged crime, or upon rumor, is merely hypothetical or conditional on the truth of the rumor or the newspaper reports read; that he has no settled opinion as

to the guilt or innocence of the accused; and that he can render a fair and impartial verdict upon the evidence adduced on the trial, under the instructions of the court, the juror is competent. * * * Under the statutes, the mere fact that a juror has formed an opinion from what he has heard or read does not disqualify him from acting nor make him incompetent to serve as a juror. It is only when the venireman has such a settled opinion, or the examination shows such a state of mind as will preclude him from returning a true verdict upon the evidence submitted on the trial, that he is disqualified. In other words, he is incompetent if he entertains an unqualified or unconditional opinion on the merits of the case, however formed, or an opinion of that fixed character which repels the presumption of innocence of the prisoner. The statute does not by express terms, nor by fair implication, disqualify one from serving as a juror who has read newspaper reports of the commission of the crime."

The errors assigned to the fifteenth and sixteeenth instructions will be considered together, as they present the same questions. Instruction 15 reads as follows: "You are instructed that if you find from the evidence, beyond a reasonable doubt, that the defendant was city treasurer of the city of Omaha, and if you further find beyond a reasonable doubt that the said city of Omaha, through its proper officer, or through a person authorized so to do, made a demand upon the defendant to settle and account to the said city of Omaha for funds received by the defendant during his term of office as such city treasurer, in the regular course of his business as such officer, and if you further find that the defendant neglected and refused to make settlement; and if you further find from the evidence, beyond a reasonable doubt, that there was any money received by the said Henry Bolln, defendant, as such city treasurer, such moneys being received in the regular course of business while the said Henry Bolln was treasurer of the said city of Omaha, and the said

money being the property of the said city of Omaha, such demand for settlement and such refusal to turn over to the person authorized by the city of Omaha to receive such money, if you find that the said defendant did receive and hold any money, the property of the city of Omaha, is *prima facie* evidence that the defendant did embezzle such money, as you find beyond a reasonable doubt that the defendant did receive for safe keeping, transfer, and disbursement of the moneys of the said city of Omaha, and which he refused and neglected to turn over and account for to the said city of Omaha." The sixteenth instruction differs from the above in that the words "school district of the city of Omaha" are substituted for the words "city of Omaha" in every place they are employed in said instruction 15. The criticism offered upon said instructions is that under section 124 of the Criminal Code the presumption of embezzlement does not arise from the failure of a public officer to account or make settlement for funds in his hands until the expiration of a reasonable time after notice so to do has been given him. Said section 124 of the Criminal Code, relating to the embezzlement of public moneys, *inter alia* declares that "any failure or refusal to pay over the public money, or any part thereof, by any officer or other person charged with the collection, receipt, transfer, disbursement, or safe-keeping of the public money, or any part thereof, whether belonging to the state or to any county or precinct, or school district, or organized city or incorporated village in this state, or any other public money whatever; or any failure to account to, or to make settlement within a reasonable time after notice so to do, with any proper and legal authority of the official accounts of such officer or person, shall be held and taken as *prima facie* evidence of such embezzlement. And the refusal of any such officer or person, whether in or out of office, to pay any draft, order, or warrant which may be drawn upon him, by the proper officer, for any public money in his hands, no matter in what capacity the same may have been re-

ceived or may be held by him, or any refusal, by any person or public officer named in this act, to pay over to his successor any public moneys, or securities promptly, on the legal requirement of any authorized officer of the state or county, shall be taken on the trial of any indictment against such officer or person for embezzlement, as *prima facie* evidence of such embezzlement." By the foregoing the legislature has made either the failure of any public officer to account to, or make settlement with, the proper legal authority of his official accounts within a reasonable time after notice so to do, or any refusal of a public officer to promptly pay over to his successor any public moneys or securities on the legal requirement of any authorized officer, *prima facie* evidence of embezzlement. Both of the instructions under consideration omitted to state that a reasonable time must elapse after notice for settlement and accounting has been received by an officer before the law will raise therefrom any presumption of embezzlement. For this omission a reversal is asked. In the light of the facts before us, we think it should be denied. The record discloses that the defendant was the treasurer of the city of Omaha and *ex officio* treasurer of the school district of said city for two terms. Early in July, 1895, he resigned his office, and J. H. Dumont was appointed to fill the remainder of the official term, which expired in January following. A. G. Edwards was the duly elected and qualified successor of the latter. The defendant, on July 11, 1895, accounted to and paid over to Dumont, his successor, for $221,705.69, which was only a portion of the funds in his hands belonging to the city of Omaha and the school district of said city, and he had not at the time of the trial in the court below on May 9, 1896, accounted for or paid over to the proper officer the residue of the public moneys received by him. On the 30th day of January, 1896, A. G. Edwards, the then treasurer of the city of Omaha and *ex officio* treasurer of said school district, for and on behalf of said city, as well as said school district, and in

pursuance of instructions from proper officers, made a written demand upon the defendant that he pay to said Edwards all moneys received by the defendant by virtue of his office from whatever source belonging to the city of Omaha and said school district, respectively. To this request and demand the defendant did not comply, but replied: "I cannot pay you, Mr. Edwards." No request for further time in which to account and make payment was ever suggested by the accused; but his refusal to make settlement and payment was unequivocal. The information under which the trial was had was not filed until April 2, 1896. In view of the facts detailed, and the further fact that the defendant had deposited moneys of the city and school district respectively in certain banking institutions, and had paid out several thousand dollars of the public funds without warrants or vouchers therefor, the defendant was not prejudiced by the giving of the instructions assailed. More than a *prima facie* case of embezzlement was made out by the uncontradicted evidence adduced on the trial. The statute requires a public officer to pay over to his successor all public funds unaccounted for to his successor promptly upon legal demand being made upon him therefor.

The next contention is that the verdict is not warranted by the evidence. The fourth and ninth counts of the information upon which the defendant was convicted charge the embezzlement of the sums of $2,500 and $3,000, respectively, belonging to the school district of the city of Omaha. It developed on the trial that the defendant had on deposit with the Omaha Loan & Trust Company Savings Bank about $10,000 of the funds belonging to the school district of Omaha, and of which amount he withdrew from said bank on July 28, 1893, the sum of $2,500. This he received in cash, and the evidence on behalf of the state tends to show that he never charged himself therewith, nor accounted therefor, or for any part thereof, to the school district. The moneys came into his hands as their proper custodian, and he had

wholly failed and refused to account for or pay the same over to his successor upon demand. To establish embezzlement it did not devolve upon the state to show how or where the moneys were converted by the defendant to his own use. The proof adduced by the state in support of the ninth count is fully as convincing, and is ample to sustain the averments of said count. The state, by uncontradicted testimony, traced the $3,000 of the school money therein mentioned into the hands of the defendant, and he failed and refused to account for the same in any manner whatever.

The other count upon which there was a conviction, the eleventh, charges the defendant with the embezzlement of $100,000 of the moneys of the city of Omaha. The shortage of the defendant for both terms of city treasurer was proven by the state to be $115,188.66. This is conceded in the brief filed by his counsel, although in argument at the bar it was insisted that the larger portion of this amount was made up by charging the defendant twice with the sum realized from one sale of city bonds. An analysis of the evidence fully refutes this contention, and establishes that the defalcation of the defendant on account of city funds alone for both terms was over $100,000. The point is made that a portion of the above shortage in the city funds occurred during the defendant's first term of office, and more than three years prior to the filing of the information against him. This feature of the case was passed upon by the jury adversely to the defendant under instruction eleven, given by the court on its own motion, which in clear and explicit language submitted to them that question for consideration. The evidence shows that the embezzlement in the case at bar consisted of a continuous series of acts, committed at different times, but with a common purpose, and hence constitute a single offense. (*State v. Reinhart*, 38 Pac. Rep. [Ore.], 822; *Brown v. State*, 18 O. St., 496; *Jackson v. State*, 76 Ga., 551; *Ker v. State*, 110 Ill., 627; *Gravatt v. State*, 25 O. St., 162; *Campbell v. State*, 35 O. St., 70.)

Moreover, the evidence is ample to establish that over $100,000 of the funds of the city of Omaha were embezzled by the defendant within three years prior to the commencement of this prosecution.

There was no error in refusing to admit in evidence the communications of Theodore Olsen, comptroller, to the city council, since they did not tend to show that the defendant was not guilty of embezzlement.

When the defendant turned over his office to his successor, Mr. Dumont, there was in the cash drawer, carried as cash, slips and memorandum checks, aggregating about $24,000, representing that amount of public funds which he had paid out to, and which were, carried as charges against, various persons, mostly city employes, and contractors with the city. The defendant offered to show that it had been the custom of the various city treasurers who had preceded the defendant in office to so pay out city funds. The offer was rejected, and such ruling is assigned as error. The fact, if it be a fact, that the money represented by said slips and checks in the cash drawer was paid out in pursuance of a custom with the knowledge of the city authorities did not make the transaction in question lawful. The disbursement of public funds in that manner was in violation of law, a practice in the highest degree reprehensible and constituted embezzlement, notwithstanding the transaction was openly done with the knowledge of the entire city government, and might be sanctioned by a custom or usage as old as the Mosaic Law.

Finally, it is argued that the defendant was not present in court when the jury returned their verdict. It is true the record does not affirmatively disclose that the prisoner was present at the time the verdict was received, nor does it appear he was not so present. The journal entry, however, does recite that Mr. Bolln was in court with his counsel when the jury were instructed, which was the same day the verdict was returned. His presence at the trial having been once shown by the record,

the presumption will be indulged that it continued until the end unless the contrary appears. (*Folden v. State*, 13 Neb., 328; *Dodge v. People*, 4 Neb., 220.)

We have with much care examined the voluminous record in this case, and have given every proposition argued in the brief for reversal careful consideration, and the conclusion is irresistible that the defendant has been accorded a fair and impartial trial, and no error which could have prejudiced his substantial rights having been committed, a judgment of affirmance will be entered.

AFFIRMED.

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## MISSOURI PACIFIC RAILWAY COMPANY V. THOMAS K. BRADLEY, ADMINISTRATOR.

FILED MAY 18, 1897. No. 7148.

1. **Administrators: APPOINTMENT: JURISDICTION OF COUNTY COURT.** Where a resident of another state dies intestate, an administrator may be appointed by the county court of any county in this state in which there shall be an estate to be administered, irrespective of the value of such estate.
2. ———: ———: ———. The county court of a county wherein a nonresident of the state is killed may appoint an administrator to prosecute a statutory action for the injury causing the death of the decedent, though the latter left no property in this state.
3. ———: REVOCATION OF LETTERS. The fact that one has been sued by an administrator will not authorize such person to petition to the county court for a revocation of the letters of administration.
4. ———. The acts of an administrator *de facto* are binding between the estate and innocent third persons, although his appointment be erroneous and voidable.

ERROR from the district court of Otoe county. Tried below before CHAPMAN, J. *Affirmed.*

*E. F. Warren*, *C. W. Seymour*, *James W. Orr*, and *B. P. Waggener*, for plaintiff in error.

*John C. Watson, Wash Adams,* and *Numa F. Heitman, contra.*

NORVAL, J.

On the 9th day of January, 1894, a petition was presented to the county court of Otoe county for the appointment of an administrator of the estate of Charles L. Myers, deceased, alleging, *inter alia*, that Myers, a resident of Jackson county, Missouri, died intestate in Otoe county, this state, on the 22d day of April, 1892, leaving an estate to be administered, consisting of personal property situated and having its situs in said county of Otoe. The prayer of the petition was granted, and Thomas K. Bradley was appointed administrator, who duly qualified as such. Afterwards, on January 30, 1894, the Missouri Pacific Railway Company filed a petition in said county court, setting forth that Bradley, as administrator of the estate of said Myers, deceased, had instituted an action against it in the district court of Otoe county to recover damages resulting from the death of Myers, alleged to have been caused by the negligence of the railroad company; that the appointment of Bradley was fraudulent and collusive, and made for the sole purpose of prosecuting said action; that at the date of the death of Myers he was a resident of the state of Missouri, and left no estate to be administered in the state of Nebraska, and praying that the letters of administration granted to Bradley might be revoked and set aside. A citation was thereupon issued by the county court to Bradley, fixing the date for him to show cause why his appointment as administrator of said estate should not be revoked and annulled, which was duly served. An answer was filed by the administrator denying the allegations contained in the petition of the railroad company, and alleging that it has no interest in the estate of said Myers, as creditor, heir, or distributee of said estate, and that said corporation has no right or authority to file said petition or to

be heard to raise objections to the appointment of said administrator. Upon the hearing, on April 2, 1894, the county court refused to revoke and cancel the letters of administration, finding specially that Myers died intestate in Otoe county; that he resided in Jackson county, Missouri, at the time of his death; that he left as his estate "$4 in money and a pocket-book found upon his person at the time of his death, which said $4 and purse were sent to the widow of deceased at Kansas City, Missouri, at once; that said money in cash and the said purse were returned to said county of Otoe after the commencement of this proceeding, and came into the hands of the administrator on the 2d day of April, 1894; a claim for $25 for money he had on his person at the time he left home, and a claim to right of action for damages against the Missouri Pacific Railway Company for injuries occasioning the death of the said Charles L. Myers." The railroad company excepted, and prosecuted error to the district court, where the decision of the county court was affirmed. The record has been brought to this court for review.

It is argued that the grant of letters of administration to Thomas K. Bradley upon the estate of Charles L. Myers, deceased, by the county court of Otoe county, was *coram non judice*, because said Myers at the time of his death was a resident of Missouri, and left no estate to be administered in Nebraska. Section 177, chapter 23, Compiled Statutes, 1895, declares: "When any person shall die intestate, being an inhabitant of this state, letters of administration of his estate shall be granted by the probate court of the county of which he was an inhabitant or resident at the time of his death. If such deceased person, at the time of death, resided in any other territory, state, or county, leaving estate to be administered in this state, administration thereof shall be granted by the probate court of any county in which there shall be estate to be administered; and the administration first legally granted shall extend to all the estate of

the deceased in this state, and shall exclude the jurisdiction of the probate court of every other county." There is no claim that Myers was a resident or inhabitant of this state at the time of his death, so the letters of administration issued to Bradley are invalid unless the decedent left an estate to be administered in Otoe county. That Myers died in that county and was then a resident of the state of Missouri is undisputed; but it is asserted that he left no estate in Otoe county sufficient to confer jurisdiction upon the county court of that county to grant administration. The county court found that Myers left in said county, as his estate, a pocket-book, $4, a claim for $25 for money, and the right of action against the railroad company for injuries causing his death. These constituted an estate to be administered. It is true, exclusive of the claim against the company, they were not of great value, but that is wholly an immaterial consideration, so far as the question of jurisdiction is concerned. The statute has not fixed any limitation upon the value of the estate to be administered, and the courts have no right to do so. The jurisdiction of the county court to grant administration is not determined by the value of the estate. (Schouler, Executors and Administrators, secs. 24, 93; 19 Am. & Eng. Ency. Law, 166; *Welch v. New York C. R. Co.*, 53 N. Y., 610; *Wheeler v. St. Joseph & W. R. Co.*, 31 Kan., 640; *Union P. R. Co. v. Dunden*, 37 Kan., 1; *City of Horton v. Trompeter*, 53 Kan., 150.) In the last case the deceased owned property of the value of $2.25 at the time of his death, and it was held the estate was sufficient to authorize the granting of letters of administration. Authority is conferred to administer upon the estates of the poor and rich alike. The statute has made no distinction in that regard.

The argument that jurisdiction was lost by the sending of the pocket-book and the $4 to the widow in Kansas City, Missouri, prior to the filing of the petition for administration in the county court of Otoe county is without merit. Myers' property vested in the adminis-

trator when appointed by relation from the death of decedent. (*Bullock v. Rogers*, 16 Vt., 294; *Valentine v. Jackson*, 9 Wend. [N. Y.], 302; *McMillan v. Wacker*, 57 Mo. App., 220; *Adey v. Adey*, 58 Mo. App., 408; 1 Woerner, American Law of Administration, sec. 173.) An estate was left in Otoe county to be administered, and the sending of a part or all of the personal property out of the county could not divest the court of jurisdiction to issue letters of administration. The widow had no right to the pocket-book and money, as they did not belong to her. The fact that they were forwarded to her, presumably for safe-keeping, is entirely immaterial and did not affect the jurisdiction of the county court. The authority of the county court did not rest alone upon the few articles of personal property already mentioned which the deceased had upon his person when he died, since the cause of action against the railroad corporation was sufficient estate to justify the appointment of an administrator, had there been no other estate to be administered. The decisions in the other states upon the question are conflicting, but the decided weight of the authority sustains the doctrine that the cause of action, under Lord Campbell's Act, is an estate sufficient to grant administration thereon. This court so held in *Missouri P. R. Co. v. Lewis*, 24 Neb., 848. In that case Joseph B. Lewis died in the state of Kansas, from injuries inflicted there by the railroad company. The sole assets of the estate consisted of the claim against the company. Letters of administration were granted by the county court of Washington county, Nebraska, to the widow, who instituted suit against the company for the death of her husband. The jurisdiction of the county court was sustained, and we think properly so, in the light of chapter 21, Compiled Statutes, which reads as follows:

"Section 1. That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would if death had not ensued, have entitled the party injured to maintain

an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

"Sec. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate," etc.

Under these provisions the right of action against the railroad company for causing the death of Myers constituted an estate within the meaning of section 177, chapter 23, Compiled Statutes. In the language of Montgomery, J., in *Findley v. Chicago & G. T. R. Co.*, 64 N. W. Rep. [Mich.], 732, "it could not have been contemplated by the legislature that the right to bring this action could be made to depend upon the question of whether the deceased left other property. We think it was clearly the purpose to treat this right of action as assets for distribution, and we hold, in accordance with the weight of the authority, that they are such assets within the meaning of section 5848." In the case from which the foregoing excerpt was taken it appears that Myrtle Findlay, an inhabitant of the city of Hamilton, in the county of Wentworth, Ontario, was killed in a railroad accident upon the Chicago & Grand Trunk Railway, near Battle Creek, Michigan. An administrator of her estate was appointed by the probate court of Wayne county, in that state. It was urged that the letters of administration were granted without jurisdiction,—the right of action given an administrator by Lord Campbell's Act did not constitute assets of the estate of a non-

resident of Michigan killed within the state sufficient to grant administration thereon by the probate court of that state under a statute relative to the administration of estates of deceased persons identical with our section 177 quoted above. The supreme court of Michigan held letters of administration were properly granted. To the same effect are *Merkle v. Bennington*, 68 Mich., 33; *Hartford & N. H. R. Co. v. Anderson*, 36 Conn., 213; *Morris v. Chicago, R. I. & P. R. Co.*, 65 Ia., 727; *Pinney v. McGregory*, 102 Mass., 186; *Griswold v. Griswold*, 20 So. Rep. [Ala.], 437; *Lang v. Houston Street R. Co.*, 75 Hun [N. Y.], 151; *Goltra v. People*, 53 Ill., 224.

*Hutchins v. St. Paul, M. & M. R. Co.*, 44 Minn., 5, was an action by the administrator of William F. Ferguson to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of defendant. Deceased was not an inhabitant of Minnesota at the time of his death and left no property therein, yet letters of administration were granted by the probate court of Hennepin county, Minnesota, in which the deceased received his injuries of which he there died. The jurisdiction of the probate court to direct administration was assailed on the same ground as urged in the case at bar. The court overruled the contention, saying: "It is true that, strictly speaking, the cause of action did not belong to the deceased in his lifetime, but only accrued at his death; also, that, when realized on, the proceeds form no part of his general estate, but belong to his next of kin. But the narrow and literal construction contended for by the appellant would often prevent the enforcement of the cause of action at all, because of the impossibility of securing a personal representative of the deceased to maintain it. Administration is a proceeding *in rem*, the *res* being the estate of the deceased; and we apprehend that, whether the deceased is a resident or a non-resident, the existence of assets is essential to administration, for it is the estate, and not the expired breath, of the deceased upon which administration operates. Hence it would seem to follow,

from the appellant's logic, that if the deceased left no assets, strictly so called, no administration could ever be had, and consequently the statutory right of action for the benefit of the next of kin could never be enforced. This right of action is given in case of the death of any person, whether a resident of the state, or only temporarily sojourning in it at the time of his receiving the injuries causing his death. The law will not allow it to be defeated for want of a party to maintain it. The fact that the statute gives such a right of action to the personal representative, and to him alone, implies the right to appoint, if necessary, an administrator to enforce it, and administer the proceeds in accordance with the statute."

The first paragraph of the syllabus in *Brown's Administrator v. Louisville & N. R. Co.*, 30 S. W. Rep. [Ky.], 639, reads thus: "The court of the county wherein a non-resident is killed by the negligence of a railroad company may appoint an administrator to sue the company, though the deceased leaves no property in the state other than such right of action." The contrary doctrine is sustained by *Perry v. St. Joseph & W. R. Co.*, 29 Kan., 420, and *Jeffersonville R. Co. v. Swayne*, 26 Ind., 477; but the weight of the adjudications is in favor of the right to have an administrator appointed for the sole purpose of prosecuting an action arising under Lord Campbell's Act, even though there exist no other necessity for such an appointment, and the deceased was not domiciled in this state and left no property therein, and that the county court of the county where the injury was received and the deceased died may properly entertain such jurisdiction. The fact that our statute authorizes a foreign administrator to maintain an action in this state has no bearing upon the question. The legislature has conferred power upon county courts to grant administration in case of non-resident decedents where any estate is left in this state to be administered, and such power is not affected by the fact a foreign administrator may maintain an action in our courts.

The decisions of the county and district courts are right, for the reason that the railroad company possessed no such interest as to authorize it to move to set aside the appointment of the administrator. The corporation is not a creditor of the deceased, nor is it in any manner interested in preserving the assets, or in the settlement of the estate of Myers. The company is a mere debtor of the estate, and has been sued by the administrator for the recovery of money, but that gives no right to it to petition for the removal of the administrator. (*Penniman v. French*, 2 Mass., 140; *Swan v. Picquet*, 3 Pick. [Mass.], 443; *Labar v. Nichols*, 23 Mich., 310; *White v. Spaulding*, 50 Mich., 22; *Augusta & S. R. Co. v. Peacock*, 56 Ga., 146; *Chicago, B. & Q. R. Co. v. Gould*, 64 Ia., 343.) In the last case an administrator of Melville Madden, deceased, sued the railroad company to recover for the death of plaintiff's intestate. Thereupon the corporation filed a petition for the revocation of the appointment of administrator, setting up that he had been sued at law by the administrator to recover $20,000 alleged to be due the estate; and that the appointment was illegal on the account of the administrator's non-residence. The supreme court held that the railroad company did not have such an interest in the estate as to authorize it to move for the revocation of the appointment of the administrator, saying: "The plaintiff has an interest to defeat the claim which the estate holds against it. This interest promps it to resist the claim, and if it is successful, it will destroy what is now regarded as defendant's property. It is absurd to say that plaintiff is interested in the estate in any other way than as a litigant is interested to defeat the claim of his adversary. Its interest is of the character of that which an enemy feels who seeks the destruction of his foe."

The only case conflicting with the above which has come under the observation of the writer is *Jeffersonville R. Co. v. Swayne*, 26 Ind., 477. The opinion therein does not contain a single well founded reason for support

of the right of the railroad company to question the legality of the act of the court granting letters of administration. The company, as a debtor merely to the estate, had no such interest as entitled it to resist the appointment of the administrator in the county court in the first instance, or to authorize the prosecution of an appeal from such appointment to the district court. (2 Woerner, American Law of Administration, sec. 544; *Swan v. Picquet*, 3 Pick. [Mass.], 443; *Drexel v. Berney*, 1 Dem. [N. Y.], 63; Croswell, Executors & Administrators, 257.) The bringing of the action against the company for damages gave it no interest in the estate. Its only interest is against the estate.

This and other courts have held that the appointment of an administrator cannot be assailed in a collateral proceeding, where the record of appointment does not disclose a want of jurisdiction. (*Missouri P. R. Co. v. Lewis*, 24 Neb., 848; *Estate of Moore v. Moore*, 33 Neb., 509.) It does not follow, however, that merely because one has been sued by an administrator he may be heard in a direct proceeding in the county court to revoke the appointment because the facts set up in the application on which the letters were granted were untrue. Where the want of authority to make the appointment is disclosed by the record the validity of the letters of administration may be questioned collaterally. But if such letters are issued on the estate of a deceased person by a court of competent jurisdiction upon a petition containing proper allegations, and the requisite notice has been given, they cannot be collaterally attacked, but are binding until reversed, vacated, or revoked in a proper proceeding. The appointment of Mr. Bradley as administrator was in every respect regular as disclosed by the record, and therefore his letters, until revoked, were sufficient to protect innocent persons acting upon the faith of them. A payment to him would bind the estate and discharge the debtor. So a judgment recovered by such administrator against this railroad company would be a bar to a

suit for the same cause of action brought against it by another administrator of the same estate. (*Roderigas v. East River Savings Institution*, 63 N. Y., 460; *Chicago, B. & Q. R. Co. v. Gould*, 64 Ia., 343; Compiled Statutes, ch. 23, sec. 193.) Adams, J., in delivering the opinion of the court in the last case, says: "It is shown by the petition that plaintiff insists that if judgment should be rendered against it in favor of defendant as administrator it could not safely pay the judgment; the thought being that the claim of the estate would not thereby be discharged. Plaintiff, it seems, does not regard the appointment of defendant as void, but voidable only, in that it does not treat his acts as mere nullities, but seeks to have his appointment revoked. If the order of the court in making the appointment was erroneous, and therefore merely voidable, all acts of the administrator, until his appointment be set aside, will be valid. Hence, payment to him before his removal would bind the estate. While acting as such he is regarded as the administrator *de facto*, and his acts are binding between the estate and persons who deal with him in good faith. (*Mutual Benefit Life Ins. Co. v. Tisdale*, 91 U. S., 238; *Cocke v. Halsey*, 16 Pet. [U. S.], 71; *Shephard v. Rhodes*, 60 Ill., 301; *Moreland v. Lawrence*, 23 Minn., 84; *Belden v. Meeker*, 47 N. Y., 307; *Emery v. Hildreth*, 2 Gray [Mass.], 228; *Irwin v. Bank*, 38 Upper Can. Q. B., 375.)" The majority of the cases are in harmony with the foregoing views, although a different rule has been adopted in *Jeffersonville R. Co. v. Swayne*, 26 Ind., 477, and *McChord v. Fisher's Heirs*, 13 B. Mon. [Ky.], 193.

It is also insisted, because the statute authorizes an appeal in all matters of probate jurisdiction "from any final order, judgment, or decree of the county court to the district court by any person * * * who may be affected thereby," that the railroad company had the right to move to vacate the appointment of the administrator. The fallacy of this argument consists in the erroneous assumption that the railroad company was affected by the order granting letters of administration.

The right to appeal from the decision of the county court in probate matters is vested alone in persons against whom an order, judgment, or decree is made, or who may be thereby affected or aggrieved. One is aggrieved or affected by a decision of such court alone when it operates upon his property or bears directly upon his interest. (2 Woerner, American Law of Administration, sec. 544; *Deerings v. Adams*, 34 Me., 41; *Bryant v. Allen*, 6 N. H., 116; *Wiggin v. Sweet*, 47 Mass., 195; *Smith v. Bradstreet*, 33 Mass., 264.) This railroad company is not affected by the order appointing the administrator, and it had not sufficient interest to move the revocation of the appointment.

The judgments of the county and district courts are right, and they should be

AFFIRMED.

HARRISON, J., concurs.

IRVINE, C., dissenting.

The first question naturally presented is the right of the railway company to maintain the proceeding. We have just decided (*Bradley v. Missouri P. R. Co.*, 51 Neb., 653), following prior decisions of this court, that where want of jurisdiction does not affirmatively appear from the record of the county court, the appointment of an administrator may not be collaterally attacked. From this it logically follows, and to the writer's mind it necessarily follows, that a person sued by one claiming to be an administrator may be heard in a direct proceeding in the probate court to move to revoke the letters for want of jurisdiction to grant them. It certainly seems that a defendant in any action must at some time and in some manner be permitted to question the capacity of the plaintiff to maintain the action against him. To hold that he may not do so collaterally in the suit against him and to also hold that he may not be heard in a direct proceeding for such a purpose, is to deny him all remedy and to the extent of that issue all protection of the law. Our

statute does not provide in terms who may be heard to resist the appointment of an administrator or to move to revoke the same; but it does provide that "in all matters of probate jurisdiction appeals shall be allowed from any final order, judgment or decree of the county court to the district court by any person against whom any such order, judgment or decree may be made, or who may be affected thereby." (Compiled Statutes, ch. 20, sec. 42.) Surely one who may appeal not only may, but must, as a foundation for the exercise of that right, be heard in the court of original jurisdiction to contest the order appealed from. Our statute is in this respect broad, and is to be distinguished from those which confine opposition in such matters to "persons interested in the estate," or "persons aggrieved by the order." A person interested in the estate is one entitled to or claiming some portion thereof. A person aggrieved by an order is in effect a person against whom such order has been made. Our statute uses the latter language and then extends the right to appeal to all persons who may be affected by the order. One who has been sued by a person whose sole right to maintain the action is based upon the order is certainly in any just sense of the term "affected thereby." The following cases directly sustain the view we have indicated: *Jeffersonville R. Co. v. Swayne*, 26 Ind., 477; *Estate of Mallory v. Burlington & M. R. R. Co.*, 53 Kan., 557; *Donaldson v. Lewis*, 7 Mo. App., 403. The cases cited in support of an opposite view in the opinion of Judge NORVAL are all readily distinguishable. In Massachusetts the statute confines the right to be heard to "any person aggrieved," and *Penniman v. French*, 2 Mass., 140, and *Swan v. Picquet*, 3 Pick. [Mass.], 443, are based entirely on a construction of that statute. Moreover, in Massachusetts the authority of the administrator may be collaterally attacked in a suit brought by him, on the ground of want of jurisdiction to grant the letters. (*Emery v. Hildreth*, 2 Gray [Mass.], 228; *Holyoke v. Haskins*, 9 Pick. [Mass.], 259.) *Labar v. Nichols*, 23 Mich., 310, was

founded and decided upon the same statute as existed in Massachusetts, and related to an appeal from the allowance of the account of an administrator. There was no question of the validity of his appointment. The appellant was interested only to the extent of a legacy of $10, which the order complained of ordered paid. He certainly could not appeal because the order gave him all that he claimed. *White v. Spaulding*, 50 Mich., 22, was a case where the decedent was domiciled in Massachusetts, and administration had been there granted. The widow resided in Massachusetts, but asked to have an ancillary administration in Michigan revoked. The application was not based on any claim of want of authority to grant the letters, and it was not shown that the widow had any interest whatever in any of the Michigan property. In *Augusta & S. R. Co. v. Peacock*, 56 Ga., 146, a case somewhat like the present, no suit had been begun by the administrator, and it was merely held that a person who simply apprehended that the administrator would sue him had no standing to ask his removal. Moreover, in Georgia also, the defendant in such an action may attack the authority of the administrator collaterally. (*Griffith v. Wright*, 18 Ga., 173.) In *Drexel v. Berney*, 1 Dem. [N. Y.], 163, the decision was based entirely on a construction of a statute confining the right to be heard to creditors "or persons interested in the estate," and another statute defined "persons interested" as those entitled either absolutely or contingently to a share in the estate. The court held that the statute was exclusive and did not permit a debtor to contest. *Chicago, B. & Q. R. Co., v. Gould*, 64 Ia., 343, was based upon a similar statute.

A sufficient reason for sustaining the right of the railway company to maintain this proceeding is derived from the fact that if, as is claimed, the county court of Otoe county was without jurisdiction in the premises and the grant of administration was void, then a judgment for or against the railway company in the damage suit would

be no bar to an action by the lawful administrator. (*Jeffersonville R. Co. v. Swayne, supra; McChord v. Fisher's Heirs*, 13 B. Mon. [Ky.], 193.) In opposition to this view Judge NORVAL cites *Roderigas v. East River Savings Institution*, 63 N. Y., 460, and *Chicago, B. & Q. R. Co. v. Gould*, 64 Ia., 343. The New York case was one where a man had been long absent and his mother made proof of his death and took out letters of administration on the faith of which the bank paid her a deposit of the supposed decedent. In fact, however, the man was alive. He died several years later, and administration was granted to his widow, who sued the bank for the deposit. It was held by a bare majority of the court that the bank was protected in its payment to the false administratrix. It is unnecessary here to comment at large on this class of cases. To the writer it seems that they are founded upon a confusion of ideas between jurisdiction depending upon the fact of death, or supposed proof of death. The idea that a man's property may be confiscated and distributed in his lifetime, and he forbidden to reclaim it by virtue of the fiction that the record of his death imports verity, and that he cannot as against it assert his own existence, is absurd to the reason and abhorrent to the conscience. The Iowa case we have already noticed begs the whole question by assuming that the grant of administration was voidable only and not void, because the railroad company attacked it directly instead of collaterally. Assuming that the appointment was voidable, it rightly holds that the administrator was one *de facto*, whose acts bound the estate until his authority should be revoked. How carelessly this case was considered is shown by the authorities it cites in support of its position. *Mutual Life Ins. Co. v. Tisdale*, 91 U. S., 238, held that in an action against a life insurance company on a policy the letters of administration upon the estate of the insured were not competent evidence of his death. It decided nothing else. *Cocke v. Halsey*, 16 Pet. [U. S.], 71, held that the decision of a court acting within its juris-

diction is binding until reversed. *Belden v. Meeker*, 47 N. Y., 307, held merely that letters of administration are sufficient *prima facie* to establish the capacity of the plaintiff to maintain an action as administrator as against a general denial in the answer. The other cases cited held that the acts of an administrator bind the estate when his appointment was erroneous or voidable merely, and distinguish between that case and a void administration. Herein, indeed, lies the distinction. If the county court of Otoe county was without jurisdiction the grant of administration was absolutely void, and not merely voidable.

This brings us to the question decided by the county court—the validity of the appointment. The statute provides (Compiled Statutes, ch. 23, sec. 177): "When any person shall die intestate, being an inhabitant of this state, letters of administration of his estate shall be granted by the probate court of the county of which he was an inhabitant or resident at the time of his death. If such deceased person, at the time of death, resided in any other territory, state, or county, leaving estate to be administered in this state, administration thereof shall be granted by the probate court of any county in which there shall be estate to be administered; and the administration first legally granted shall extend to all the estate of the deceased in this state, and shall exclude the jurisdiction of the probate court of every other county." It will be observed that there is a double foundation for the jurisdiction of a county court in such matters. A general jurisdiction is conferred to grant letters of administration where the deceased was an inhabitant or resident of the county at the time of his death. There is a further grant of power in cases where the decedent was not such an inhabitant or resident, but where he left estate in the county to be administered. Under the conceded facts Myers was not an inhabitant or resident of Otoe county or of the state of Nebraska. Therefore the administration must be founded upon his leaving

estate in Otoe county to be administered. There is in the transcript what purports to be a bill of exceptions, containing the evidence on which the county court acted, and it is claimed that this evidence discloses that he left a pocket-knife and a suit of clothes in addition to the articles described in the finding of the county court. At the time of the proceeding there was no authority to allow a bill of exceptions in such a case. (*Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520.) But even if we might look into this evidence it does not disclose that the judgment of the county court was wrong in failing to find that he left any such property. Lewis was killed in a railroad wreck at Nebraska City. The suit of clothes was that which he wore at the time of the accident. The coroner testified that they were so injured as to be wholly without value. As to the knife, the evidence relates simply to a knife which he customarily carried. It was not found, and we hardly think that a county court would be justified in granting administration for the purpose of authorizing some one to search for a pocket-knife in the wreck of a railroad train; and administration so granted would have a very slender foundation if the knife should not be found. We therefore accept the finding of the county court that he left as his estate a pocket-book, $4 in money, and the right of action against the railway company. Were these, or any of them, "estate to be administered" within the meaning of the statute? As to the articles of personal property, the finding is that the $4 and pocket-book were at once sent to the widow at Kansas City, and that they did not come into the possession of the administrator until the day the order complained of was made. Administration partakes largely of the nature of proceedings *in rem*, and personal property may have in some cases a definite situs, but ordinarily it follows the person, and its situs is his domicile. If the property had remained in Otoe county, it may be that it would be sufficient whereon to found administration in that county, because we quite agree with counsel for the administrator

in their contention that in the absence of a statutory limitation the courts cannot grant or refuse administration merely because of the value of the estate to be administered, and whether the property is subject to the payment of debts, or, on the other hand, certain to be entirely consumed by the widow's allowance, does not affect the jurisdiction. In either event it must be administered. But before application was made for the appointment of the administrator the property had been delivered to the widow in Kansas City, Missouri. At the time administration was granted it was not in Otoe county. The widow was not there. There was neither property within reach of the administrator in that county nor a right of action other than the personal injury case which could there be prosecuted. What the estate had, if anything, was a transitory cause of action for the conversion of the property, or to replevy it, and this action must be brought not in Otoe county, but where the property could be reached, or where the widow could be served with summons, to-wit, in Missouri. Where a decedent left personal property in New York which was reduced to possession by the domiciliary executor and removed from the state, it was held that the fact that the property was in New York at the time of the decedent's death did not confer jurisdiction upon the courts of that state. (*Townsend v. Pell*, 3 Dem. [N. Y.], 367.) It must be conceded that the right of property in an administrator vests by relation from the death of the decedent. It is because of this rule that the widow, had she refused to deliver the property to the administrator, would be liable in an action of trover; but it does not follow that the law establishes any fiction whereby property in a county at the time of the decedent's death is held to remain there, notwithstanding the fact of its removal. It is true that it is not for all purposes that personal property has its situs at the place of domicile; but when this is not true it is because the fiction yields to the fact when necessary to enable the court to obtain effective jurisdic-

tion. As said by the supreme court of Mississippi, speaking to this point: "Personal property, whether of a tangible or an intangible character, is considered as located, for the purposes of administration, in the territory of that state whose laws must furnish the remedies for its reduction to possession. * * * For the purposes of administration, therefore, personal property is situated in that state in which it is found." (*Speed v. Kelly*, 59 Miss., 47.) The object, therefore, of departing from the fiction that personal property follows the domicile is to secure possession of the property, and the general rule should not be departed from for the purpose of founding a jurisdiction where the property cannot be obtained. Again, there can be no reason for departing from the general rule with regard to such articles of apparel of strictly personal use as the decedent habitually carries upon his person. The personal property which has its *situs* at a place other than the domicile is property of a substantive nature having no fixed connection with the person of the owner. We have never heard until this case arose that the clothing on a man's back, the small coin in his pocket, and the trifling articles which he habitually carries upon his person, can give jurisdiction to administer his estate to the courts of a foreign state in which he happens to be traveling at the time of his death.

The most serious question is whether the cause of action under Lord Campbell's Act was sufficient to sustain the jurisdiction of the county court. On this the authorities are conflicting. It is contended that the question has been settled in this state in favor of the jurisdiction, and on this point we are cited to *Burlington & M. R. R. Co. v. Crockett*, 17 Neb., 570, and *Missouri P. R. Co. v. Lewis*, 24 Neb., 848. Neither of these cases determines the question. In the first what was decided was that a petition in order to show a cause of action under Lord Campbell's Act must disclose that there was a widow or next of kin entitled to the beneficial interest in the judgment. In the second case an administrator had been

appointed in Washington county in this state. The decedent met his death in Kansas, and this court held, following *Dennick v. Central R. Co.*, 103 U. S., 11, that where the statute of one state gives a right of action for injuries causing death, an administrator appointed in another state may there maintain the action, the proceeds to be distributed according to the law of the state where the wrongful act was committed. It was incidentally held that inasmuch as the statute gives a right of action to the administrator, it follows that administration may be granted for the purpose of maintaining the action. But nothing was said as to the forum. It appears by clear inference that the administratrix in that case had been appointed in the county of the decedent's domicile, so that jurisdiction existed by virtue of the first clause of section 177, ch. 23, already quoted. The authority of this case is rather in favor of an action brought in Missouri by an administrator there appointed, than in favor of an action brought in the county where the accident occurred. The question is therefore an open one in this state, and the authorities elsewhere are so conflicting that we feel at liberty to adopt that view which seems best supported by principle. (See, for instance, in favor of the contention of the railway company, *Jeffersonville R. Co. v. Swayne*, 26 Ind., 477, and *Perry v. St. Joseph & W. R. Co.*, 29 Kan., 420; and as entirely supporting the contention of the administrator, *Hutchins v. St. Paul, M. & M. R. Co.*, 44 Minn., 5.) All the authorities agree that a cause of action under Lord Campbell's Act is transitory in its nature; although, until the decision of *Dennick v. Central R. Co., supra*, there was a conflict as to whether the statute could be enforced outside of the state enacting it. We feel bound by the decision in *Missouri P. R. Co. v. Lewis, supra*, to hold that such a cause of action is sufficient to warrant the granting of letters of administration, although the proceeds of the action are not to be distributed according to the usual course. But it does not follow from this conclusion that such a cause

of action has its situs in the place where the injuries were inflicted or where death occurred, so as alone to justify administration in that county, where it is not the county of which the decedent was an inhabitant or resident. Conceding the full force of the Lewis case, it merely places such a cause of action on the same foundation as any other transitory cause of action. If such a cause has its situs in any place it would be the domicile of the plaintiff or that of the defendant, and not the county where the facts occurred creating the cause of action. In some states it has been held that a transitory cause of action against a resident of a county constitutes assets or estate in that county for the purposes of administration. But in those states the law does not permit a foreign administrator to sue. (*Pinney v. McGregory*, 102 Mass., 186; *Maysville Street R. & T. Co. v. Marvin*, 59 Fed. Rep., 91; *Brown v. Louisville & N. R. Co.*, 30 S. W. Rep. [Ky.], 639.) We think that such a state of affairs might fix the *situs* of a debt in such a manner that administration must be granted where it can be reached. But our statute provides that "An executor or administrator duly appointed in any other state or county may commence and prosecute any action or suit in any court in this state in his capacity of executor or administrator, in like manner, and under like restrictions, as a non-resident may be permitted to sue." (Compiled Statutes, ch. 23, sec. 337.) This language is very broad, and confers complete power upon a foreign administrator to maintain any action, subject only to the same requirements as exist in cases of other non-residents. In answer to this argument, the administrator contends that the law of Missouri would not permit a Missouri administrator to maintain such an action. But to this there are two answers. The law of Missouri does not appear in this record, and it will therefore be presumed to be the same as our own. (*Chapman v. Brewer*, 43 Neb., 890.) Again, it does not follow that the limitations upon an administrator's authority in Missouri would apply in an action

brought by him in this state under Lord Campbell's Act, and if such limitations would apply, it would seem that the defect is one arising from the laws of Missouri and which this state would be without power to remedy. We cannot see that the fact that the injuries were inflicted or that death resulted in Otoe county tend in any way to localize the cause of action. Indeed, all the authorities are to the contrary.

POST, C. J., RYAN and RAGAN, CC., concur in the foregoing dissenting opinion.

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## W. E. HODGIN ET AL. V. NOAH WHITCOMB ET AL.

FILED MAY 18, 1897. No. 7193.

1. **Unauthenticated Bill of Exceptions.** This court will not consider a bill of exceptions where the same is not authenticated by the certificate of the clerk of the court below.
2. **Instructions:** NEW TRIAL: REVIEW. An objection to a charge not called to the attention of the court by the motion for a new trial will not be considered.
3. ———: ASSIGNMENTS OF ERROR. An assignment of error to instructions as a whole, in a motion for a new trial or petition in error, is insufficient unless each paragraph is erroneous.
4. ———: EXCEPTIONS. An instruction will not be reviewed unless it appears to have been excepted to below.
5. **New Trial:** JUDGMENT RENDERED IN VACATION. A judge of the district court is without authority, in vacation and out of term time, to either pass upon a motion for a new trial or render a money judgment in a cause.

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

*Jay & Beck* and *A. C. Abbott*, for plaintiffs in error.

*J. M. Curry* and *Barnes & Tyler, contra.*

NORVAL, J.

This was a suit on a builder's bond. From a verdict and judgment for plaintiffs below, error is prosecuted by the unsuccessful parties.

The petition in error contains numerous assignments, based upon alleged rulings of the trial court on the admission and exclusion of testimony, which cannot be considered, inasmuch as the document attached to the transcript which purports to be the bill of exceptions in this cause is in no manner authenticated by the clerk of the district court. (*Romberg v. Fokken*, 47 Neb., 198; *Childerson v. Childerson*, 47 Neb., 162; *Romberg v. Hediger*, 47 Neb., 201; *Andrews v. Kridler*, 47 Neb., 585; *Derse v. Straus*, 49 Neb., 665.) For the same reason we cannot review the evidence for the purpose of ascertaining its sufficiency to sustain the verdict, or determine whether there was error in the assessment of the amount of recovery, or whether there was any misconduct of the jury.

Complaint is made of the giving of paragraphs 4 and 5 of the court's charge. Those instructions were not assigned for error in the motion for a new trial, the only reference made therein to the subject being in the following language: "8. The court erred in giving paragraphs Nos. ————, given by the court on its own motion." This was wholly inadequate to lay the foundation for the review of any of the instructions of the court.

Three assignments in the petition in error are based upon as many instructions alleged to have been given at the request of the plaintiffs below. There are two reasons why such assignments are not well founded: First, the record does not disclose that any one of the instructions requested by plaintiffs was given or read to the jury. In the next place the assignment in the motion for a new trial was directed to the instructions requested by plaintiff as a whole, which is insufficient unless all are erroneous. Errors in respect to giving instructions must be separately assigned in the motion for a

new trial as well as in the petition in error. (*Spears v. Chicago, B. & Q. R. Co.*, 43 Neb., 720; *Dempster Mill Mfg. Co. v. First Nat. Bank of Holdrege*, 49 Neb., 321; *Stough v. Ogden*, 49 Neb., 291.)

The assignment that the court erred in refusing to give instruction 2, asked by the defendants, must be overruled, because it does not affirmatively appear that such request was not given. Furthermore, if it was refused, no exception was taken at the time to such refusals in the court below, therefore no objections can be successfully presented in this court. (*Merrill v. Equitable Farm & Stock Improvement Co.*, 49 Neb., 198.)

It appears from the record that this cause was tried, the verdict returned, and the motion for a new trial filed, during the May term, 1894, of the district court of Thurston county, which term adjourned without day on the 19th day of May, and that the motion for a new trial was passed upon and the judgment rendered on the verdict of the jury by Judge Norris on the 24th day of said month, out of term time. This action of the court is now assailed. By section 23, article 6, of the constitution, "the several judges of the courts of record shall have such jurisdiction at chambers as may be provided by law." It is plain that the constitution confers no judicial powers upon a judge of the district court at chambers. He can exercise such authority alone as is given by the legislature. (*Ellis v. Karl*, 7 Neb., 381.) The statutes of this state have conferred jurisdiction upon such judges at chambers in certain matters,—among others, to confirm the sale of real estate (*State Bank v. Green*, 8 Neb., 297; *McMurtry v. Tuttle*, 13 Neb., 232; *Lawson v. Gibson*, 18 Neb., 137), to license an executor, administrator, or guardian to sell real property for certain purposes (Compiled Statutes, ch. 23, sec. 339; *Stewart v. Daggy*, 13 Neb., 290; *Stack v. Royce*, 34 Neb., 833, and to issue a *mandamus* (*Wheeler v. State*, 32 Neb., 472; Compiled Statutes, ch. 19, secs. 39, 57). We are unable to find any legislative enactment in this state which authorizes a judge of the district

court to pass upon a motion for a new trial, or to render a money judgment, when the court is not in actual session for the transaction of business. Judge Norris was clothed with no judicial authority in vacation to rule upon the motion for a new trial and render judgment, and his acts in that regard are *coram non judice*. (*Brumley v. State*, 20 Ark., 77; *Wightman v. Karsner*, 20 Ala., 446; 1 Black, Judgments, sec. 179.) The judgment is reversed and the cause remanded to the district court with directions to proceed in the cause in accordance with law, in all respects as though the decision and journal entry of date of May 24, 1894, had never been made and entered.

REVERSED AND REMANDED.

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MEYER & RAAPKE ET AL. V. GEORGE W. MILLER ET AL.

FILED MAY 18, 1897. No. 7194.

1. **Garnishment of Mortgagee.** Where a mortgagee of chattels is in possession of the mortgaged property, the interest of the mortgagor therein after the debt is paid may be reached by process of garnishment by a creditor of the latter.
2. **Effect of Garnishment.** It is firmly settled that proceedings in garnishment are binding from and after the service of the summons upon the garnishee, and the property of the debtor in his hands is thereby placed *in custodia legis*.
3. **Chattel Mortgages:** REGISTRATION. Under section 14, chapter 32, Compiled Statutes, a chattel mortgage can be made a valid lien as to the other creditors of the mortgagor only by depositing the instrument, or a copy thereof, in the office of the county clerk of the proper county, or by the mortgagee taking and retaining possession of the mortgaged chattels.

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

*E. A. Cook*, for plaintiffs in error.

*C. W. McNamar* and *G. W. Fox, contra.*

NORVAL, J.

On the 15th day of February, 1893, D. R. Cole, of Lexington, Dawson county, executed and delivered to D. E. Cole and G. W. Cole a chattel mortgage on his stock of merchandise and fixtures to secure a *bona fide* debt which he then owed them. The mortgage was filed, and possession of the property was immediately taken thereunder by the mortgagees, who sold the same, receiving $214 in excess of the amount of their debt. On the same day said D. R. Cole executed and delivered to G. W. Miller & Co. a second chattel mortgage on the same property, by its terms subject to the one aforesaid, to secure a note of $300, but which last mentioned mortgage was not filed for record until February 17, 1893, and at no time had the firm of G. W. Miller & Co. taken possession of the property under its mortgage. On the 16th day of February, 1893, Meyer & Raapke, Atwood & Steel, Allen Bros., and George W. Chase & Son each instituted an action in the county court of Dawson county against said D. R. Cole to recover a debt due for merchandise sold and delivered to him. A writ of attachment and garnishee summons were issued in each cause, and the latter was directed to and served upon the said D. E. Cole and G. W. Cole the day prior to the filing of the chattel mortgage to G. W. Miller & Co. Subsequently, each plaintiff recovered a judgment in its said action against the defendant therein for the amount of his indebtedness. The garnishees appeared in said causes and answered that they had in their hands the sum of $214 belonging to D. R. Cole as the proceeds of the sale of the mortgaged property over the amount of their debt, interest, and costs. G. W. Miller & Co. intervened in the garnishment proceedings and claimed under and by virtue of their mortgage the said sum remaining in the hands of the garnishees. From a decision rendered adversely to such claim in the county court, an appeal was prosecuted to the district court, where a judgment was entered to the

effect that the garnishees should pay the surplus money arising from the sale of the property to G. W. Miller & Co. The judgment creditors bring the cause into this court, alleging that the finding of the district court is contrary to the law and the evidence.

It is not a mooted question in this state that where a mortgagee of chattels is in possession of mortgaged property, the interest of the mortgagor therein, after the debt due the mortgagee is paid, may be reached by the process of garnishment by a creditor of the mortgagor. That doctrine was first stated by this court by LAKE, C. J., in *Burnham v. Doolittle*, 14 Neb., 217, in this language: "But in view of our attachment law and the ruling of the supreme court of Ohio on a statute from which ours was copied, and upon more mature reflection, we are now satisfied that whatever interests a mortgagor of chattels may have in them, in this state may be reached by seizure under a writ of attachment at any time while in his possession, and by means of the process of garnishment if they have passed into the hands of the mortgagee." (See *Chicago Lumber Co. v. Fisher*, 18 Neb., 334; *Grand Island Banking Co. v. Costello*, 45 Neb., 119.) That proceedings in garnishment are binding from the time of the service of summons upon the garnishee, and the property of the debtor in his hands is thereby placed *in custodia legis*, there can be no doubt. (*Reed v. Fletcher*, 24 Neb., 435; *Northfield Knife Co. v. Shapleigh*, 24 Neb., 635; *Grand Island Banking Co. v. Costello*, 45 Neb., 119.) It follows that the judgment creditors of D. R. Cole acquired liens upon his interest or equity of redemption in the mortgaged chattels from the time of the service of the garnishment process. Upon the fact that the mortgage to G. W. Miller & Co. was given before the garnishment proceedings were instituted, the claim of said mortgagees to a prior lien is predicated. If section 14, chapter 32, Compiled Statutes, means what it says, this contention is wholly untenable. Said section has been before this court for consideration more than once, and it has been

decided that a chattel mortgage is void, as to the creditors of the mortgagor, when the mortgage or a copy thereof is not filed as required by law, and the mortgagee has not taken possession of the property described in the mortgage. (*Farmers & Merchants Bank v. Anthony*, 39 Neb., 343; *Spaulding v. Johnson*, 48 Neb., 830; *Forrester v. Kearney Nat. Bank*, 49 Neb., 655.) In the last case the court, in speaking of chattel mortgages, said: "Under the statute, it could be made a valid and subsisting lien as to the other creditors of the mortgagor in one of two ways,—by depositing the instrument, or a copy thereof, in the office of the county clerk of the proper county, or by the delivery of the mortgaged property to the mortgagee. It could be made valid at any time as to creditors who had not already acquired any rights or interests in the mortgaged property, by the proper filing of the mortgage. The statute does not limit the time in which it must be filed. A chattel mortgage becomes valid as to creditors as of the date of the filing of the same, or the taking of actual possession of the property by the mortgagee." G. W. Miller & Co., having neither taken possession of the chattels, nor filed their mortgage in the office of the county clerk prior to the service of the garnishment summons, said mortgage, under the foregoing decisions, is void as to these judgment creditors. The finding and judgment of the district court must be

REVERSED.

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## HOME FIRE INSURANCE COMPANY OF OMAHA V. ROBERT W. PHELPS.

FILED MAY 18, 1897. No. 7251.

1. **Review:** QUESTIONS NOT RAISED BELOW. An objection that the court refused to direct a verdict in the case not considered, because not raised below in the motion for a new trial.

2. **Instructions:** EXCEPTIONS. Exceptions to instructions as a whole are unavailing unless each paragraph is erroneous.

3. ———: ASSIGNMENTS OF ERROR. Errors in respect to giving or refusing instructions must be separately assigned in the motion for a new trial.

4. **Review:** CONFLICTING EVIDENCE. A verdict based on conflicting evidence will not be disturbed.

5. **Insurance:** WAIVER OF BREACH OF POLICY. Where an insurance company, with knowledge of a breach of the conditions by the insured, fails to declare a forfeiture of the policy and continues to recognize its liability by demanding proofs of loss, it waives the defense based upon such breach of policy.

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

*Tiffany & Vinsonhaler* and *Jacob Fawcett*, for plaintiff in error.

*Smith & Sheean, contra.*

NORVAL, J.

Action by Robert W. Phelps against the Home Fire Insurance Company of Omaha on a fire insurance policy issued by the defendant upon plaintiff's dwelling. The policy insured him in the sum of $300 for the term of three years from February 7, 1889, against loss or damage by fire. On December 31, 1891, the property insured was totally destroyed by fire. Notice was given, and proofs of loss were duly furnished by plaintiff, and the defendant refusing to pay, suit was instituted to recover the amount covered by the policy. From a verdict and judgment for plaintiff, the defendant prosecutes error.

At the close of the testimony defendant requested the court to direct the return of a verdict in favor of the company, which motion was denied, and the ruling is now urged as a ground of reversal. The question not having been called to the attention of the trial court in the motion for a new trial, it is not available here.

It is claimed that the court erred in giving certain instructions, and in refusing others requested by the defendant. The charge consisted of seven distinct paragraphs, and eight instructions were requested by the de-

fendant, which were refused. The instructions given, as well as those refused, were excepted to *en masse* by counsel for the company, and the instructions were grouped in the assignment in the motion for a new trial; hence the instructions will not be reviewed, as all of those given were not erroneous, and at least one of defendant's requests was rightfully refused. (*Union P. R. Co. v. Montgomery*, 49 Neb., 429.)

Complaint is made of but one ruling of the trial judge upon the taking of the testimony, namely, the exclusion from the jury of "Exhibit 6." This paper is an unsigned notice of loss under the policy in suit bearing date of January 2, 1892. It is not in the handwriting of plaintiff, nor was it shown that he caused the same to be prepared, or that it was drawn under his directions. Moreover, it was not competent evidence to prove that plaintiff did not furnish proofs of loss, and it is conceded the paper was tendered to establish that no proof of loss was ever demanded, tendered, or received.

The assignment that the verdict is excessive lacks merit. The recovery was for the full amount of the policy with interest. There was a total loss, and the building far exceeded in value the face of the policy, and counsel for the defendant in the brief with candor concede that if plaintiff was entitled to recover anything, the amount awarded by the jury was correct.

It is urged that the verdict is not sustained by sufficient evidence, and that plaintiff is not entitled to recover for two reasons: (1.) The policy was assigned without the consent of the company. (2.) The insured premises were permitted by plaintiff to become vacant and unoccupied during the life of the policy. It is disclosed that plaintiff assigned the policy by writing indorsed on the back thereof to one George A. Hoagland. The testimony adduced by the company tended to show that this was an absolute assignment made before the loss occurred, while the testimony on behalf of plaintiff was to the effect that the transfer was made to Mr. Hoagland

for collection, and for no other purpose whatever. These different theories were submitted to the jury under a proper instruction, and its finding is abundantly sustained by the proofs. It is not our province to weigh the evidence farther than to ascertain that it is sufficient to uphold the verdict. We have done this, and approve the conclusion reached by the jury upon that issue of the case.

The policy in suit provides that it should be void "if the above mentioned buildings be or become vacant or unoccupied * * * without consent indorsed hereon." For the purpose of defeating the action it was alleged and proved on the trial that the insured building was vacant and unoccupied at, and for some time prior to, the fire without the knowledge and consent of the defendant. To meet this defense plaintiff pleaded in his reply, and introduced evidence tending to establish the same, that the company, with full knowledge of the nonoccupancy of the insured property, called upon plaintiff to furnish additional proofs of loss, which were furnished, and that defendant also tendered to him thereafter a small sum of money in full settlement of his claim for damages under the policy, whereby it is insisted that the company has waived its right to urge a forfeiture of the policy on account of the vacancy of the building. The evidence relating to this branch of the case is conflicting, but it was ample to justify the jury in finding that the company, by the acts of its officers and agents, waived the defense predicated upon the forfeiture of the policy resulting from the vacancy of the premises. The defendant having recognized the binding force of the policy by demanding additional proofs of loss, it is estopped to now urge the forfeiture of the policy to defeat a recovery. (*Billings v. German Ins. Co.*, 34 Neb., 502; *Home Fire Ins. Co. v. Kennedy*, 47 Neb., 138.)

For the reasons stated, we conclude that the judgment of the district court is correct, and it is accordingly

AFFIRMED.

J. J. EVERINGHAM ET AL. V. J. F. HARRIS & COMPANY.

FILED MAY 18, 1897. No. 7281.

1. **Review Without Bill of Exceptions.** Questions of fact cannot be considered in the supreme court in the absence of a bill of exceptions.
2. **Instructions. REVIEW.** An assignment directed against an entire group of instructions is not available when the action of the trial court as to one or more of such instructions is not shown to be erroneous.

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

*James W. Carr* and *O. H. Ballou*, for plaintiffs in error.

*Harwood, Ames & Pettis* and *Weaver & Giller, contra.*

RYAN, C.

Plaintiffs in error complain of a judgment rendered against them in the district court of Douglas county for an alleged failure to receive and pay for certain corn as required by a written memorandum between the parties. On motion the bill of exceptions had been suppressed before the submission of this case on its merits; hence the arguments now based upon a consideration of the evidence must be ignored. The second, third, fourth, fifth, and ninth instructions given by the court were grouped in a single assignment, both in the motion for a new trial and in the petition in error, and as three of these depend for their applicability, and consequently for their correctness, entirely upon the evidence, we must disregard the whole group. Of the assignment as to seventeen instructions asked by plaintiff in error and refused, the same observation, in a more marked degree, is applicable; hence this too must be disregarded. There is found no error in the record and the judgment of the district court is

AFFIRMED.

## A. A. MCCLANAHAN ET AL. V. WILLIAM B. DINGMAN.

FILED MAY 18, 1897. NO. 7304.

**Cross-Examination of Witness:** ATTORNEYS' FEES: EVIDENCE. Where the question at issue is whether attorneys' fees charged and retained should have been restricted to ten per cent of the amount collected, and the parties who employed the attorneys had testified to that restriction, it was error, on cross-examination, to hold that this witness could not be asked if said witness, at the time he had been paid seventy-five per cent of the collection, had not said to one of the attorneys who had made the collection, that witness would not expect said attorney to do all the work for ten per cent, that said attorney was the doctor, and furthermore, that witness had accepted the proffered check for seventy-five per cent of the said collection.

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

*George W. Cooper*, for plaintiffs in error.

*Will H. Thompson, contra.*

RYAN, C.

In his petition filed in the district court of Douglas county William B. Dingman alleged that the defendants therein were attorneys at law and were indebted to the said Dingman in the sum of $83.05 for so much money had and received of the receiver of the Omaha Hardware Company for the use of said Dingman, which sum, it was alleged, had not been paid, but was still due and owing. There was an answer in which was admitted the averment that the defendants were attorneys at law. Every other allegation of the petition was denied. There was a verdict, followed by a judgment for the full amount claimed in the petition, and the judgment defendants have prosecuted this error proceeding.

There was no question made in the district court as to the amount which had been collected for Dingman. For their services in making this collection the attorneys

sued had retained and charged over and above ten per cent of such collection an amount equal to that sought to be recovered. The theory of Dingman was that there was an express contract which limited the compensation for making the collection to ten per cent of the amount collected in any event. The theory of the defendants was that ten per cent was to be the measure of their compensation, if the collection did not involve the necessity of a contest over the allowance of the claim to be collected; but if there was a contest, the fee was to be a reasonable fee in view of the required services. The receiver rejected the claim and it was necessary to establish its validity and amount in the district court. The contract of employment was made on behalf of Mr. Dingman by W. R. McCullough, who testified that there was to be paid in no event more than ten per cent of the amount collected. Mr. McCullough, as he admitted on cross-examination, was paid the amount of the collection by Mr. McClanahan less twenty-five per cent. There was then propounded this question, "Didn't you state to Mr. McClanahan at the time that you would not expect to do all of that work for ten per cent and accepted the check for seventy-five per cent and tell him he was the doctor, or words to that effect?" An objection that this question was incompetent, immaterial, and irrelevant was sustained, to which ruling the plaintiffs in error excepted. The defendant in error seeks to justify this ruling on the ground that the proposed evidence was entirely immaterial and irrelevant. The witness, Mr. McCullough, was the agent of Dingman in employing these attorneys to make the collection for Dingman. There was no question made that the authority of this agent was general with regard to this particular business. He had testified to his understanding of the terms on which he had intrusted this collection to McClanahan & Halligan, and he had admitted in his testimony that Mr. McClanahan, as full payment, had presented a check to him for an amount equal to seventy-five per cent of the

collection which had been made. The question above quoted was proper in this connection on cross-examination, for, if his answer had been in the affirmative, it would have been corroborative of the theory of the plaintiff in error, which was that the compensation under the circumstances had been fixed at no particular figure, but was to be simply reasonable. For the error in this ruling the judgment of the district court is

REVERSED AND REMANDED.

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JOEL C. WILLIAMS V. STATE OF NEBRASKA.

FILED MAY 18, 1897. No. 8660.

1. **Banks and Banking: FALSE ENTRIES: INFORMATION: EVIDENCE: VARIANCE.** A charge in an information of having made, or caused to be made, a false entry in the account of an individual with a bank on its books, is not sustained by proof that such an entry was in an account of such bank with such individual designated in the account as township treasurer.
2. ——: ——: ——: ——: ——. Where, under the circumstances above indicated, the false entry was in the account of the party designated as "treasurer," or simply "Tr.," when such abbreviation evidently means the same as treasurer, the variance is rendered none the less fatal by the mere fact that in such account there was included private money of the individual referred to as treasurer.

ERROR to the district court for Gage county. Tried below before LETTON, J. *Reversed.*

*L. W. Colby*, for plaintiff in error.

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

RYAN, C.

In the information in this case, filed in the district court of Gage county, Joel C. Williams was charged with

having unlawfully and feloniously made and caused to be made on January 10, 1896, a false entry in the books of the Blue Springs Bank, of which corporation he at the said time was the president. This false entry was of an overdraft of $378.97 in the bank account of J. L. Schlosser, and it was averred in the information that the false entry was made so as to falsely show that J. L. Schlosser owed the bank aforesaid the amount of said overdraft with the intent to deceive the state bank examiner. There was a plea of not guilty. The verdict was guilty and from the judgment pronounced thereon these proceedings in error are prosecuted.

The account charged to have been falsified was that of J. L. Schlosser as an individual. There was a motion to require the state to elect whether a conviction would be claimed for making or for causing to be made the entry indicated. This motion was overruled. There was direct evidence that the entry was actually made by the son of the accused, but there was a refusal to permit the maker of this entry to testify what instructions, if any, the accused gave him with reference to making it. There was permitted to be given in evidence by a non-expert witness his oral statements from memoranda as to items of account shown by the books of the bank and by a pass-book, hereinafter more fully described, and therefrom his conclusions were permitted to be stated. In the view which we take of this case it is not necessary to consider these matters to reach the conclusion which under the circumstances must govern its determination. We therefore venture no suggestion on any question except the one which we deem of vital importance, and that question we shall now consider.

It was alleged, as before stated, that the false entry was made, or caused to be made, in the account of J. L. Schlosser. On the trial there was introduced as "Exhibit J," by the state, a book entrusted by the bank to Mr. Schlosser in which the bank authorities made the entries of deposits and checks under an account entitled,

"The Blue Springs Bank, in account with J. L. Schlosser, Township Treasurer." It was shown that this was the counterpart of an account kept on the books of the aforesaid bank with "J. L. Schlosser, Tr." Mr. Schlosser testified that he had been treasurer of Sicily township in 1894 and 1895; that the entry in "Exhibit J" of a credit of $644.80 had been made by the accused. This entry was not made on the books of the bank and in consequence, as the state claimed, there appeared to be an overdraft due the bank until and during January 10, 1896. On his cross-examination Mr. Schlosser testified that he had had another account in the bank than that shown by "Exhibit J," but that this other account was not in existence while the bank was going; that while the bank was running Mr. Schlosser banked the money as his own; that in January, 1896, witness had no account with the bank other than that shown by "Exhibit J," and that he had never had an individual account with the bank after he opened the account shown by "Exhibit J," which was in January, 1894. This witness said he deposited his own and the township money in the account evidenced by "Exhibit J." In the course of his cross-examination in this connection there was the following testimony given by Mr. Schlosser:

Q. Did you put your individual money in with the township money?

A. I put it all in together because you can't bank as township treasurer.

Q. Have the attorneys in this case told you that you were committing a crime if you put any money in the bank as an officer, and isn't that the reason you are swearing this way before this jury?

A. They have.

Q. That is the reason that you are swearing that it is your individual money?

A. It is.

Q. Isn't it a fact, a part that you put in there was money received from Sicily Creek township?

A. Yes, sir.

Q. How much did you put in there? What amount was so received?

A. I can't tell.

Q. Can you tell one single item?

A. I don't know that I can.

Q. Take the book and find a single dollar.

A. I don't know as I can.

Q. Take the book and find a single dollar, one dollar, ten dollars, or ten cents, any place; tell the jury where it is.

A. I can't, because I had money of my own and township money and banked it all together.

If this account had been opened as an account with J. L. Schlosser, as township treasurer of Sicily township, and, after all the funds of the township had been drawn out the account represented only personal transactions between Schlosser and the bank, it might be that, with a certain degree of accuracy, the account could be described as that of J. L. Schlosser. This, however, was not the condition of the account on January 10, 1896, when it was charged that the false entry was made in the account of Mr. Schlosser. The only entry shown on the date indicated was in the book of the bank in which the account was described as that of J. L. Schlosser, tr. The pass-book (Exhibit J) purported to contain the same account and this was described as an account of the bank with "J. L. Schlosser, Township Treasurer." This coincidence shows that the abbreviation "Tr." was a substantive descriptive term with reference to the account itself, and not a mere description of the person with whom the bank was transacting business. The crime charged was the making or causing to be made a false entry in the books of the bank for the purpose of deceiving the bank examiner. The description of the particular account alleged to have been tampered with was of the essence of the charge made. It was not as though the crime had been the embezzlement of funds of J. L. Schlosser en-

trusted to the bank, for then a substantive matter of description would have been the person of whom the money was embezzled, and not how such person was described on the books of the bank. The fact that in the account of J. L. Schlosser as treasurer there were mingled some of Mr. Schlosser's private funds did not tend to make the designation of the account as a treasurer's account any the less accurate. In *Prehm v. State*, 22 Neb., 673, the information charged that the defendant "did unlawfully and feloniously pretend to one James Wilson that five worthless drafts were each worth the sum of $100, by which said false pretenses the said Al. A. Prehm then and there did obtain in exchange for said five worthless drafts from the said Wilson one bay gelding," etc., "the aggregate value being of the sum of $250," etc. The instruments referred to as drafts were alike, except that they were differently numbered, otherwise, each was in this language:

"OFFICE E. DURAND,
"ESTEY ORGAN DEPOT, ST. JOSEPH, MISSOURI.

"This draft will be received by me at the Estey Organ depot in St. Joseph, Missouri, for one hundred dollars in payment for any style of Estey organs the holder of this may select at catalogue prices. The balance of the organ to be paid in cash or approved paper bearing ten per cent interest. E. DURAND."

It was held that the designation of the above instrument as a draft was a misnomer, and as the evidence showed that the five instruments on which the credit was obtained were of the above form, there was held to be a fatal variance between the averments of the information and the proofs offered to sustain them. To justify this conclusion there were cited three adjudicated cases, of which the first was *Lancaster v. State*, 9 Tex. App., 393, in which the defendant had been convicted upon an indictment charging that on a certain day he had committed the crime of larceny by stealing from the owner thereof $142, current money of the United States. The

proof was of the theft of checks of various denominations instead of money, and this variance was held to be fatal. The second case cited was *Grummond v. State*, 10 O., 510, in which the defendant was indicted for stealing bank bills. The proof showed that the stolen property consisted of orders of the Ohio Railroad Company, and this variance was held to be fatal. The third case was *State v. Handy*, 20 Me., 81. The indictment was for the forgery of an acquitance or discharge for the sum of $48. On its face the order was for $48. On its back, however, there was an order for the further sum of $1, and it was held that this constituted a variance between the allegations and proofs. The same principle was applied in *Haslip v. State*, 10 Neb., 590, as to the necessity of conforming the proofs to the averments of the information. In line with the above authorities and illustrative of the importance attached to an abbreviated descriptive term, following the name of the individual, is the more recent case of *Roush v. State*, 34 Neb., 325, the holding in which as to the propositions indicated is fairly reflected in the third paragraph of the syllabus, which is in the following language: "In an information for knowingly uttering and publishing a bank draft with the forged indorsement of the payee thereon as follows, 'B. F. H., Mgr.,' *held*, that the abbreviation aforesaid is a material and essential part of the indorsement and must be proved like any other material allegation of the information."

We are constrained to believe that in the case at bar there was such a variance between the description of the account alleged to have been falsified and the account introduced in evidence that the judgment of the district court cannot be sustained and it is therefore reversed.

REVERSED AND REMANDED.

ALBERT U. WYMAN, RECEIVER OF THE NEBRASKA FIRE INSURANCE COMPANY, APPELLANT, V. NATIONAL BANK OF COMMERCE, APPELLEE.

FILED MAY 18, 1897. No. 7053.

**Banks and Banking:** TRUST FUNDS DEPOSITED BY CORPORATION: LIABILITY OF BANK. Where certain officers and stockholders of a corporation borrowed money intended by them to be deposited in a bank and therein held as a trust fund for the creditors of the said corporation, but such intention as well as the insolvent condition of the corporation were unknown to the bank wherein the deposit was made, the payment in good faith of the fund upon the check of an officer of the corporation did not render the bank liable as a trustee to other creditors of the corporation, or to its receiver on their behalf, merely because the proceeds of said check, with the consent of the bank, were used to take up the note on the faith of which the loan had originally been made by the bank.

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

*A. C. Wakeley, E. Wakeley,* and *Hall & McCulloch,* for appellant.

*E. J. Cornish, contra.*

RYAN, C.

This action was brought by Albert U. Wyman, as receiver of the Nebraska Fire Insurance Company, in the district court of Douglas county. There was a judgment against George F. Wright and Samuel R. Johnston, by whom an appeal was taken to this court. As there has been a settlement of this branch of the controversy these parties will be referred to merely for the purposes of the discussion of the right of the receiver to a reversal of the judgment of the district court in favor of the National Bank of Commerce.

The averments of the petition were, in substance, that, on the 14th day of May, 1891, William G. Madden, a

holder of certain shares of the stock of the Nebraska Fire Insurance Company, applied for the appointment of a receiver of the aforesaid insurance company; that the attorney general intervened in said proceeding, and that on the application of both these parties there was, about June 6, 1891, a receiver appointed as prayed, on account of the insolvency of the insurance company. It was further alleged that about the 11th day of April, 1887, the insurance company had deposited with the National Bank of Commerce, then known as the Bank of Commerce, the sum of $35,000, to be held for the use of said insurance company, and especially as a guaranty to the holders of policies of insurance which had been or might thereafter be issued by the company, and for the purpose of meeting any liabilities then existing or which might thereafter accrue against said company. The said $35,000, it was averred, was, in the statement filed with the state auditor of public accounts respectively in 1887, 1888, 1889, and 1890, represented as a fund available for the above purposes, all of which facts were known to the officers of the defendant bank. It was further alleged that this fund was held for the use and benefit of, and in trust for, the said insurance company, and especially for its policy holders and other creditors, from the time of its being deposited with the bank until it was wrongfully appropriated as alleged. The allegations with reference to the wrongful appropriation of this fund were made at great length and, condensed as much as may be, they were that about April 11, 1887, the co-defendants of the bank borrowed of it the said sum of $35,000, for which they executed their promissory note to the said bank; that on April 13, 1891, said note, or a renewal thereof, was held by the bank as security for the payment of said sum; that at the time the said money was borrowed, and at the time of the occurrence of other matters complained of, certain of the makers of the aforesaid note sustained the following relations to the insurance company, to-wit: Samuel R.

Johnston was a director and was its president; George F. Wright was a director and a member of its executive committee; J. T. Hart was a director, its general manager, and a member of its executive committee; J. W. Morse was a director, and was its vice-president and treasurer. Of the other makers of the note it was alleged that Henry Laub, Eli Clayton, and George W. Kingsworth were holders of stock of said insurance company. In general terms, it is sufficient for all practical purposes to state that the petition in this connection charged that on the 13th day of April, 1891, the insurance company was, and for some time prior thereto had been, hopelessly insolvent, and that its capital at the above named date had become so impaired that the company was unable longer to transact a safe insurance business and comply with statutory requirements designed to guard against irresponsible insurance, wherefore the state auditor aforesaid revoked its license. Full knowledge of the existence of these conditions, by the petition, was imputed to the officers and managers of the bank. It was further averred by the receiver that the defendants, Johnston and Wright, with others unknown to the receiver, conspired and colluded with one M. J. Burns, a director and secretary of the insurance company, to appropriate the aforesaid sum of $35,000 to the use and benefit of themselves and the other makers of the aforesaid note, and to that end induced Burns to sign the following instrument:

"OMAHA, NEB., April 13, 1891.

"National Bank of Commerce; pay to the National Bank of Commerce, for note, or order $35,018.05, thirty-five thousand and eighteen and 5-100 dollars.

"THE NEBR. FIRE INSURANCE COMPANY.

"By M. J. BURNS, *Secretary.*"

It was further charged that with the proceeds of this check the note aforesaid was paid. It was also alleged that Burns had no authority to apply the aforesaid fund to the payment of the note held by the bank, and that

the appropriation thereof to the purpose indicated was in violation of the rights of policy holders and other creditors of the insurance company, and that by reason of the premises, the National Bank of Commerce and the other defendants became and continued to be liable to the receiver for the said sum of $35,000, for which amount, with interest from April 13, 1891, there was a prayer for judgment. There were answers for the several defendants, to which replies were duly filed.

The issues thus presented need not be described, for there were special findings in respect to them by which their nature is sufficiently indicated. In effect, these findings were that the makers above referred to borrowed the sum sought to be recovered in this action; that upon borrowing said sum it was by the parties who had made the note deposited in the bank to the credit of the treasurer of the insurance company for the uses, purposes, and upon the trust described in the petition, and so remained on deposit until April 13, 1891, except that, at some time, a small part of it was used by the insurance company, but not sufficient to reduce the deposit to less than $31,000 at any one time. It was specially found that the sum of $35,000 was described in the annual statements to the state auditor of public accounts; that on, and for a considerable time before April 13, 1891, the insurance company had been insolvent and unable to pay its debts,—a fact well known to the makers of the aforesaid note, but this condition was unknown to the officers, managers, agents, and directors of the Bank of Commerce. Other special findings were made, but as they refer only to the acts of the parties held liable, and constituted the ground of such liability, they need not be described, in view of the fact that this branch of the case is not presented for review. It is thus seen that the issues now presented are reduced to a very limited scope of inquiry. The $35,000 was borrowed by certain officers and stockholders of the insurance company and by them this fund was deposited with the bank. It was intended

by the parties obtaining and depositing this money that it should be used as a trust fund for the benefit of the creditors of the insurance company. The court found specially, and upon sufficient evidence to sustain such finding, that the officers and agents of the bank had no knowledge of this trust purpose. As shown by the evidence, without contradiction, the credit was at first in favor of the treasurer of the insurance company, afterwards the sum was placed to the credit of the company itself. The loan was solely on the faith of the credit of the individuals who signed the note, and to this amount the insurance company was therefore indebted to those signers,—a fact well known to the officers of the bank. As has been held by this court, these creditors of the insurance company, though its officers, were entitled to receive payment of the indebtedness due them, provided they made no use of their official relations to secure an advantage in that respect. (*Tillson v. Downing*, 45 Neb., 549; *Ingwersen v. Edgecombe*, 42 Neb., 740; *Gorder v. Plattsmouth Canning Co.*, 36 Neb., 548.) As the bank had no knowledge of the insolvent condition of the insurance company, and was not aware that there was any trust with relation to the deposit in question, there existed no reason why it should have refused to honor the check drawn upon it by a proper officer of the insurance company for the payment of this particular indebtedness of the insurance company. The judgment whereby the bank was held not to be liable was right and accordingly it is

AFFIRMED.

IRVINE, C., not sitting.

## S. D. LANE v. HARLAN COUNTY.

FILED MAY 18, 1897. No. 7241.

1. **Highways: COUNTIES: DAMAGES: WITNESSES.** In a suit by a land-owner against a county to recover damages which he alleged he had sustained by reason of the appropriation of a part of his land towards the construction of a public highway, a supervisor of such county, who participated in the location of such highway, and in passing upon the claim filed by the land-owner against the county for damages, is a competent witness in behalf of the county.
2. **Witnesses: CREDIBILITY.** The conduct of such supervisor in the premises is proper to go to the jury for the purpose of affecting the credibility of the witness or the weight to be given his evidence.
3. **Highways: DAMAGES.** Evidence examined, and *held* to sustain the finding of the jury.

ERROR from the district court of Harlan county. Tried below before BEALL, J. *Affirmed.*

*R. L. Keester*, for plaintiff in error.

*Gomer Thomas, contra.*

RAGAN, C.

The county authorities of Harlan county laid out and established a certain public road, and for that purpose they appropriated certain lands of S. D. Lane. The county board of the county allowed Lane as compensation for the damages he had sustained in the premises the sum of $96. From this award he appealed to the district court, where the case was tried, resulting in a judgment in favor of Lane for the same sum. To reverse this judgment he prosecutes here a petition in error.

1. On the trial one of the supervisors who had participated in establishing the road and fixing the amount of Lane's damages was called and testified as a witness for the county. The first assignment of error is that the court erred in permitting this witness to testify. The contention is that the witness, by reason of the facts just

stated, had rendered himself incompetent. The fact that the witness was a supervisor of the county; that he had participated in establishing the road, and as a supervisor had passed upon the amount of damages allowed Lane by the county, were all facts which were proper to go to the jury as affecting the credibility of this witness or the weight to be given his evidence; but the witness was competent and the court did not err in permitting him to testify.

2. The second argument is that the verdict is not sustained by sufficient evidence. In constructing the road eight acres of Lane's land was appropriated. The evidence in behalf of Lane tended to show that this land was worth from $15 to $25 per acre, and that 320 acres of the land had been depreciated in value $2 per acre by reason of the construction of the road through said 320 acres in such a manner as to leave 160 acres on the east and 160 acres on the west side of said road. The witnesses in behalf of the county fixed the value of the land taken as low as $12 per acre and testified that the 320 acre tract was not all depreciated in value by reason of the construction of the road through it. We are not at liberty to disturb this finding, based as it is on such conflicting evidence. We frankly confess that we have doubts as to the justness and correctness of this verdict; but unfortunately, perhaps, for plaintiff in error, this is not the tribunal invested by the law with authority to weigh and reconcile this conflicting evidence. The rule as to the measure of damages was properly submitted to the jury by the instructions of the court and the evidence sustains the finding made by the jury. The judgment must therefore be, and is,

AFFIRMED.

IDA A. BRADFORD, ADMINISTRATRIX, APPELLANT, V. ARCHER EKE ET AL., APPELLEES.

FILED MAY 18, 1897. No. 7273.

**Review: EVIDENCE.** The record presents no question of law. Evidence examined, and *held* to sustain the finding of the district court.

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

*Montgomery & Hall*, for appellant.

*Wright & Thomas*, *Will H. Thompson*, and *Howard R. Smith*, *contra.*

RAGAN, C.

Louis Bradford brought this suit in the district court of Douglas county against Archer Eke and others to foreclose a lien which Bradford claimed he had acquired on certain real estate of Eke's by reason of materials furnished him under a verbal contract for the erection of some houses on said real estate. A number of persons holding mortgages on the real estate were made defendants to the action, and filed cross-petitions therein claiming that their mortgages were liens upon the real estate prior to the mechanic's lien claimed by Bradford. Pending the suit Bradford died and the action was revived in the name of Ida A. Bradford, his administratrix. From the decree rendered the administratrix has appealed.

The property of Eke was lot 3 and the south 80 feet of lot 4, in block 6, Improvement Association Addition to the city of Omaha. The property lies in the form of an L at the corner of Nineteenth and Dorcas streets, in said city. Lot 3 faces north on Dorcas street, and the south 80 feet of lot 4 faces west on Nineteenth street. Eke built four houses upon this property,—three of them upon said lot 3, and one upon said lot 4. He purchased the lumber which went into these houses of Bradford.

and Bradford claims that all material was furnished for all these houses in pursuance of a verbal contract made between him and Eke on the 25th of August, 1890. Bradford, on the 13th of June, 1891, filed his verified account of the items of material furnished, claiming a lien upon the property. The district court found that Bradford was not entitled to any lien whatever for the material furnished for erecting the three houses on said lot 3; that he was entitled to a lien upon the house and the land upon which it was situate built on lot 4; but that such lien was subject to the mortgage of the appellee Whitney, recorded October 25, 1890.

The record presents no question of law. It is insisted with much earnestness by counsel for appellant that the finding of the district court is not supported by sufficient evidence; but, after a careful examination of the evidence, we think it supports the finding of the district court. The evidence is not entirely clear and satisfactory, but we think it is sufficient to warrant the conclusion of the court that the last item of material furnished by Bradford towards the construction of the houses which were erected on lot 3 was furnished more than four months prior to the 13th day of June, 1891; and that the first of the material which went into the house on lot 4 was furnished after the recording of the appellee Whitney's mortgage. The district court found that the material was furnished by Bradford to Eke in pursuance of four separate contracts between the parties, one contract for each house. We agree with counsel for appellant that the evidence does not warrant that particular finding, but rather that in August, 1890, Eke made the contract with Bradford under and by which the latter furnished all the material which went into the construction of three houses on lot 3, and that about January, 1891, the contract was made between Eke and Bradford in pursuance of which the latter furnished the material which went into the house on lot 4. The decree of the district court is

AFFIRMED.

HERBERT J. MOTT ET AL. V. ULRICH BISSICUMMER ET AL.

FILED MAY 18, 1897. No. 7278.

1. **Action on Bond to Discharge Liens Against Realty:** PLEADING. Petition examined, and *held* to state a cause of action.
2. ———: EVIDENCE. Evidence examined, and *held* wholly insufficient to sustain the verdict.

ERROR from the district court of Dundy county. Tried below before WELTY, J. *Reversed.*

*S. R. Smith,* for plaintiffs in error.

*J. S. West* and *J. W. James, contra.*

RAGAN, C.

Ulrich Bissicummer owned a tract of land in Lincoln county and Herbert J. Mott owned a tract of land in Dundy county. The land of Mott was incumbered by two mortgages,—one of $800 and one of $120. The parties exchanged lands and Mott and others executed and delivered to Bissicummer a bond in the penal sum of $1,000 conditioned that the signers of said bond would pay and discharge the incumbrances upon the land conveyed to Bissicummer on the maturity of such incumbrances. Bissicummer brought this suit against Mott and others in the district court of Dundy county on said bond. He had a verdict and judgment, and Mott and others have brought the judgment here by petition in error.

1. The first argument is that the petition does not state a cause of action. The petition alleges the ownership of the lands by the parties; their exchange; the incumbrances upon the Mott land; the execution and delivery of the bond to indemnify Bissicummer against said incumbrances, and the failure of Mott to pay off said incumbrances; plaintiffs' payment of said mortgage; his

mortgaging the land to raise that money, and that suit had been brought on that mortgage, the same foreclosed, and the land sold and Bissicummer thereby deprived of his title. The petition states a cause of action.

2. The second assignment of error is that the verdict on which the judgment is based is not supported by sufficient evidence. With this contention we agree. The $800 mortgage is not involved in this action. It seems, indeed, that suit was brought to foreclose that mortgage, and some one paid it off before it went to decree. We presume this payment was made by Mott, though the record is silent upon the subject. In any event there is no claim in the evidence that Bissicummer paid it or that he was deprived of the title to the land purchased of Mott by a foreclosure of that mortgage. The evidence shows that suit was brought to foreclose the $120 mortgage, and that Mott thereupon advanced the money and paid the full amount of the decree rendered thereon and all the interest then due upon the unmatured $800 mortgage; and not only that, but that he also paid part, at least, of the attorney fees of Bissicummer's counsel, and the sum of $45 to indemnify Bissicummer for the wear and tear "of his system," as it is expressed in the record. This was late in February, 1890. This evidence stands undisputed. After this payment by Mott a man named Graves brought a suit in attachment against Bissicummer and caused the land conveyed to him by Mott to be seized and sold subject to the $800 mortgage. The theory of Bissicummer's petition is that his indebtedness to Graves arose by his borrowing from him the money with which to pay the decree of the $120 mortgage. Bissicummer himself does not appear as a witness in this case. A witness testifies for him that he did borrow the money of Graves for the purpose of paying the decree rendered on the $120 mortgage. But there is not a word of evidence that the money Bissicummer borrowed of Graves was in fact applied to the payment of such decree; and before Graves brought his suit against Bissicummer Mott had

paid the $120 mortgage decree in full. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

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## NEBRASKA LAND, STOCK-GROWING & INVESTMENT COMPANY ET AL. V. GEORGE H. CUTTING ET AL.

FILED MAY 18, 1897. No. 7322.

1. **Review: JUDICIAL SALES: OBJECTIONS NOT MADE BELOW.** This court, in reviewing the judgment of a district court confirming a judicial sale, will not consider any objection to the confirmation of such sale which was not brought to the attention of the district court in the motion to set such sale aside.
2. **Judicial Sales: DESCRIPTION OF REALTY.** In the decree of foreclosure of a mortgage the real estate was described as the "S. E. ¼ of section 24 in township 12 N., and range 15 W. of the Sixth P. M., in Buffalo county." The description in the notice of sale was the same, except the description read, "in township 12," without showing whether the township was north or south. *Held*, That there was no variance in the description between the decree and the notice of sale.
3. ———: OBJECTIONS TO CONFIRMATION. The owner of the equity of redemption of real estate sold on mortgage foreclosure cannot be heard to object to the confirmation of the sale because prior liens existing against the real estate were not deducted from the appraisement made thereof.
4. ———: OBJECTIONS TO APPRAISEMENT. The objection that real estate was appraised too high or too low cannot be raised for the first time after the sale thereof.

ERROR from the district court of Buffalo county. Tried below before HOLCOMB, J. *Affirmed.*

*Francis G. Hamer*, for plaintiffs in error.

*William Gaslin, contra.*

RAGAN, C.

This is an error proceeding to review a judgment of the district court of Buffalo county confirming a judicial sale of real estate made in pursuance of a decree of foreclosure of mortgage.

1. The first complaint is that the record does not disclose that the notice of the sale was published in Buffalo county, where the real estate sold was situate. There are three answers to this contention: (1.) No such point was made in the motion to set the sale aside and cannot be made here for the first time. (*Ecklund v. Willis*, 44 Neb., 129.) (2.) This point is not made in the petition in error filed here. (3.) The affidavit of the publisher attached to the published notice of sale and the return of the officer who made the sale both show that the notice of sale was published in Buffalo county.

2. The second point made is that the record does not disclose that the newspaper in which the notice of sale was published was a paper of general circulation in said Buffalo county. No such point as this was made in the motion to set the sale aside. This is not one of the assignments of the petition in error filed here, and the return of sale made by the sheriff recites that the paper in which he caused the notice of sale to be published was in general circulation in said Buffalo county.

3. The third assignment of error is that one of the appraisers of the real estate was not a freeholder. The return of the sheriff who made the sale recites that the appraiser was a freeholder of the county, and the record brought here contains no competent evidence to the contrary.

4. The real estate is described in the decree as the "S. E. $\frac{1}{4}$ of section 24, in township 12 N., and range 15 W. of the sixth P. M. in Buffalo county." The description of the real estate in the notice of sale is the same, except that the description is "township 12," etc., without showing whether it was township north or south. It is now insisted that the variance between the description in the decree and the notice of sale is such as to call for the setting aside of the order of sale. But this description is sufficiently definite and certain. The section is the same in each description. The number of the township is the same in each, and the range is the same in each,

and in each case the land was described as being in Buffalo county. It follows that it could not be in any other place than township 12 north. (*Kansas City & S. W. R. Co. v. Hurst*, 22 Pac. Rep., [Kan.], 618.)

5. The fifth assignment of error is that the record does not disclose that the register of deeds of Buffalo county furnished the sheriff a certificate of incumbrances existing against the real estate sold. A sufficient answer to this contention is that the owner of the equity of redemption of real estate sold on mortgage foreclosure cannot be heard to object to the confirmation of the sale because prior liens existing against the real estate were not deducted from the appraisement made thereof. (*Smith v. Foxworthy*, 39 Neb., 214.)

6. The sixth assignment of error is that the real estate was appraised too low. No objection was entered to the appraisement made of this real estate until after its sale. It was then too late to raise the question.

7. Section 498 of the Code of Civil Procedure, among other things, provides that if the court shall, after having examined the proceedings of the officer making a judicial sale of real estate, be satisfied that the sale has in all respects been made in conformity with the provisions of the statute the court shall direct the clerk to make an entry in the journal that the court is satisfied of the legality of such sale, etc. The seventh assignment of error is that the order of confirmation is void because the journal entry of the confirmation does not recite "that the court is satisfied of the legality of such sale." The journal entry recites that the court "finds that said sale has been conducted fairly and legally, and is in all respects fair and in conformity with law." Then follows an order overruling the objections to the confirmation of the sale and confirming it. This is a substantial compliance with the statute and the judgment is not void. There is no error in the proceedings of the district court and its judgment is

AFFIRMED.

## TUCKER BOLIN V. JOHN W. FINES.

FILED MAY 18, 1897. No. 8272.

1. **Replevin:** JUSTICE OF THE PEACE: PLEADING. In an action in replevin brought before a justice of the peace it is not necessary that the plaintiff should file a bill of particulars. The affidavit in replevin may be used in lieu thereof.

2. ———: ———: ———. The filing with a justice of the peace of an affidavit, substantially complying with the requirements of section 1034 of the Code of Civil Procedure, is a necessary prerequisite to invest such justice with jurisdiction to entertain an action in replevin, and to invest him with jurisdiction to issue a writ of replevin.

3. ———: ———: ———. An affidavit in replevin filed with a justice of the peace in which the affiant alleges that he is the owner and entitled to the immediate possession of certain property by virtue of a chattel mortgage thereon given to secure the payment of a note of $——, but does not allege that said note has matured or that any part of the same remains unpaid, or the existence of any exigency or fact entitling him to the immediate possession of the mortgaged property, does not state facts sufficient to invest the justice of the peace with jurisdiction to entertain the action in replevin, nor invest the justice of the peace with jurisdiction to issue a writ of replevin for the described property.

ERROR from the district court of Hall county. Tried below before KENDALL, J. *Reversed.*

*Dryden & Main*, for plaintiff in error.

*W. H. Thompson, contra.*

RAGAN, C.

This is an action in replevin brought before a justice of the peace of Hall county by John W. Fines against Tucker Bolin. Fines, in his replevin affidavit, alleged that he was the owner and entitled to the immediate possession of certain chattel property, describing it; that Bolin wrongfully detained the possession of said property from him, Fines; that said property had not been taken from him on any order or judgment, etc., following

the statute; that "the plaintiff has a chattel mortgage on the corn given by Oscar De Witt duly recorded, the same being security on a promissory note of $159.55." A trial of the action resulted in a judgment in favor of Fines, and Bolin appealed to the district court. In that court Bolin filed a motion to quash the replevin writ on account of the alleged insufficiency of the affidavit filed to procure the issuance of the same. This motion the court overruled. A trial in the district court resulted in a verdict and judgment for Fines and Bolin brings the case here for review on error.

The only assignment of error which we notice is the action of the court in overruling the motion to quash the replevin writ issued by the justice of the peace. Section 1033 of the Code of Civil Procedure provides: "A plaintiff may recover possession of specific personal property of less value than two hundred dollars before a justice of the peace as herein provided." And section 1034 of said Code provides: "An action for this purpose shall not be brought until there is filed in the office of the justice an affidavit of the plaintiff, his agent or attorney, showing (1) a description of the property claimed; (2) that the plaintiff is the owner thereof, or has a special ownership therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the property; (3) that the property is wrongfully detained by the defendant; (4) that it was not taken in execution," etc. It will thus be seen that the filing with the justice of the peace of an affidavit substantially complying with the requirements of the statute is a necessary prerequisite to invest the justice of the peace with jurisdiction to entertain an action in replevin, and to invest him with jurisdiction to issue a writ of replevin. (*Bardwell v. Stubbert*, 17 Neb., 485; *Commercial State Bank v. Ketcham*, 46 Neb., 568.) The statute does not expressly require the plaintiff in a replevin action brought before a justice of the peace to file a bill of particulars; and it was said in *Hill v. Wilkinson*, 25 Neb., 103, that section 951 of the Code of Civil

Procedure, which requires the filing of a bill of particulars on the part of the plaintiff in all cases before a justice of the peace, is not applicable to a case in replevin brought before a justice. It seems, therefore, that in an action in replevin brought before a justice of the peace the application may stand for the bill of particulars. Therefore, whether the court erred in refusing to quash the writ of replevin depends upon whether the affidavit filed to procure its issuance substantially complies with the requirements of said section 1034; that is, whether that affidavit states a cause of action in favor of the plaintiff in replevin against the defendant therein. This affidavit is imperfect; but section 121 of the Code requires the courts, in the construction of all pleadings, and for the purpose of determining their effects, to liberally construe the allegations thereof with a view to promote justice between the parties. Looking to the entire affidavit filed by Fines to procure this writ of replevin, we think the allegations amount to this: That Fines claimed to be entitled to the possession of this property because of the fact that he had a chattel mortgage upon it, and he seems to have been of the opinion that because of his mortgage he was the actual owner of the property. The affidavit complies with all the requirements of said section 1034, except that it does not allege the facts in relation to Fines' special ownership of the property. It does not allege when the mortgage was given, when the note matured which it was given to secure, or that the note had matured and was unpaid; nor does it allege the existence of any other fact, or that any exigency had arisen since the execution of the note and mortgage which entitled him to possession of the mortgaged property. We think, therefore, that the affidavit does not state a cause of action, that the allegations thereof were insufficient to invest the justice of the peace with jurisdiction to entertain the replevin action, and were insufficient to invest him with jurisdiction to issue the writ of replevin, and the court erred in not sustaining the

motion to quash it. The justice had no jurisdiction and the entire proceeding was void. The judgment of the district court is reversed and the action dismissed.

REVERSED.

HARRISON, J., not sitting.

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THOMAS K. BRADLEY, ADMINISTRATOR, V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED MAY 18, 1897. No. 7732.

**Appointment of Administrator:** COLLATERAL ATTACK. Where a sufficient petition for administration is presented to the county court, and statutory notice given, the action of the court in appointing an administrator cannot be collaterally attacked. The record not disclosing want of jurisdiction, the existence of jurisdictional facts will in a collateral proceeding be conclusively presumed. *Estate of Moore v. Moore*, 33 Neb., 509, followed.

ERROR from the district court of Otoe county. Tried below before CHAPMAN, J. *Reversed.*

*John C. Watson, Wash Adams,* and *Numa F. Heitman,* for plaintiff in error.

*E. F. Warren, C. W. Seymour, James W. Orr,* and *P. B. Waggener, contra.*

IRVINE, C.

The plaintiff in error, as administrator of the estate of Charles L. Meyers, deceased, brought this action against the Missouri Pacific Railway Company to recover damages on account of the death of his intestate alleged to have been caused by the negligence of the railway company. Among other defenses, the railway company pleaded that Meyers was not an inhabitant of the state, and that he left no estate to be administered therein, and

that the county court of Otoe county, from which Bradley held letters of administration, was without jurisdiction in the premises. At the close of the evidence the district court instructed the jury that the county court was without jurisdiction, and that Bradley therefore had no authority to maintain the action, and that the jury should, for this reason, return a verdict for the defendant. A verdict was so returned and the case dismissed.

The petition for the appointment of the administrator alleges sufficient facts to confer jurisdiction on the county court of Otoe county, and this being true, the appointment of the administrator is not subject to collateral attack. *Missouri P. R. Co. v. Lewis*, 24 Neb., 848, was an action similar in character to this, and the jurisdiction of the court appointing the administrator was attacked. In the opinion Judge COBB says: "And, again, I do not think that in any event her appointment as administratrix of the deceased could be attacked collatally." *Estate of Moore v. Moore*, 33 Neb., 509, was an appeal from an order allowing a claim against the estate. One of the heirs had filed objections to the claim, one objection being that the administration was void for want of jurisdiction in the court. The objections to the jurisdiction were the same as in this case, to-wit, that the decedent was not an inhabitant of the state at the time of his death, and left no estate to be administered therein. It was held that the appointment was not open to attack in this manner, NORVAL, J., saying: "The application for the appointment of an administrator must allege the necessary jurisdictional facts, for if a want of jurisdiction affirmatively appears from the face of the record, it is fatal to the proceedings, and the objection can be urged at any time. * * * The right of the plaintiff in error to question the authority of the county court to grant letters of administration on the hearing of his objection to the allowance of the claim filed against the estate depends upon whether the record of the county court on its face shows the lack of jurisdiction to make

the appointment. It cannot be doubted that where a sufficient petition for administration is presented to the proper county court, and the statutory notice is given, its action in appointing an administrator is valid and binding unless revoked or set aside on appeal." These decisions control the present case, and we think that they are in accord with the vast weight of authority elsewhere, as well as consonant with sound principle. The district court, therefore, erred in giving the instruction complained of.

REVERSED AND REMANDED.

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## HOME FIRE INSURANCE COMPANY OF OMAHA V. JAMES SKOUMAL.

FILED MAY 18, 1897. No. 8862.

1. **Review:** ABSTRACT. In a case submitted under rule 2, on an agreed printed abstract, the court will not look beyond the abstract; and, in order to a reversal of the judgment below, error must affirmatively appear from the abstract itself. *Closson v. Rohman*, 50 Neb., 323, followed.

2. **Compromise and Settlement:** CONSIDERATION. The settlement of a doubtful or disputed claim is generally a sufficient consideration for a compromise, but in order to have such effect it is essential that there be in fact a dispute or doubt of the rights of the parties. An arbitrary refusal to pay, based on the mere pretense of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will of itself support a compromise resulting in a reduction of the amount of his indebtedness. *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb., 463, followed.

3. **Costs:** ATTORNEYS' FEES: INSURANCE. In an action on a policy of insurance written on real property, the court in rendering judgment against the insurance company may allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs. (Compiled Statutes, ch. 43, sec. 45.)

4. ———: ———: ———: REVIEW. But on a review of the judgment in this court an additional sum will not be allowed as attorneys' fees for conducting the proceedings here.

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

*Greene & Breckenridge*, for plaintiff in error.

*J. M. Leyda* and *A. N. Sullivan, contra.*

IRVINE, C.

This case has been submitted on an agreed printed abstract under rule two. It appears from the abstract that the case was begun in the county court, where judgment was rendered in favor of Skoumal, the plaintiff. It was taken by appeal to the district court, where judgment was again rendered for the plaintiff. The action was on a policy of fire insurance upon a dwelling house to the amount of $500, and upon personal property to the amount of $200. In defense of the action the insurance company pleaded that proofs of loss were furnished claiming a loss to the building of $337.10, and on personal property of $162.90,—in all, $500, at which amount the loss was then and there adjusted; that the loss was payable sixty days after proofs of loss were furnished, and within that time a draft for $500 was tendered the plaintiff, but by him refused. The tender was made in court of $500, and an offer was made to confess judgment for that amount. By the reply it was pleaded that the proofs of loss were prepared by the agent of the insurance company, who fraudulently inserted the amount specified, and who threatened the assured that he would receive nothing whatever unless he signed said proofs; that the assured had a very limited knowledge of the English language, and had had no experience with insurance companies, and relied on the acts and representations of the agent. The case was tried on a stipulation of facts, by which it appeared that a policy had been issued whereunder $500 was written on the house and $200 on the personalty; that the property was destroyed September 1, 1895, and that the house was totally destroyed;

that proofs of loss were submitted as pleaded and that the insurance company agreed to pay within sixty days $500, and the assured agreed to accept the same; but the assured supposed that it was to be paid forthwith; that the proofs of loss were prepared by the adjuster of the insurance company; that the damage to the dwelling house was $337.10, and to the personal property $162.90; that the assured objected to accepting less than the face value of his policy, and that the adjuster threatened him with litigation that would last four or five years unless he agreed to take said sum of $500; that the assured could not tell how the fire originated; that the adjuster told him that if he could tell the origin of the fire it might be different and he might be entitled to the face value of his policy, and relying on and believing said statements the assured made the agreement hereinbefore stated.

The first question presented is as to the binding force of the adjustment or agreement pleaded, and established by the stipulation. It will be observed that the amount for which the house was insured was $500; that the loss was total, and if the company was liable at all it was bound to pay the face of the policy on account of the house. (Compiled Statutes, ch. 43, sec. 43.) It was also agreed that the loss to the personalty was $162.90, so that on the same assumption of liability the company was bound to pay $662.90. The amount of the judgment does not appear in the abstract, but presumably it was for more than the $500 which the company was willing to pay or the company would not be here seeking to reverse the judgment. It will also be observed that the stipulation contains no facts in support of averments of fraud in procuring the adjustment or proofs of loss. To support the validity of this adjustment or settlement the insurance company cites a large number of cases. A case chiefly relied on is *Home Fire Ins. Co. v. Bredehoft*, 49 Neb., 152. In that case, however, it appeared that there was a *bona fide* dispute between the parties as to the

liability of the company, and in addition the amount agreed upon in settlement had been actually paid and received in discharge of the contract by the insured. In all the other cases cited the demand was either unliquidated as to the amount of recovery, or there was an actual dispute as to the rights of the parties, or there had been a satisfaction as well as an accord. In this case the law fixed the amount of recovery so far as the house was concerned, and as to the personal property, the stipulation shows that there was no dispute. Nor does it appear there was any dispute as to the liability of the company. The adjuster did not claim that the company was not liable nor does it seem that he claimed that the company hoped to be successful in case of litigation. He merely threatened the assured with a delay of four or five years as the result of litigation. It is true that by the stipulation it appears that the insured could not tell how the fire originated; but nothing with regard to the terms of the policy appears in the abstract, and we cannot presume that the policy was effective only in case the insured was able to account for the origin of the fire. In a case submitted under rule two on agreed printed abstracts, this court will not look beyond the abstracts to ascertain the facts. (*Closson v. Roman*, 50 Neb., 323.) So far as appears by the abstract, then, there was no actual dispute between the parties either as to the amount of the loss or the liability of the insurance company. There was nothing but the threat of an agent of the company to delay the plaintiff by protracted litigation unless he compromised the claim. The law on this subject is now well settled, and a case precisely in point is *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb., 374, 44 Neb., 463. From the syllabus of the last opinion we quote as follows: "The settlement of a doubtful or disputed claim is generally a sufficient consideration for a compromise; but in order to have such effect it is essential that there be in fact a dispute or doubt of the rights of the parties. An arbitrary refusal to pay, based on the mere pretense

of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive, is not such a dispute as will of itself support a compromise resulting in a reduction of the amount of his indebtedness." This case falls entirely within the principle so stated.

The district court allowed an attorney's fee of $75 as part of the costs, and its action in this regard is complained of. Section 45, chapter 45, Compiled Statutes, provides that "the court, upon rendering judgment against an insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee to be taxed as part of the costs." It has already been held that the words "such policy" in this section refer to policies written on real property and include policies covering both real and personal estate. (*Hanover Fire Ins. Co. v. Gustin*, 40 Neb., 828; *Omaha Fire Ins. Co. v. Thompson*, 50 Neb., 580.) It is suggested that the amount allowed was too large in view of the real sum in controversy; but there was evidence to support the finding of the court in this respect.

We are asked by the defendant in error to allow an additional sum for services in this court. This cannot be done. (*German Ins. Co. of Freeport v. Eddy*, 37 Neb., 461; *Eddy v. German Ins. Co. of Freeport*, 51 Neb., 291.)

AFFIRMED.

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PENN MUTUAL LIFE INSURANCE COMPANY, APPELLEE, V. CREIGHTON THEATRE BUILDING COMPANY ET AL., APPELLEES, AND A. L. REED ET AL., APPELLANTS.

FILED MAY 18, 1897. No. 9097.

1. **Review:** PARTIES: RIGHT OF APPEAL. An appealable interest exists when the judgment or decree so affects a party or privy to the record that he would derive a substantial benefit from its modification or reversal.

2. ———: ———: ———: MOTION TO DISMISS. Consequently, on a motion to dismiss an appeal on the ground that the appellants are without an appealable interest, the question is not whether on the merits they are entitled to a reversal of the order appealed from, but it is whether the record shows that they are in the attitude of parties claiming a substantial right defeated by the order.

3. **Judicial Sales:** RIGHT OF BIDDER TO APPEAL. A bidder at a judicial sale whose bid has been accepted may appeal from an order setting the sale aside.

4. ———: ———: MOTION TO DISMISS. And where the report of sale is ambiguous as to the acceptance of the bid, but affords a fair basis for contention that a particular bid was accepted, that bidder may appeal from the order, and, on motion to dismiss the appeal, the court will not inquire whether the contention is well founded and the appellant entitled to a reversal.

5. ———: APPEAL: SUPERSEDEAS. The third subdivision of section 677 of the Code of Civil Procedure, providing for superseding orders directing the sale or delivery of possession of real estate on giving bond not to suffer or commit waste, contemplates appeals by the owner or party in possession and has no application to an appeal by a purchaser from an order setting aside a sale and directing a resale.

6. ———: ———: ———. But in cases not within the statute the district court may, in its discretion, allow a supersedeas on proper terms, and should do so where the appellant's rights will be jeopardized if the order is not superseded, and no party will be injured beyond the protection of a bond by superseding the order.

APPEAL from the district court of Douglas county. Heard below before SCOTT, J. Submitted on motion to dismiss appeal and on motion to vacate supersedeas allowed by supreme court. *Motion to dismiss overruled. Order below denying supersedeas reversed.*

*John L. Webster* and *Montgomery & Hall*, for the motions.

*William D. Beckett* and *R. S. Hall, contra.*

IRVINE, C.

The Penn Mutual Life Insurance Company brought an action in the district court of Douglas county to foreclose a mortgage made by the Creighton Theatre Building Company. This proceeded to decree, and on the 30th

of January, 1897, the mortgaged property was offered for sale at 10 o'clock A. M. As to what occurred at the sale we quote as follows from the master's report:

"I received two bids for said property, as follows:

"From Abraham L. Reed and Freeman P. Kirkendall, by William D. Beckett, their attorney, I received a bid of $117,000, at 10:57 o'clock A. M., that sum being more than two-thirds of the appraised value of said property; no other bids having been received by 11 A. M., I accepted from said bidders the sum of $20,000 upon said bid, deeming it unnecessary to require the whole amount of said bid to be deposited with me until just prior to the confirmation.

"Being informed at that time that other bids might be made, I deemed it my duty to receive any such bids in case they should be made, and thereafter, at 1:20 o'clock P. M., I received a bid for said property from Edward W. Nash, trustee, of $117,500. No other bids being made up to 9 o'clock P. M., I declared said property sold to Edward W. Nash, trustee, for the sum of $117,500.

"Immediately after declaring said property sold to Edward W. Nash, trustee, I tendered back to William D. Beckett, attorney for Abraham L. Reed and Freeman P. Kirkendall, the sum of $20,000 paid by them upon their bid by said Beckett, and said Beckett then and there refused to receive the same. Said Edward W. Nash, trustee, then paid to me the sum of $27,000 upon his bid, I deeming it unnecessary to require the whole of said bid to be deposited with me at that time, and it was agreed that the balance of the bid should be paid prior to the confirmation of the sale. The amount paid by said Edward W. Nash, trustee, was the highest bid made for the property and not less than two-thirds of the appraised value thereof."

As soon as the master's report was filed, plaintiff moved "to confirm the sale made by the special master commissioner." Reed & Kirkendall moved to confirm the sale "made by the special master commissioner to

them." E. W. Nash moved "to confirm the sale of said property to him," and objected to the confirmation of the sale to Reed & Kirkendall. Reed & Kirkendall also filed objections to the confirmation of the sale to Nash. The cause coming on for hearing on these several motions, the court overruled all motions to confirm, but set the sale aside, directing that the property should be resold under the decree. Reed & Kirkendall appealed from this order, and the case is now presented to us upon the motion of the plaintiff and of Nash to dismiss the appeal. The grounds of this motion are that the order appealed from is not a final order affecting a substantial right, and that Reed & Kirkendall have no standing to appeal therefrom.

The order setting aside the sale shows that the various motions were heard upon evidence. The record contains no bill of exceptions embodying this evidence. The appellees have, however, filed a certified transcript of what purport to be affidavits used on the hearing of the motions in the district court, and ask us, for the purpose of the pending motion, at least, to consider this transcript in the place of a bill of exceptions. This we cannot do. It would be supererogatory on this point to cite the multitude of decisions holding that, for the consideration of evidence used in the district court, it is essential that it should be embodied in a bill of exceptions duly settled, allowed, and authenticated; and that the clerk's certificate verifying copies of affidavits on file cannot under any circumstances take the place of such a bill. We must, therefore, consider the motion solely in the light of the transcript of the record before us. The argument of the motion covered quite generally the merits of the appeal, and while in one sense those merits are to a certain extent necessarily involved, we cannot on this motion finally pass thereon. The right of a party to appeal does not depend upon his having in fact a meritorious ground for the appeal. We take it that the question presented is not whether by the sale Reed & Kirkendall obtained

a valid interest in the property, the subject-matter of the action, but whether on the record they are substantially interested in the event of the suit. "An appealable interest exists when the judgment or decree so affects a party or privy to the record that he would derive a substantial benefit from its modification or reversal." (2 Ency. Pl. & Pr., 161, and cases there cited.) In passing upon this motion, therefore, we do not inquire whether a valid enforceable sale was made to Reed & Kirkendall, but merely whether the record discloses such a substantial claim on their part as to bring them within the foregoing definition.

A few propositions established by former decisions of this court go far towards solving the question. In the first place it has been held that an order setting aside a judicial sale is in its nature appealable. (*Berkley v. Lamb*, 8 Neb., 392.) It is contended that the order in the case cited was appealable only because the sale was set aside for a reason which prevented a resale, and therefore determined the proceeding. Some of the language used by the court indicates that this feature was considered an important one in the case. But the decision was based largely on the authority of *Mayer v. Wick*, 15 O. St., 548, where the same rule was announced under circumstances which permitted a resale. Moreover, in *Bachle v. Webb*, 11 Neb., 423, in *Roberts v. Robinson*, 49 Neb., 717, and perhaps in other cases, this court has entertained appeals from such orders, reversed the order setting aside the sale, and ordered confirmation thereof, showing that the doctrine of *Berkley v. Lamb* has not by the court been confined so narrowly as the argument referred to would require. It is also settled by the same cases that the court, in examining a foreclosure or execution sale, is not vested with any arbitrary discretion to set the sale aside. On the other hand, if the sale was regularly made in conformity to the decree and to law, the parties have a right to insist upon confirmation. In *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281, where the contest was

as to which of two bidders should have been declared the purchaser, it was distinctly held that the contract is closed by the acceptance of a bid; in other words, that rights become vested thereby. True, the rights of the purchaser do not become complete until confirmation; but if his bid be good and sufficient, if it be the highest, if it be accepted, and if the proceedings have been regular, he becomes entitled to the order of confirmation which finally adjudicates his rights; *per contra*, a refusal to confirm and a setting aside of the sale if acquiesced in by the purchaser, would finally defeat all right obtained under the sale. By the acceptance of a bid the bidder becomes a party, subject to the jurisdiction of the court and concluded by its orders, and he may be required and compelled to perform his bid. (*Philips v. Dawley*, 1 Neb., 320; *Jones v. Null*, 9 Neb., 254; *Gregory v. Tingley*, 18 Neb., 318; *Norton v. Nebraska Loan & Trust Co.*, 35 Neb., 466, 40 Neb., 394.) It follows from these considerations that the successful bidder becomes absolutely bound by the proceedings, and that he becomes obligated to perform his part of the contract. If he incurs obligations, he also acquires rights, and the right acquired is to enforce the confirmation of the sale if it be valid, and the conveyance of the property which he has bought. If he fails to assert the right in the foreclosure proceedings he may not be heard to do so in a collateral action, for the simple reason that he is concluded by the record.

But it is contended that while the right to appeal may exist after a resale and final order of confirmation an order merely setting aside the sale and ordering a new one is not final and does not affect the purchaser's rights, because on the resale he may obtain the property on terms equally advantageous. In support of this view we are cited to *Childs v. Hurd*, 25 W. Va., 530. In the first place, it is to be remarked that the court was there considering a statute fixing the right to appeal which is much narrower than ours. In the second place, that case seems contrary to the weight of authority; as, for

instance, among cases taken at random by the writer from a long list, *Curtis v. Thompson*, 29 Gratt. [Va.], 474; *Mutual Life Ins. Co. v. Sturges*, 33 N. J. Eq., 328; *Yerby v. Hill*, 16 Tex., 377; *Murphrey v. Wood*, 2 Jones' Law, 63; *Blossom v. Milwaukee & C. R. Co.*, 1 Wall. [U. S.], 655. In the third place, that view is based upon a fallacy. It is not true that the order setting aside the sale leaves the purchaser's rights unaffected until the resale is had and confirmed. If the same purchaser is successful at the new sale the right he then has is acquired solely through the subsequent sale. His rights under the first sale have been divested. A purchaser steps into the record at the latest by the acceptance of his bid. He steps out by the order setting aside the sale to him, unless he appeals from that order. It is final and cuts off all his rights acquired to that time so long as the order stands. For the reasons indicated we think an order setting aside such a sale and ordering a resale is a final order affecting a substantial right of the purchaser, and that he may appeal therefrom.

On this motion it remains only then to consider whether these particular appellants appear on the record to occupy the position of purchasers whose rights, if any, have been defeated by the order complained of. It appears from the master's report that the property was offered at 10 A. M.; that at 10:57 the appellants made their bid of $117,000, being more than two-thirds the appraised value of the property, and that at 11 A. M., no other bid having been received, the master accepted from them $20,000 upon the bid, "deeming it unnecessary to require the whole amount of said bid to be deposited until just prior to the confirmation." While we are not aware of any statute on the subject, it is a settled practice in this state to hold such a sale open one hour. From this fact and from the fact that the bid was reported, that the master received a portion of the purchase money, which is not usual and which probably could not be demanded from a bidder whose bid is not accepted, and also

from the further statement that the master did not receive the rest because he deemed it unnecessary until just prior to confirmation, it is, at least, a fair matter for argument that the appellants' bid was accepted and the sale closed. In this connection it may be well to call attention to the case of *Jones v. Null*, 9 Neb., 254, where it was held that where the purchaser refuses to comply with the bid the officer may at once resell the property, but he cannot wait until the sale is closed and the bidders have departed before again offering the property for sale. We think that the report shows a substantial claim of interest by the appellants upon which they are entitled to be heard.

There is also presented a motion by the same parties to vacate a supersedeas heretofore allowed. The history of this proceeding is as follows: The appellants applied to the district court for an order fixing the amount of a supersedeas bond under subdivision 3 of section 677 of the Code of Civil Procedure. This application was denied. After the case was brought to this court, a similar application was made to us, on the theory that the order complained of was one directing the sale of real estate within the meaning of the third subdivision of section 677, and that the appellants were, therefore, as of right, entitled to a supersedeas on giving a bond conditioned against the suffering or commission of waste. There being at the time no opportunity for a full hearing of the parties and a deliberate investigation of the question presented, an order was made allowing a supersedeas in pursuance of the statute referred to, with leave, however, to the appellees to move to set aside the order. On further investigation and reflection we think the case is not one in which the appellees are entitled as of right to a supersedeas. The subdivision of section 677, to which reference has been made, evidently contemplates an appeal by the party in possession, the former owner whose title or right of possession will be divested by the order of sale or delivery of possession. This is apparent from

the condition of the bond. The legislature could have had no possible object in requiring one out of possession and not claiming a present possessory interest to give bond not to commit waste on the premises. It has, however, been several times held that in cases not within the statute the district court may, in its discretion, allow a supersedeas. (*Gandy v. State*, 10 Neb., 243; *State v. Judges*, 19 Neb., 149; *Cooperrider v. State*, 46 Neb., 84; *Home Fire Ins. Co. v. Dutcher*, 48 Neb., 755.) The appellants excepted to the order refusing the supersedeas, so that order is now before us for review. A resale of the property at this time would, to say the least, put in hazard any rights which the appellants may have, if it would not absolutely defeat them, while we cannot see that any other parties can be irreparably damaged by allowing a supersedeas. The Creighton Theatre Building Company is the mortgagor in possession. It is not appearing in this proceeding and is making no objection. The effect of the delay merely continues its possession of the property. The bid of appellants was more than sufficient to discharge the whole decree in favor of the plaintiff. In the event of affirmance if the property brings a higher price the plaintiff does not suffer. If it brings less it is not the fault of these appellants who are here insisting upon a confirmation of the sale which will entirely protect the plaintiff. Nash, by seeking to enforce the order setting aside the sale, claims no interest himself, and cannot be damnified. Under the circumstances, we think that the refusal of a supersedeas amounted to an abuse of discretion. The supersedeas allowed by this court must, of course, be vacated, but the order of the district court refusing a supersedeas is reversed and a supersedeas allowed upon the appellants giving bond in the sum of $25,000 within twenty days from this order conditioned to pay all damages and costs which may accrue to any of the parties by reason of the delay, in case the judgment of the district court should finally be affirmed.

JUDGMENT ACCORDINGLY.

FIRST NATIONAL BANK OF WAHOO, APPELLANT, V. FRANK HAVLIK ET AL., APPELLEES.

FILED MAY 18, 1897. No. 7222.

1. **Gift from Husband to Wife.** The married woman's act, being for the purpose of extending and not contracting or limiting the rights of married women in this state, will not be held to have abrogated the equitable rule which upheld gifts from husbands to wives, made when the husband was solvent, and which did not impair the existing rights of creditors. *Dayton Spice-Mills Co. v. Sloan*, 49 Neb., 622, followed.

2. ———: TRUSTS: RIGHTS OF CREDITORS. Evidence examined, and *held* to sustain a finding that property in a wife's name was not held in trust for her husband and was not subject to the payment of his debt created after she acquired the property.

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

A statement of the facts appears in the opinion.

*Simpson & Sornborger* and *Good & Good*, for appellant.

In support of an argument in favor of the contention that the property in controversy belongs in equity to the husband and should be subjected to the payment of appellant's judgment, reference was made to the following cases: *Bailey v. Gardener*, 31 W. Va., 94; *Musgrave v. Parish*, 11 S. W. Rep. [Ky.], 464; *Seitz v. Mitchell*, 94 U. S., 584; *Clinton Mfg. Co. v. Hummell*, 25 N. J. Eq., 45; *Switzer v. Valentine*, 4 Duer. [N. Y.], 96; *Glaun v. Younglove*, 27 Barb. [N. Y.], 480; *Woodbeck v. Havens*, 42 Barb. [N. Y.], 66; *Ryder v. Hulse*, 24 N. Y., 372; *Connors v. Connors*, 4 Wis., 112; *Elliott v. Bently*, 17 Wis., 591; *Edson v. Hayden*, 20 Wis., 682; *Duncan v. Roselle*, 15 Ia., 501; *Cramer v. Reford*, 17 N. J. Eq., 367; *Hamill v. Henry*, 69 Ia., 752; *Thomas v. Desmond*, 63 Cal., 426; *Goddard v. Reagan*, 28 S. W. Rep. [Tex.], 352; *Brittain v. Crowther*, 54 Fed. Rep. 295; *McAnally v. O'Neal*, 56 Ala., 299; *Humes v. Scruggs*, 94 U. S., 22; *Triplett v. Graham*, 58 Ia., 135;

*Steinkraus v. Korth*, 44 Neb., 777; *Plummer v. Rummel*, 26 Neb., 147; *Brownell v. Stoddard*, 42 Neb., 177; *Aultman v. Obermeyer*, 6 Neb., 260; *First Nat. Bank v. Bartlett*, 8 Neb., 319; *Thompson v. Loenig*, 13 Neb., 386; *Stevens v. Carson*, 30 Neb., 544; *Hill v. Fouse*, 32 Neb., 637.

*J. R. Gilkeson, H. Gilkeson*, and *Reese & Gilkeson, contra.*

IRVINE, C.

This was an action in the nature of a creditor's bill by the First National Bank of Wahoo against Frank Havlik, Barbara Havlik, his wife, Emma Sommers, and the Packers' National Bank of South Omaha, to subject certain property to the payment of a judgment of the Wahoo bank against Frank Havlik. The judgment was rendered in September, 1892, and the debt on which it was based was created in May, 1892. The petition alleged that in June, 1892, Frank Havlik was the owner of lots 4, 5, and 6, in block 170, of the County Addition to Wahoo, in Saunders county, and on the 9th of June, without consideration and with the intent of defrauding his creditors, he conveyed the same to Emma Sommers; that on the 3d of May, 1891, Frank and Barbara Havlik purchased of Louis Shroeder, with money of Frank's, lot 24, block 3, Brown Park Addition to South Omaha, Douglas county, and that the title was taken in Barbara Havlik in secret trust for Frank, and with the purpose of placing it beyond the reach of his creditors; that on the 24th of June, 1891, Frank Havlik purchased from the Union Stock Yards Company lots 13 and 14, in block 9, and lot 10, in block 12, in the First Addition to South Omaha; that said realty was paid for out of the moneys of Frank, but the title taken in the name of Barbara in secret trust for him and with a similar fraudulent purpose; that on the 22d of March, 1892, Frank Havlik was the owner in fee of a certain tract of land in Saunders county, which was then conveyed to one Zahourek, who gave in part payment therefor three promissory notes, one for $800, two for $700

each, both due March 1, 1894, and made payable to the order of Frank and Barbara; that said notes were fraudulently transferred by Frank to Barbara for the purpose of placing them beyond the reach of Frank's creditors, and were deposited for safe keeping with the Packers' National Bank. These notes turned out to be in the possession of Barbara and the Packers' National Bank was therefore dismissed from the case. By the answers of the two Havliks and Emma Sommers, all allegations of fraud were denied and it was pleaded that the conveyances and transfers referred to in the petition were made for good and valuable considerations. The court found that lots 5 and 6, in block 170, in Wahoo, were the homestead of the Havliks and did not exceed in value the sum of $2,000. It then found that Frank had an undivided one-half interest in lot 4, and decreed that that interest be subjected to the payment of the judgment. This disposed of the interest of Emma Sommers, and so far no complaint is made of the decree by any party. As to the transactions with Barbara Havlik, the court found in favor of the defendants. The plaintiffs proceeded upon the theory that all the property in controversy was the result of profits derived from a saloon and boarding house kept in Wahoo in the name of Frank Havlik; that while Mrs. Havlik advanced $350 to permit him to enter into this business, and while the boarding house portion thereof was maintained by her labor, there was no loan to Frank of the money, and she had no interest in the business or the profits thereof; that the money with which the property was bought having been so derived, the property was in equity Frank's, and not Barbara's, and that the titles were taken in Barbara in secret trust. As to the notes the plaintiffs' theory was that they having been received in part payment for the sale of land which was in equity Frank's, the transfer thereof to Barbara was for the purpose of creating a like secret trust. The very able briefs discuss many authorities bearing upon the liability of property so acquired and

conveyed for the debts of the husband. But the relative times of the conveyances and of the creation of plaintiff's debt render it, in the light of the decisions of this court, unnecessary to consider these questions. It will be observed that the South Omaha property was all acquired by Barbara prior to the time when Frank became indebted to the bank. The evidence tends strongly to show that Frank had contracted for the purchase of this property, but having become addicted to the excessive use of intoxicants, was unable to make his payments, and that most of the purchase money was in fact paid by Barbara out of her own separate earnings; and the conveyances were therefore made to her. This was done with Frank's knowledge, if not his consent, and while there was introduced in evidence a document which seems to be a petition in the district court of Douglas county by Frank against Barbara and the vendor of part of the property, seeking to annul the conveyance to her, it is not shown that the document was genuine or that any such action was ever begun. The circumstances, especially in the light of subsequent dealings between the parties, are sufficient to establish a ratification, or at least acquiescence, by Frank which would operate as a gift of his equity, if any he had, in this property.

It is also claimed in argument that prior to the sale of the Saunders county farm a loan was secured of $2,500 by placing a mortgage thereon, and that this money was used in improving the South Omaha property. If the farm was in fact Frank's and he chose to borrow money in this manner and improve his wife's real estate, it would be another transaction in the nature of a gift to her.

As to the notes, it is contended that the transfer was not made until after the bank's debt was incurred. But the weight of the evidence is the other way and supports the finding of the court.

It follows that if all of the contentions of the appellant be well founded as to the property having been acquired by moneys earned by and belonging to Frank, in each case

there was a gift thereof to Barbara prior to the creation of the debt on which the bank's judgment is founded. Our married woman's act being for the purpose of extending and not contracting or limiting the rights of married women in this state, will not be held to have abrogated the equitable rule which upheld gifts from husbands to wives, made when the husband was solvent, and which did not impair the existing rights of creditors. (*Dayton Spice-Mills Co. v. Sloan*, 49 Neb., 622; *Studebaker v. Welch*, 51 Neb., 228.) The application of this principle disposes of the case.

AFFIRMED.

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## GEORGE MORGAN V. STATE OF NEBRASKA.

FILED JUNE 3, 1897. No. 8413.

1. **Criminal Law**: CIRCUMSTANTIAL EVIDENCE. The test by which to determine the sufficiency of circumstantial evidence in a criminal prosecution, is whether the facts and circumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt.

2. ———: ———: PROVINCE OF JURY. It is the province of the jury to determine the circumstances surrounding, and which shed light upon, the alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. (*Casey v. State*, 20 Neb., 138.)

3. **Homicide in Perpetration of Rape**: EVIDENCE. The body of deceased, a girl eleven years of age, who was last seen alive about 7 o'clock P. M., was, about 1 o'clock the next morning, found in an uninhabited building with unmistakable evidence of violence upon her person, including well-defined finger marks on the larynx; also below the left ear and under the chin. The face was swollen and discolored. The eyes and tongue were swollen and protruding, while contusions were apparent upon the head and lower limbs. Blood was oozing from the vagina, and the vaginal passage was torn and lacerated from the opening so far as explored. Her under clothing was torn from her person and there was blood on her thighs and private parts. There was also found in the vaginal

passage a quantity of fluid which an experienced and apparently capable chemist pronounced semen of a male person, and medical witnesses concurred in the opinion that death resulted from strangulation. *Held*, To warrant the conclusion that the deceased was killed in the perpetration of a rape upon her person.

4. ———: ———. Evidence examined, and *held* to point with such certainty to accused as the perpetrator of the crime charged as to warrant the verdict of murder complained of in this proceeding.

5. **Statutes:** ADOPTION OF JUDICIAL CONSTRUCTION. The legislature of this state, in the enactment, in 1873, of the Ohio Criminal Code, is presumed to have adopted the settled construction thereof by the courts of that state.

6. ———: ———: EFFECT. But a construction of that statute by the courts of Ohio is entitled to no greater consideration than previous decisions of this court, and will be rejected for reasons which would require the overruling thereof had it been first adopted in this state.

7. **Homicide in Perpetration of Felony:** MALICE: PRESUMPTION. Homicide committed in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary is by section 3, Criminal Code, declared murder in the first degree. The turpitude of the act is, in the exceptional cases mentioned in the statute, made to supply the place of deliberate and premeditated malice, while a purpose to kill is conclusively presumed from the intention which is the essence of the enumerated felonies. (*Henry v. State*, 51 Neb., 149.)

8. ———: INFORMATION: INSTRUCTIONS. An information for murder contained two counts, by the first of which the accused was charged with the killing of deceased purposely and of his deliberate and premeditated malice, and by the second count, the killing was alleged to have been done in the perpetration of a rape upon the person of deceased. *Held*, Proper to instruct that murder in the second degree, and manslaughter, are not included in the second count, and that in case the accused is found guilty as therein charged, the verdict should be for murder in the first degree.

9. **Criminal Law:** ASSUMPTION OF FACTS. It is not, in a criminal prosecution, error for the trial court to assume the existence of facts asserted by the accused on the trial, or treated by him as proved. (*Hill v. State*, 42 Neb., 503.)

10. ———: INSTRUCTIONS: OBJECTIONS NOT RAISED BELOW. Objection to an instruction on the ground that it contains two or more distinct propositions will not be noticed when made for the first time in this court. (*Smith v. State*, 4 Neb., 277.)

11. **Circumstantial Evidence.** It is in a criminal prosecution permissible for the state to introduce evidence of any number of facts and circumstances tending to connect the accused with the crime charged, and if the facts actually proved are sufficient to establish

guilt beyond a reasonable doubt, he is not entitled to an acquittal because of a failure of proof with respect to one or more of the facts relied upon for a conviction.

12. **Criminal Law: JUROR: WAIVER OF OBJECTION.** A party by failing to exercise his right of peremptory challenge will be held to have waived any objection on account of the disqualification of a juror then known to exist. (*Palmer v. State*, 4 Neb., 68.)

13. **Transcript for Review: CORRECTION.** It is a rule applicable to all appellate proceedings that the record of the trial court, when properly authenticated, imports absolute verity. If such record is partial or incorrect, the remedy is by means of an appropriate proceeding to secure a correction thereof in the lower court. (*Omaha Loan & Trust Co. v. Hogeboom*, 47 Neb., 7.)

14. **Criminal Law: INTRODUCTION OF EVIDENCE: LIMITATION.** It is within the discretion of the district court to place a reasonable limit upon the time for the production of evidence, and the exercise of such discretion is not, except in case of an abuse of power, the subject of review.

15. **New Trial: ABSENT WITNESS.** A new trial will not be allowed on account of the absence of a witness who on a subsequent day of the trial attends and testifies for the complaining party.

ERROR to the district court for Douglas county. Tried below before SCOTT, J. *Affirmed.*

The opinion contains a statement of the case.

*W. R. Patrick* and *W. S. Summers*, for plaintiff in error.

References to sustain the contention that there was error in the orders overruling challenges to jurors having opinions as to the guilt of the accused: *Olive v. State*, 11 Neb., 1; *Curry v. State*, 4 Neb., 545; *Carroll v. State*, 5 Neb., 31; *Cowan v. State*, 22 Neb., 523; *Miller v. State*, 29 Neb., 445; *Owens v. State*, 32 Neb., 167.

Where the evidence is circumstantial, the circumstances established must, to warrant a conviction, be such as to exclude every reasonable hypothesis, except that of the defendant's guilt. It is not sufficient that the circumstances create a probability, however strong. (*Botsch v. State*, 43 Neb., 501; *Dreessen v. State*, 38 Neb., 375; *Eliot v. State*, 34 Neb., 49.)

The trial judge should use the statutory language de-

scriptive of a crime in giving instructions, and no change from the statute can be made that may mislead or deceive the jury. (*Long v. State*, 23 Neb., 33.)

Instruction 13 was erroneous as invading the province of the jury. (*State v. Lee*, 60 N. W. Rep. [Ia.], 119; *Parrish v. State*, 14 Neb., 60; *Olive v. State*, 11 Neb., 1; *Young v. Hibbs*, 5 Neb., 433.)

The trial court is not permitted to indicate his opinion and thereby influence the jury by discussing the evidence or to give instructions which are commentaries on the testimony introduced. (*Omaha Fair & Exposition Ass'n. v. Missouri P. R. Co.*, 42 Neb., 111; *State v. Hudson*, 58 Mo., 138; *Smith v. State*, 43 Tex., 103.)

A charge that the law does not require the jury to be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt, is erroneous. (*State v. Gleim*, 17 Mont., 17; *Marion v. State*, 16 Neb., 349; *Kollock v. State*, 60 N. W. Rep. [Wis.], 817; *People v. Phipps*, 39 Cal., 333; *Commonwealth v. Webster*, 52 Am. Dec. [Mass.], 711.)

If any member of the jury entertained a reasonable doubt as to the sufficiency of the proof to establish any one material averment in the information against the accused he should have been free under the instructions to have given the accused the benefit of the doubt. (*Castle v. State*, 75 Ind., 146; *State v. Wilt*, 34 Kan., 488; *State v. Stewart*, 52 Ia., 284; *State v. Sloan*, 55 Ia., 217.)

Instruction 18 is erroneous because it states two propositions, and invades the province of the jury. (*Williams v. State*, 51 Neb., 711; *Long v. State*, 23 Neb., 33; *People v. Clarke*, 62 N. W. Rep. [Mich.], 1117; *Prime v. State*, 19 So. Rep. [Miss.], 711.)

The court in giving instructions cannot go outside of the theories advanced and the testimony given by the parties. (*People v. Wallin*, 55 Mich., 497; *Ingalls v. State*, 48 Wis., 647.)

The court should not single out, and give undue prominence to, certain features of the state's case. (*Williams*

*v. State*, 13 So. Rep. [Ala.], 333; *Hodgkins v. State*, 15 S. E. Rep. [Ga.], 695.)

An erroneous instruction is reversible error though a correct exposition of the law on the same point has been given to the jury. (*Barr v. State*, 45 Neb., 458; *Metz v. State*, 46 Neb., 547; *Raker v. State*, 50 Neb., 202.)

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

The mere fact that a juror has formed an opinion from what he has heard or read does not disqualify him from acting, or make him incompetent to serve. (*Bayse v. State*, 45 Neb., 261; *Bohanan v. State*, 18 Neb., 57; *Curry v. State*, 5 Neb., 412.)

If there was error in overruling challenges to jurors, it was without prejudice to defendant, as it does not appear in the record that he exhausted his peremptory challenges. (*Bohanan v. State*, 15 Neb., 209; *Palmer v. State*, 4 Neb., 68; *Nowotny v. Blair*, 32 Neb., 175; *Burnett v. Burlington & M. R. R. Co.*, 16 Neb., 332.)

The transcript of the proceedings imports verity and cannot be altered, amended, or impeached by affidavits. (*Dryfus v. Moline*, 43 Neb., 233; *Sullivan v. Benedict*, 36 Neb., 409; *Hagerty v. Walker*, 21 Neb., 596; *State v. Hopewell*, 35 Neb., 822.)

All that was necessary for the jury to find in order to convict accused of murder in the first degree under section 3 of the Criminal Code was that the killing was done while he was perpetrating, or attempting to perpetrate, the crime of rape. Deliberate and premeditated malice, if elements of the crime charged, is conclusively presumed when it is shown that the killing was done while perpetrating the crime of rape. (*Moynihan v. State*, 70 Ind., 126; *Titus v. State*, 9 Crim. Law Magazine [N. J.], 353; *Graves v. State*, 45 N. J. Law, 204; *Commonwealth v. Manfredi*, 162 Pa. St., 144; *Buell v. People*, 78 N. Y., 492; *State v. Gray*, 19 Nev., 212; *State v. Miller*, 13 S. W. Rep. [Mo.], 832; *State v. Hopkirk*, 84 Mo., 278.)

The statement in instruction 20, that the law does not require the jury to be satisfied, beyond a reasonable doubt, of each link in the chain of circumstances relied upon to establish defendant's guilt, is not ground for reversal when considered in connection with the entire charge. (*State v. Hayden*, 45 Ia., 11; *Bressler v. People*, 117 Ill., 422; *People v. Phipps*, 39 Cal., 326; *People v. Anthony*, 56 Cal., 397; *Koerner v. State*, 98 Ind., 7.)

POST, C. J.

The plaintiff in error was, at the September, 1895, term of the district court for Douglas county, convicted of murder in the first degree, and from the judgment imposing the extreme penalty therefor he prosecutes error to this court. The information which was the basis of the prosecution below contained two counts, in the first of which the accused was in substance charged with fatally assaulting the deceased, Ida Gaskill, with intent her, the said deceased, feloniously and of his deliberate and premeditated malice, to kill and murder; and by the second count thereof it was charged that the accused feloniously killed and murdered the said Ida Gaskill in the perpetration of a rape then and there committed upon her, the said Ida Gaskill, a female child under eighteen years of age, to-wit, of the age of eleven years. A verdict was returned finding the accused not guilty as charged in the first count of the information and guilty in manner and form as charged in the second count thereof. A motion for a new trial was interposed, in which were alleged numerous grounds for the setting aside of the verdict, and which are made the basis of separate assignments of the petition in error.

The questions to be determined in this proceeding may, it is believed, be greatly simplified by the preliminary observation that there exists no controversy respecting the *corpus delicti*. Indeed, the fact was conceded by counsel for the accused on the argument of the cause, and cannot, upon the record, be disputed, that the body of the

deceased, a girl eleven years of age, who was last seen alive about 7 o'clock P. M. of Sunday, November 3, 1895, was, about the hour of 1:30 in the morning following, found in an uninhabited building in the city of Omaha, with unmistakable evidence of violence before death, including well-defined finger marks on the neck and larynx; also below the ear and under the chin. The face was blue and swollen, the eyes and tongue were swollen and protruding, while contusions were apparent upon the head and lower limbs. Blood was oozing from the vagina, and the vaginal passage was torn and lacerated from the opening so far as explored. The underclothing of the deceased had been torn from the person, and there was blood on her thighs and private parts. There was also found in the vaginal passage a considerable quantity of fluid, which Dr. Detwiller, an experienced and apparently capable chemist, from a careful analysis, pronounced semen of a male person; and medical witnesses, of whom a number were examined, concurred in the opinion that death resulted from strangulation subsequent to the violation of the person of deceased in manner as charged. It is thus apparent that the important inquiry relates to the connection, if any, of the accused with the homicide proved, and to that subject our attention will now be directed.

For a month or six weeks previous to the tragedy above noted Mrs. Gaskill, mother of the deceased, with her family, consisting of the said Ida and her son Willie, aged nine years, had occupied rooms on the third floor of a building described in the record as No. 1814 Half-Howard street, in the city of Omaha, on the first floor of which was a suite of two rooms occupied by the accused and one Sanford, to whom further reference will hereafter be made. Among the acquaintances of the Gaskill family was Martin Booker, a single man, engaged on his own account as a teamster, and who resided at No. 1806 St. Mary's avenue, in the neighborhood of a half block distant. On the fatal Sunday, Ida and her brother, with

their mother's permission, dined with Booker, going to his rooms a little before noon, and returning home between 3 and 4 o'clock P. M. Ida, after the dinner with Booker, washed and put away the dishes of their host, and scrubbed the floor of his room, receiving therefor some trifling compensation tendered her. From the time of her return home until about 5:30 P. M. she was engaged alternately in assisting with the household duties and in play with companions of her own age in the neighborhood. Mrs. Gaskill, about the hour last named, in return of the hospitality shown her children, permitted Ida to go out for the purpose of inviting Booker to supper with her. After delaying the meal for an hour or more, and becoming alarmed on account of the prolonged absence of the child, search was instituted by the mother, which, with the assistance of officers Hudson and McGrath of the police force, finally resulted in the finding of her lifeless body as already narrated. The first meeting of Ida and the accused on that day, of which the record furnishes any positive evidence, was at Booker's rooms between 1 and 3 o'clock P. M., on which occasion there was, as testified to by Booker, some conversation between them which the latter did not overhear. Some time during the afternoon she visited the accused at his rooms, remaining for a few minutes only, at which time, as admitted by him to witnesses for the state, she sat upon his lap. She was, during the afternoon or evening, observed by Mrs. Van Horn to meet and speak to the accused while passing through an alley in the rear of the uninhabited building in which her body was subsequently found (by witnesses referred to as the "old red house"), to-wit, No. 1807 Half-Howard street. She was seen by Fanny Donovitch, a girl of her own age, a few minutes before 6 o'clock, returning from St. Mary's avenue by way of ›ker's, and a little boy, Claude McCrum, testified to having seen her about the same time talking with Booker near the latter's house. She was also seen by Mr. Penny, who testified for the defense, at

6:30, when too dark for recognition except by her voice, coming from the direction of Booker's, and within a few feet of the door of the accused, where, in response to a question by some person, unseen by the witness, she answered, "Wait; I will be back in a minute," or in words of like import. Accused was seen in the vacant building and in the immediate vicinity thereof at different times during the afternoon and evening. John Flannigan, a teamster, while passing through the alley, spoke to him, at which time he was in one of the back rooms of said building; and later in the afternoon he attempted, according to the witnesses for the state, by beckoning and by means of other signs, to attract to said building two little girls of the age of deceased. He was seen by Mrs. Agnew to come from his room about twenty minutes before 6 o'clock and pass between the vacant building and the barn, and was by Mrs. Koch seen to return from the direction of St. Mary's avenue to the vicinity of said building about 5:30 or 6 o'clock.

But the witness, of all others, best qualified to speak from a personal knowledge of the movements of deceased that afternoon and evening was her brother Willie, who testified that subsequent to his return from Booker's he was the bearer to her of a message from the accused which amounted to a request for her to meet him, the accused, at the vacant building. In view of the important bearing of this testimony of the last named witness upon the question at issue, we here set out the material part thereof:

He [accused] was over there and told me. He said, "I have got something to tell you," and I said, "Tell it out." He said: "I will give you a nickel if you won't tell anybody. Don't tell it to your mother. Just keep it to yourself," and a man came along and talked to him a while, and he said, "Now remember, and don't tell;" and he told me to go up and tell Ida to come down, he wanted to see her; and I asked what he wanted to see her for, and he said he wanted to see her a minute; and I went

up and told her to come down, and she said she would come down in about ten minutes; and then I come down. * * * I said, "Hello;" and he began to tell me what I did tell you, and then he said, "I have got something to tell you;" and I said, "Tell it out;" and he said, "Sure you won't tell anybody,—your mother or any living soul?" and I said, "All right;" and then a man come back, and stopped and talked awhile; and I said, "Tell me;" and he said, "Now, won't you ever tell nobody?" And then we walked around the old house, and he told me to go up and tell Ida.

Q. What old house?

A. Where she was found.

Q. You saw him go around there?

A. Yes; I walked with him.

Q. Where did you leave him?

A. Down there by that old house.

Q. Now, did you go and tell Ida?

A. Yes, sir.

Q. Where did you find Ida at that time?

A. Up home; and I called her out, and mamma told her to go and see what he wanted, and she said, "I'll be down in about ten minutes."

Q. And then what did you do,—what did George [the accused] tell you when you told him that?

A. I told him, and we had had some money that he gave me and Ida; and he told me, "Here is a penny to go and get me some taffy;" and I went over and got it, and between 5 and 6 o'clock I was coming back, and Ida came down and said she was going over to Martin Booker's.

Q. When you came back from telling Ida, Morgan wanted to see her, where did you find Morgan?

A. Down in the house there.

Q. Found him in the house?

A. Yes, sir.

Q. In this old house?

A. Yes, sir. * * *

Q. Where were you? Which side of the house did you go on?

A. Out doors. I didn't go inside. I ran to see where he had gone; and then I looked in that second window and just got in time to see him jump into the closet, and said, "What are you hiding from?" and he said, "I ain't hiding." * * *

Q. Where was he when you asked him, "What are you hiding from?"

A. In the little closet where she was found.

We quote also as bearing upon the same subject from the testimony of Mrs. Gaskill, who, after stating that the deceased went out to play about 4:30 P. M., continued:

Q. How long was she out to play when she went out about 4 or half past 4 o'clock?

A. Well, as near as I can guess, it must have been an hour.

Q. So that she must have come back in the neighborhood of 5 or half past 5?

A. Yes, sir.

Q. Is that right?

A. I think so; she was home before half past 5. * *

Q. How long was she in the house before she left the last time to go to Martin Booker's?

A. Why, about half an hour. Between the time she was out to play and came in, she stayed with me about half an hour.

Q. Stayed about half an hour in the house before she went the last time?

A. Yes, sir.

The prosecution was conducted upon the theory, evidently accepted by the jury, that deceased left her home, as narrated above, for the double purpose of conveying her mother's invitation to Booker and of meeting the accused in response to his request. It was, in short, contended by the state that her little brother was made the unconscious instrument by means of which she was lured

to her destruction. In this connection should be mentioned another set of facts tending strongly to connect the accused with the crime charged. That he had been drinking to excess during that day is conceded by all. He had, as early as 3 o'clock P. M., according to statements made as a witness in his own behalf, visited a neighboring saloon as often as six or eight times, and had on each occasion taken one or more drinks of liquor. He was seen during the afternoon with a bottle of liquor in his possession. To Mr. Henning, a newspaper reporter, he stated that he drank that day a pint of whiskey in his room,—that he was in fact drunk; and to officers Haze and Hudson, by whom he was arrested at 3 o'clock the next morning, he said, referring to his movements the evening previous, that he had been drinking with some friends and did not exactly know what he was doing. He was found by the officers asleep in his rooms, and appeared to be greatly perturbed when aroused. The only clothing upon his person at that time was a white shirt, on the bosom of which was a spot of blood. There were bloody stains on the lower part of his shirt, and on both sides of the front opening of the pantaloons he is shown to have worn the day of the homicide. There was also blood under and around the finger nails and between the fingers of his left hand, while in one of his pockets was found a handkerchief which appeared to have been recently washed, still damp, and upon which were distinct traces of blood. Upon being asked for an explanation of the blood upon his clothing and his person, he professed his inability to account therefor. Afterward he claimed to have gotten blood on his hands and clothes while carrying dressed beef for one Murry, a butcher, the Saturday previous, and later explained the circumstance in question by saying that he first went to bed without removing his pants, and that during the night he became conscious of the fact that his nose was bleeding profusely; that the blood therefrom was running through his mustache and upon his face; that he

succeeded, without arising, in stanching the flow of blood by the use of his handkerchief; that he was a second time awakened by the same means, and with the same result, except that he arose and removed his pants and again immediately returned to his bed. Unfortunately, however, for that contention, the six witnesses who, at the time of his arrest, or very soon thereafter, critically examined his person, failed to observe any blood upon his face or other facts which would indicate nose bleeding. He was contradicted also by Mr. Murry, who testified that he [accused] handled no meat on Saturday, but was engaged in washing windows, scrubbing floors, and going of errands only. Mrs. Whitman, who lodged in a suite of rooms next to those occupied by the accused and separated therefrom by a narrow hallway, in which is situated a hydrant and sink, testified to having heard a scream about 7 o'clock of the evening in question, as of one in pain or terror, from the direction of the "old red house" on the opposite side of the street, or from the livery barn across the alley therefrom, and that shortly before 8 o'clock she heard the water running in the sink above mentioned; also footsteps of some person passing between that point and the door of the accused, four or five feet distant. The accused testified in his own behalf that he last met deceased about 5:30 P. M. on the sidewalk near Booker's door, from which point he went direct to the saloon above mentioned, and thence, after a stay of ten or fifteen minutes, immediately to his room; that a half hour later he called for his mail at a neighboring hotel, being absent from home a few minutes only; that on discovering that his clock had run down, he returned to the hotel to get the correct time, which proved to be twenty minutes before 7; that he returned at once to his room where he remained until the time of his arrest, and that he retired for the night not later than 8 o'clock. He was to some extent corroborated by William Thompson, who testified that he [witness], in company with Sanford and another, were pres-

ent when, about 7 o'clock P. M., the accused left his room for the avowed purpose of ascertaining the time of day, and to the return to his room of the latter within a short time, not exceeding ten minutes thereafter. The said Martin Booker, who had previous to the arrest of the accused, been taken into custody on suspicion of complicity in the homicide, and held (but whether as a party defendant or as a witness does not appear), testified on rebuttal that he did not see the deceased after her departure from his house in company with her brother, between 3 and 4 o'clock; that within thirty minutes thereafter he went out in company with a neighbor, one Titus, in search of rooms for the latter, and was thus engaged, with the exception of the time necessarily employed in caring for his team, until about 8 o'clock, when, on parting with Titus, he returned home for his supper; that at the conclusion of his meal he again left home, going with Titus, upon the invitation of the latter, to his rooms, from which he returned home between 9 and 10 o'clock, and immediately retired.

The foregoing partial analysis presents the salient features only of the evidence, omitting minor circumstances and matters of detail confirmatory of the principal facts, and which, as argued by the state, point with such unerring conviction to the guilt of the accused as to exclude every reasonable doubt thereof. It is, on the other hand, strenuously insisted by the accused that he was entitled to a verdict of acquittal on the grounds, first, that his proof of alibi was complete; second, that the circumstances in evidence point with equal force to Booker as the perpetrator of the crime charged. Extended comment upon the evidence is deemed unnecessary at this point, particularly in view of the fact that further reference to that subject will be required in another connection.

The test by which to determine the sufficiency of circumstantial evidence in criminal prosecutions is substantially as asserted by the state, viz., whether the cir-

cumstances tending to connect the accused with the crime charged are of such conclusive nature as to exclude to a moral certainty every rational hypothesis except that of his guilt. (*Casey v. State*, 20 Neb., 138; *Dreessen v. State*, 38 Neb., 375; *Davis v. State*, 51 Neb., 301.) It is the province of the jury to determine the circumstances surrounding the alleged crime, and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not include the guilt of the accused, the proof cannot be said to have failed. Accepting, therefore, as true the testimony of the state's witnesses, the evidence does, we think, point with such certainty to the guilt of the accused as to warrant the verdict found. While there was, it must be confessed, evidence strongly tending to contradict the witnesses for the state, and which, had it been credited by the jury, would doubtless have led to an acquittal, the question was largely one of veracity, as to which the verdict must, for the purpose of this proceeding, be accepted as conclusive.

Complaint is made of the overruling of the challenge for cause by the accused of John Grant and Peter Hill, called as jurors. It is shown that the juror Grant was excused by the prisoner in the exercise of his tenth peremptory challenge, and that he subsequently exercised his thirteenth challenge by excusing juror Kinsman. There is, however, nothing to indicate that he availed himself of his three remaining challenges, or that he was unable to excuse the jurors to whom the objection applied without exhausting his rights in that respect. He must, therefore, be held to have waived whatever error, if any, was committed in the overruling of his challenges for cause. (*Palmer v. State*, 4 Neb., 68; *Bohanan v. State*, 15 Neb., 209; *Burnett v. Burlington & M. R. R. Co.*, 16 Neb., 332; *Nowotny v. Blair*, 32 Neb., 175.)

Error is assigned in the excusing from the jury, as alleged, after the same had been selected and sworn, of one of the members thereof, thereby depriving the ac-

cused of his right of peremptory challenge with respect to the person selected in place of the juror so excused. It is shown by the transcript that on Saturday, November 30, the jury having been selected and sworn, an adjournment was taken until the Monday following, when upon the convening of court, and before the introduction of any evidence, proceedings were had which are thus recorded:

"It appearing to the court that since the impaneling of the jury in this case and their retirement to the jury room of this court in custody of bailiffs Savage and Williams, on the 30th day of November, 1895, Peter Kill, one of said jurors, duly empaneled and sworn to try this case, has become so violently sick and is now so indisposed as to be wholly unable to remain longer as a juror in this case without, in the opinion of the court, greatly endangering his life, and no evidence having as yet been introduced before the jury, the court upon its own motion hereby discharges said jury, the defendant in open court consenting and agreeing thereto.

"Whereupon the defendant and the state in open court, consenting and agreeing that a new jury shall be impaneled and sworn, and the trial of this cause proceed forthwith, and the defendant in open court agreeing to and waiving all objections to the other eleven jurors, who had been heretofore impaneled and sworn in this case, and James Collins having been selected and accepted as a juror in this case by the state and by the defendant, thereupon came the said persons, to-wit, * * * who, being selected and accepted by the state and by the defendant as a jury to try this case, are now duly impaneled and sworn according to law."

No question is raised of the power of accused to accept the jury as finally completed and sworn; and that the record quoted affirmatively shows such acceptance is expressly conceded. It appears, however, that on December 21, twelve days subsequent to the return of the verdict, a motion was interposed by accused for the correc-

tion of the record based upon affidavits of his counsel denying the acceptance of the jury by him, or in his behalf, and asserting that the action had on December 2 was over his express objection. But, so far as we are advised by the transcript, said motion was never called to the attention of the district court or a ruling had thereon, and we are now in effect asked, in a strictly collateral attack, to discredit the record, the highest and most authentic evidence of judicial proceedings. It is a fundamental rule, applicable to all appellate proceedings, that the record of the trial court, when properly authenticated, imports absolute verity. (*Worley v. Shong*, 35 Neb., 311; *State v. Hopewell*, 35 Neb., 822; *Dryfus v. Moline*, 43 Neb., 233.) If such record be partial or incorrect the remedy is by means of appropriate proceedings to secure a correction thereof in the lower court. (*Omaha Loan & Trust Co. v. Hogeboom*, 47 Neb., 7.)

It is assigned as misconduct of the trial court that the judge, on the afternoon of December 4, announced that the state would be required to close its case in chief before adjournment for that day, whereupon the county attorney protested, saying that he desired to call fifteen or twenty additional witnesses; to which the judge responded that he "did not care if the state had five hundred witnesses, he had made up his mind that it must close that night, and it would have to be done." Such statement, it is argued, must, by the jury, have been construed as an intimation that the state was entitled to a conviction upon the evidence already produced, and accordingly prejudicial in the highest degree to the accused. Of this assignment it may be said that it is extremely doubtful if there exists any foundation therefor in the record. Indeed, we should, if it were necessary to determine that question, feel constrained to hold that the affidavits upon which it rests are not included in the bill of exceptions allowed by the district judge. But, assuming the question to be presented by the record, the contention is without merit since prejudice to the defend-

ant, in a criminal prosecution, will not, as a matter of law, be presumed from the exclusion of witnesses for the state. The trial court may be, and in practice frequently is, required to place a limit upon the time for the production of evidence, and the exercise of such a discretion is not, in the absence of an abuse of power, the subject of review.

Among other matters testified to by the officers who searched the room of accused at the time of his arrest, was the finding of a wash basin containing water, and on the under side of which were spots of blood. With the apparent purpose of explaining that circumstance, accused testified on his own behalf to the purchase, on the Thursday preceding his arrest, of some fish, which, on his return home, were placed in the basin above described, and that he subsequently cleaned said fish in the presence of William Thompson on a table in his room, after which he washed his hands in said basin, which statement was, as regards the purchase and cleaning of the fish, corroborated by Thompson. The state in rebuttal, having offered expert evidence tending to prove that the stains on the inside of the accused's pants could not have been produced by blood of the fish, objection was interposed by the defense, when the following conversation ensued:

"Judge—There is no testimony before the jury that a drop of blood got off those fish and onto his [accused's] clothes.

"Mr. Baldrige (for the state): * * * I move to strike from the record all testimony as to the purchasing, cutting, and cleaning of fish on this table by the defendant.

"Judge: When the question was up before * * * I held that he might show the cutting of the fish, but, as I say, there is not a semblance of testimony that a drop of blood * * * from those fish got on the clothing of the defendant, and all the evidence about the fish is wholly immaterial for the reason that it is not connected.

"Mr. Baldrige: * * * Then my motion is renewed.

"Judge (addressing counsel for defendant): If you wish to recall the defendant and have him swear * * * that there was blood of those fish on his clothes, I will allow you to do it. Otherwise I will take the testimony from the jury.

"Mr. Patrick (for defendant): We do not desire to recall him.

"Judge: The ruling will be that the testimony in regard to the cutting and cleaning of the fish on the table will be stricken from the record as wholly immaterial."

To the striking out of such testimony the accused excepted, and the ruling in that regard is now assigned as error. It is not at this time claimed for the testimony stricken that it tended in any degree to explain the blood on the person or clothing of the accused. Counsel insist, however, that it was admissible as explanatory of the blood found upon the wash basin above referred to. The writer was from first impression inclined to that view, on the ground that such testimony might be said to bear, although remotely, upon that question. But we are, from a more careful scrutiny of the record, satisfied that it was wholly irrelevant to the issue, and that the court did not err in striking it out, since, as appears from the foregoing quotation, the motion and ruling embraced the testimony only so far as it relates to the cleaning of the fish, and not such parts thereof as tended to prove their contact, direct or indirect, with the basin.

It is alleged that the county attorney was guilty of misconduct in secreting the witness Thompson. The evidence upon which that assignment rests is that on December 5 the witness could not be found when it was sought to call him in behalf of the defense, and that by direction of the county attorney he remained in the office of the latter throughout said day. Of the several answers to the argument advanced in this connection it is sufficient to mention one, viz., that the witness named

was subsequently called and examined by the accused, who cannot now be said to have been prejudiced by the action complained of.

Exception was taken to certain instructions given by the court on its own motion, the first of which relates to the manner of defining murder as charged in the separate counts of the information. Referring to the first count, it is said in paragraph No. 3: "The crime charged in the first count against the defendant is murder in the first degree. Murder in the first degree as charged in said count is thus defined by statute: 'If any person shall purposely, and of deliberate and premeditated malice, kill another, every person so offending shall be deemed guilty in the first degree. * * * The crime of murder in the first degree has three elements, to-wit: First, the killing of a human being; second, the killing must have been purposely and intentionally done; and third, the killing must have been done of deliberate and premeditated malice.'" The foregoing is followed by paragraphs defining in apt language murder in the second degree and manslaughter. And paragraph No. 12, which refers to the second count of the information, reads as follows: "The crime charged in the second count is thus defined: 'If any person in the perpetration or attempt to perpetrate any rape, kill another, every person so offending shall be deemed guilty of murder in the first degree.' Under the law, to warrant a conviction of defendant of the crime charged in the second count of the information, the state is not required to prove that the act of killing was done purposely and of deliberate and premeditated malice. The facts necessary to be established by the state by evidence beyond a reasonable doubt to warrant a conviction of the crime charged in the second count are, that the defendant in perpetrating or attempting to perpetrate a rape upon the said Ida Gaskill did choke, suffocate, or strangle her, the said Ida Gaskill, and of which choking, suffocation, or strangling by defendant she, the said Ida Gaskill, then and there

died." It is said in criticism of these instructions, first, that the accused was entitled to have section 3, Criminal Code, given to the jury as an entirety, instead of fragmentary parts thereof arranged in the order which, in the opinion of the trial court, the legislature should have adopted; second, that they are in substance vicious, since, as claimed, they exclude from the consideration of the jury, in connection with the second count, the lower degrees of homicide, and authorize a conviction for murder in the first degree without proof of malice, or of a specific intent to kill. Respecting the first ground of criticism, it is sufficient that the course pursued was, to say the least, appropriate for the purpose of an orderly presentation of the issues, and fair alike to the state and the accused. The second criticism presents a question of greater difficulty, and to which attention will now be directed, viz., the meaning of so much of section 3, Criminal Code, as relates to homicides committed in the perpetration or attempted perpetration of the felonies therein enumerated. The language of the section in question is: "If any person shall purposely and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison or causing the same to be done, kill another * * * every person so offending shall be deemed guilty of murder in the first degree." In *Henry v. State*, 51 Neb., 149, it was held that the killing of a human being while the slayer is engaged in the perpetration or attempted perpetration of either of the designated felonies is, by force of the statute quoted, murder in the first degree. But what is there said may, in view of the fact that the conviction was for murder in the second degree, only be regarded as *obiter*, which fact, in connection with reasons hereafter appearing, has led to a re-examination, on our own motion, of the subject in the light of authority. It was held in *Robbins v. State*, 8 O. St., 131, that, while the terpitude of the felonious act is, in the exceptional cases mentioned

in the statute, made to supply the place of deliberate and premeditated malice, the purpose to kill applies to each of the several classes of murder in the first degree, and is an essential element thereof. That case was, it should be remarked, decided eighteen years previous to the adoption by this state, in 1873, of the Ohio criminal code, and should be accorded due consideration in giving effect to the statute. There exists, notwithstanding the many adjudications in point, some diversity of opinion respecting the effect of constructions placed upon statutes previous to their adoption in other jurisdictions. Such a construction, it is sometimes said, becomes, upon the enactment of the statute by another state, an integral part of the act itself, having the force and effect of a legislative command. However, the more rational view, and the one sanctioned by authority, is that, except as applied to English statutes in force in this country at the time of the war of the revolution, the effect of such previous constructions is the same as of decisions by courts of last resort having jurisdiction of the particular controversy. (*Cathcart v. Robinson*, 5 Pet. [U. S.], 264.) The Ohio case must, therefore, be regarded as a construction of the statute, to be ignored or rejected only for reasons which would require the overruling thereof had the decision been pronounced by this court, and in that light it will now be examined. That case was decided by a bare majority of the judges, Swan and Brinkerhoff joining in a vigorous dissenting opinion, and the doctrine there announced has not been, so far as we can discover, subsequently asserted by that court, while it may be said to stand alone as an exposition of our own and cognate statutes. In *Brown v. State*, 7 Ore., 186, which was a prosecution for murder in the first degree under a statute in substance identical with ours, the reasoning in *Robbins v. State* was examined and rejected as wholly unsatisfactory, and the statute held to mean that whoever, while in the commission of or attempt to commit any rape, etc., kills another shall be deemed guilty of murder

in the first degree. In *Buel v. People*, 78 N. Y., 492, it was held murder in the first degree to cause the death of a female, although unintentionally, while engaged in the commission of a rape upon her person, under a statute declaring the killing of a human being to be murder in the first degree when perpetrated in the commission of any felony. In *People v. Johnson*, 110 N. Y., 134, and *People v. Wilson*, 145 N. Y., 628, homicide committed in attempting to escape from custody was held to be murder in the first degree, such attempt, by statute, being declared a felony. In *State v. Hopkirk*, 84 Mo., 278 (overruling *State v. Earnest*, 70 Mo., 520, and *State v. Hopper*, 71 Mo., 425), and in *State v. Miller*, 100 Mo., 606, it was held proper to charge that whoever kills another in the perpetration of one of the enumerated felonies is guilty of murder in the first degree. And Stephen, J., in *Reg. v. Serne*, 16 Cox's Crim. Cas., 311, after holding death resulting from a known dangerous act, done in the commission of a felony, to be murder, makes use of the following illustration: "Suppose that a man intending to commit a rape upon a woman, but without the least wish to kill her, squeezed her by the throat to overpower her, and in so doing killed her, that would be murder. * * * That kind of a crime does not differ in any serious degree from one committed by using a deadly weapon, such as a bludgeon, a pistol, or a knife. If a man once begins attacking the human body in such way he must take the consequences if he goes further than intended when he began." (See, also, *State v. Gray*, 19 Nev., 212; *People v. Mooney*, 2 Ida., 23; *People v. Greenwall*, 115 N. Y., 54; *Moynihan v. State*, 70 Ind., 126; *Robertson v. Commonwealth*, 88 Va., 900; *Reddick v. Commonwealth*, 33 S. W. Rep. [Ky.], 416; *Graves v. State*, 45 N. J. Law, 203; *People v. Nichol*, 34 Cal., 211.) The authorities here cited serve to demonstrate the fallacy of the argument employed in *Robbins v. State* as respects the grammatical construction of the statute, as well as the policy and purpose thereof, and our examination of the subject has suggested no

sufficient reason for adhering to a construction alike exceptional and obviously unsound.

The next assignment relates to the giving of instruction No. 13, viz.: "The crime of murder in the second degree and manslaughter are not included in the crime charged in the second count of the information. There are only one of two verdicts that can be rendered by the jury upon the second count under the law and the evidence, to-wit, that you find the defendant, George Morgan, guilty of murder in the first degree in manner and form as charged in the second count, or that you find the defendant, George Morgan, not guilty." The jury were by the foregoing, in effect, told that both a purpose to kill and the condition of mind essential to constitute murder in the first degree are incontrovertibly presumed from the crime of rape, in the perpetration of which the homicide is alleged to have been committed,—a proposition plainly implied from the instructions previously read, and which, as we have seen, is abundantly supported by authority.

By instruction No. 14 the jury were advised that if the accused, being eighteen years of age, caused the death of the said Ida Gaskill, a female child of the age of eleven years, in manner and form as charged in the second count of the information, the crime would be murder in the first degree, although the jury might believe that the sexual act, or the attempt thereto, was with the consent of the said deceased. But the crime when committed upon a child within the statutory age is, in this state, none the less a rape because done with her consent. (*Davis v. State*, 31 Neb., 247; *Head v. State*, 43 Neb., 30.) But if we assume the statute to refer to rape as originally defined, whereby the age of consent was ten years or upwards, the instruction could not have prejudiced the accused, since there is no evidence whatever tending to prove consent on the part of the deceased.

Exception was taken to the instructions Nos. 15 and 16, to the effect that the jury would be warranted, should

they find the facts as herein stated, in concluding that a rape had been perpetrated upon the person of the deceased and that she had by her assailant in the perpetration of said crime been choked to death. It was held in *Heldt v. State*, 20 Neb., 492, error for the trial court to assume the existence of a material fact, although there is no conflict in the evidence, on the ground that it is the province of the jury to judge of the credibility of witnesses. But in *Hill v. State*, 42 Neb., 503, it was held, following 1 Bishop, Criminal Procedure, 979, not error for the court to assume the existence of a fact which the accused has himself treated as proved. Counsel for the accused in this case, as we have seen in their oral argument, expressly conceded the *corpus delicti*, and should not, therefore, be heard to complain of the charge of the court with respect to that subject.

Particular stress is laid upon the objection to instruction No. 18, which is here set out: "Evidence is either direct and positive or presumptive and circumstantial. Evidence is direct and positive when the very facts in dispute are communicated by those who have had actual knowledge of them by means of their senses and where therefore the jury may be supposed to perceive the fact through the organs of the witnesses. It is presumptive or circumstantial, where the evidence is not direct, but where, on the contrary, a fact which is not directly and positively known is presumed or inferred from one or more other facts or circumstances which are known. The state claims that it has connected the defendant with the crime alleged in the second count of the information, not by direct and positive evidence, but by what has been herein defined as presumptive and circumstantial evidence. That is, the state has offered no evidence of a witness or witnesses who saw the act that is alleged in the second count of the information, which it is claimed resulted in the death of the said Ida Gaskill, but the state has offered the testimony of witnesses tending to prove a catalogue of facts and circumstances which

the state claims presumably and circumstantially connects the defendant with the commission of the alleged crime in said second count, and establishes his guilt of the crime charged beyond a reasonable doubt." The objection to the foregoing is two-fold, viz., (1) that it embodies two distinct and separate propositions which should, under the provisions of section 55, chapter 19, Compiled Statutes, have been separately stated and numbered; (2) that it must, by the jury, have been construed as an intimation that the state was, upon the evidence adduced, entitled to a verdict of guilty. The charge of duplicity is, we think, unfounded. But, assuming the criticism to be altogether merited, the objection on that ground was waived by the general exception. (*Smith v. State*, 4 Neb., 277.) Equally undeserved is the other objection. The instruction assailed is, indeed, a fair statement of the claim advanced in behalf of the state, and in nowise prejudicial to the rights of the accused.

Exception was taken to instruction No. 21, which reads as follows: "Before you can convict the defendant in this case upon either count of the information it must appear from the evidence beyond a reasonable doubt that the defendant, and not someone else, committed the crime charged. * * * It is not sufficient that the evidence shows that the defendant or somebody else committed the crime, unless the probabilities are so strong as to remove all reasonable doubt as to whether the defendant or some one else is the guilty party." The foregoing should be read in connection with paragraph 19, in which it was said that in order to authorize a conviction it was not alone essential that the circumstances should be in harmony with the guilt of the accused, but that they could not in the nature of things be true and the accused be innocent, also, that they must be absolutely incompatible, upon any reasonable hypothesis, with the theory of innocence, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused. These paragraphs, when read together, are in

harmony with the authorities above cited and correctly embody the rule applicable to the case at bar.

By paragraph No. 20 the jury were further charged as follows: "The law requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction, does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish guilt. It is sufficient if, taking the testimony altogether, you are satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged in the second count of the information. But if you have a reasonable doubt of the defendant's guilt because of the weakness of one link of the chain of circumstances relied upon by the state to establish the defendant's guilt, when taken and weighed by you with all the evidence in the case, it may fairly be said that a reasonable doubt exists in your minds, and you should acquit the defendant of the crime charged in the second count of the information." This instruction is vigorously assailed upon the ground that it authorizes a conviction although the proof may be insufficient to establish beyond a reasonable doubt one or more of the facts essential in order to warrant the conclusion of guilt,—a criticism we think wholly unmerited. The metaphor of the chain is, it must be confessed, inaccurate and misleading, inasmuch as the circumstances which the evidence tended to prove are not interdependent, *i. e.*, each depending for its support upon the others. But the fatal weakness of the argument advanced in this connection is that it ignores the distinction between facts relied upon to sustain the particular charge and those facts which are necessary to the conclusion sought to be established. It is permissible for the state to introduce evidence of any number of facts and circumstances tending to connect the defendant on trial with the offense charged. In so doing it may be said to rely upon each and all of the facts thus sought to be established, and if those actually proved beyond a reasonable doubt are suf-

ficient to exclude to a moral certainty every reasonable hypothesis, save that of the defendant's guilt, he is not entitled to an acquittal because of a failure of proof with respect to one or more of the facts thus relied upon. It may in truth be said that the many refinements and subtle distinctions attempted since the decision in *Commonwealth v. Webster*, 5 Cush. [Mass.], 295, has tended to confuse rather than to elucidate the subject under discussion. As a concise, and at the same time a comprehensive, statement of the rule, the following paragraph from the charge in that celebrated case has been rarely equalled, and never excelled: "The next consideration is that each fact which is necessary to the conclusion [of guilt] must be distinctly and independently proved by competent evidence. I say every fact necessary to the conclusion, because it may, and often does, happen that in making out a case on circumstantial evidence many facts are given in evidence, not because they are necessary to the conclusion sought to be proved, but to show that they are consistent with and not repugnant, and go to rebut any contrary presumption, * * * but not being necessary to the establishment of the main fact, if the witness was mistaken in the time, or in the fact itself, such failure of proof would not prevent the inference from other facts, if of themselves sufficient to warrant it. The failure of such proof does not destroy the chain of evidence. It only fails to give it that particular corroboration which the fact, if proved, might afford." Tested by that rule, the instruction given was quite as favorable to the accused as he was entitled to, and the exception based thereon is without merit. *Marion v. State*, 16 Neb., 349, relied upon to support the opposing view, has not been overlooked. We quite agree with what is there said, viz.: "If the word 'link' here refers to those circumstances which are essential to the conclusion, it is not a correct statement of the law." But whether such was the reasonable or necessary inference from the instruction there under consideration was not

decided, and we are unable to perceive wherein the views there expressed conflict with the conclusion reached in this case.

There are other assignments in the petition in error, but those upon which reliance is placed by counsel have been sufficiently noticed in the foregoing discussion. A patient examination of the record has satisfied us that there is therein no error prejudicial to the rights of the accused, and the judgment of conviction is accordingly affirmed and ordered to be executed October 8, 1897.

AFFIRMED.

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GEORGE H. JEWETT V. CLAYTON P. WILMOT.

FILED JUNE 3, 1897. No. 7169.

1. **Breach of Contract of Employment:** MEASURE OF DAMAGES. The measure of damage upon the refusal of an employer to permit his employe to proceed under a contract for specific work at an agreed price is the difference, if any, in favor of the latter between the stipulated price and the cost of completing the work as per contract.

2. ———: ———: EVIDENCE. Evidence examined, and *held* not to sustain a judgment for substantial damages.

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

*R. G. Strong, W. S. Cook,* and *J. E. Frick,* for plaintiff in error.

*Guy T. Graves* and *Jay & Beck, contra.*

POST, C. J.

This was an action in the district court for Thurston county for the breach of a certain contract, which is thus described in the petition below: "That on or about the 3d day of August, 1893, plaintiff entered into a verbal

contract with defendant to do all of the mason work necessary to complete the plastering of three certain brick buildings built by said defendant during the year 1893 at the Winnebago Agency, in Thurston county, and known as the school building, school dormitory, and laundry; that said work was to be three-coat work, and done in a good workmanlike manner, for which defendant agreed to pay plaintiff the sum of eight cents per square yard." It is therein further alleged that the defendant subsequently employed other parties to do the work described, thus violating his agreement with the plaintiff to the damage of the latter, for which he prays judgment in the sum of $400. The answer is a general denial. There was a trial of the issues thus joined, resulting in a verdict for the plaintiff below in the sum of $200. Upon the hearing of a motion for a new trial the plaintiff, in accordance with the order of the court, remitted the sum of $150, whereupon said motion was overruled and judgment entered against the defendant in the sum of $50, from which the latter prosecutes error to this court.

The ground upon which the recovery was permitted by the district court is not apparent from an inspection of the record. The jury were correctly advised that the measure of damage for the alleged breach of contract would be the difference, if any, in favor of the plaintiff, between the stipulated price and the cost of completing the work in question. The plaintiff was, according to the allegations of his petition, required to complete the plastering of the several buildings at the rate of eight cents per yard. Two witnesses were introduced by him, one of whom testified that the work described in the petition was worth ten cents, and the other that it was worth twelve and one-half cents per yard. The only other evidence touching the cost of the work was the testimony of the plaintiff himself, who figured a small probable profit on the venture upon the assumption that he would personally have done the work. To reach that result he

multiplied the number of yards of plastering by the price per yard, and from the product given deducted his probable expense for board and lodging and wages of an assistant, etc., but without making any deduction on account of his own time and labor. It should, in this connection, be observed that the reasons which induced the district court to order the remittitur above mentioned are not disclosed; nor are such reasons material for the purpose of this investigation, since the judgment for $50 can be sustained only by resort to the plaintiff's method of computation and by excluding from the probable cost of the work the value of his own time and labor. It was, however, as we infer, contended in his behalf that labor performed by a contractor personally upon the work in hand should not in such case be reckoned as an element of the cost thereof, and which presents the only question for consideration at this time.

There is, in principle, as well as on authority, a wide distinction between contracts for personal service and for the doing of specific acts. In the former case, unless the plaintiff, who has been discharged without sufficient cause, is able to secure other employment, the contract price furnishes the exact measure of his damage. In the latter class of cases the measure of damage upon the violation of the agreement by the employer is that asserted by the district court, viz., the plaintiff's probable profit,—in other words, the difference, if any, in his favor between the contract price and the sum it would have cost to complete the work. (Field, Damages, sec. 339; *United States v. Speed*, 8 Wall. [U. S.], 77; *Watson v. Gray's Harbor Brick Co.*, 28 Pac. Rep. [Wash.], 527; *Nilson v. Morse*, 52 Wis., 240; *Nash v. Hoxie*, 59 Wis., 384; *Corbett v. Anderson*, 54 N. W. Rep. [Wis.], 727; *Glaspie v. Glassow*, 28 Minn., 158; *Atkinson v. Morse*, 63 Mich., 276; *Scheible v. Klein*, 50 N. W. Rep. [Mich.], 857.) There is in this class of agreements no element of personal trust. The employe may, unless restricted by the terms of his contract, carry on the specified work in person or by his servants,

or may sublet to a stranger, being responsible for the completion thereof according to the terms of his undertaking. The cost of completing the work in such case is the sum total of the several elements thereof, including the value of the labor required, and any analysis of such cost which excludes the value of the labor, whether performed by the employe himself or another, is necessarily incomplete. It is sufficient without further elaboration that the evidence by no possible construction can be held to sustain a finding of substantial damage in favor of the plaintiff below. The judgment is, therefore, reversed and the cause remanded.

REVERSED.

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JOSEPH G. SLOAN, SHERIFF, V. WHERRY BROTHERS.

FILED JUNE 3, 1897. No. 7342.

1. **Review:** RULINGS ON EVIDENCE. A judgment will not be reversed on account of the admission of evidence upon a proposition not controverted in this court.
2. **Evidence:** SALES: FRAUD. It is not, in order to charge a purchaser of goods with the fraud of his vendor, permissible to prove that the latter about the time in question sold other goods of like character "at a great sacrifice" without reference to their value or the price realized therefor, such evidence being the mere conclusion of the witness and not the statement of any fact material to the issue.
3. **Witnesses:** ATTORNEY AND CLIENT: PRIVILEGED COMMUNICATIONS. An attorney or counselor at law is by statute in the state prohibited from disclosing any confidential communication properly entrusted to him in his professional capacity, without his client's consent in open court or in writing produced in court. (Code of Civil Procedure, secs. 328, 333.)
4. **Instructions:** ASSIGNMENTS OF ERROR. Where several instructions are grouped together in a single assignment of the motion for a new trial or petition in error, they will be examined so far only as to determine whether a single one was rightly given or rightly refused.
5. **Action to Recover Property Seized by Sheriff Under Writ of Attachment:** VERDICT FOR PLAINTIFFS. Evidence examined, and *held* to sustain the judgment complained of.

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

*Story & Story*, for plaintiff in error.

*Humphry & Raper, contra.*

POST, C. J.

This was an action of replevin in the district court for Pawnee county, in which the plaintiffs below, defendants in error, recovered judgment and the defendant prosecutes error.

The property in controversy was certain buggies and wagons, to which plaintiffs below claimed title by purchase from one Miller, to whom further reference will hereafter be made, while the defendant, as sheriff of Pawnee county, claimed through an order of attachment issued in a certain suit wherein Gardner Baker was plaintiff and Kirkwood, Miller & Co. were defendants. The facts essential to an understanding of the controversy are as follows: In the month of December, 1892, the said Kirkwood, Miller & Co., then engaged as wholesale dealers in wagons, buggies, harness, etc., in the city of Peoria and state of Illinois, consigned to said Miller, in the name of the Henning Buggy Company, at Pawnee City, in this state, a car-load of buggies and wagons, of which those here in controversy were a part. Said property was, by the railroad company, on its arrival at Pawnee City, delivered to Miller upon the consignors' order, and by the former offered for sale in a room previously rented for that purpose, but was a day or two later, to-wit, on January 5, 1893, closed out by sale of the entire consignment to the plaintiffs below. On December 31 the firm of Kirkwood, Miller & Co. closed its doors, having been insolvent for some time previous, and there is in this record some evidence tending to prove fraud on the part of said firm in the disposition of the stock. On Janu-

ary 6 the said Baker commenced an action against Kirkwood, Miller & Co. in the district court for Pawnee county on an acceptance of the latter in the sum of $5,000, in which he procured the issuance of an order of attachment, in obedience to which the defendant below as sheriff seized the property above described, then in the possession of the plaintiffs, Wherry Bros., and which was by the latter recovered under the order of replevin in this action.

The controlling question in the district court was, as indicated by the record, whether the plaintiffs below were, upon the evidence adduced, *bona fide* purchasers for value without notice of a purpose on the part of the said Miller or the firm of Kirkwood, Miller & Co. to defraud the creditors of the latter. The relation of Miller to the firm of Kirkwood, Miller & Co., whether that of a purchaser or a factor for sale, is not entirely clear from the record. Nor is such fact material since he, Miller, was, if the agent merely of the consignors, acting within the scope of his authority as such, and the plaintiffs below stand in no worse position than if they had dealt directly with Kirkwood, Miller & Co. Plaintiffs paid in cash the reasonable value of the property purchased, and the question of fraud and good faith was submitted to the jury by instructions quite as favorable to the defendant as he was entitled to upon the case as made, and the verdict must be accepted as conclusive in this proceeding.

Error is assigned in the admission, over the objection of the defendant below, of certain statements by Miller, the plaintiff's vendor, as evidence of the latter's title; but the only objection to the testimony offered for that purpose applies to matters respecting which there is at this time no controversy; hence the ruling assigned presents no grounds of complaint.

The defendant below offered to prove by a witness offered for that purpose that about two weeks previous to the transaction here involved said Miller admitted having recently sold in the state of Kansas at a great sacrifice a car-load of buggies consigned to him by Kirk-

wood, Miller & Co., which evidence was, upon objection by the plaintiffs, excluded, and which ruling is now assigned as error. The offer included the mere conclusion of the witness without the statement of any facts indicating the value of the property or the price for which it was sold, and was therefore rightly rejected.

Mr. Giffin was called in behalf of the defendant below for the purpose of proving certain admissions by one of the plaintiffs, D. E. Wherry, and upon his preliminary examination testified that the statements to which his attention had been directed were made by the plantiiff named for the purpose of securing the advice of the witness as an attorney and counselor at law, engaged in the practice of his profession, whereupon the evidence offered was, upon the objection of the plaintiffs, excluded. Such testimony is clearly incompetent (Code of Civil Procedure, secs. 328, 333), and the ruling with respect thereto is accordingly free from error.

It is insisted that the court erred in giving instruction No. 3 at the request of plaintiffs below; but the only reference to that paragraph in the motion for a new trial is in the fourth assignment thereof, which also includes those numbered 1, 2, 4, and 5. It is not pretended that the court erred in giving each of said instructions; hence, under the oft-asserted rule of this court, the assignment cannot be further considered.

Exception was also taken to the refusing of instruction No. 7 requested by defendant below; but so far as it can be said to correctly embody the law of the case, it had been in substance included in those given on the court's own motion.

We discover no error in the record, and the judgment will be

AFFIRMED.

## CAPITAL NATIONAL BANK OF LINCOLN V. AMERICAN EXCHANGE NATIONAL BANK OF CHICAGO.

FILED JUNE 3, 1897. No. 7390.

1. **Negotiable Instruments:** TIME OF PAYMENT: HOLIDAYS. When, uninfluenced by statute, a bill or note without grace falls due on Sunday or a legal holiday, it is payable on the business day next following.
2. ———: MATURITY: GRACE: SUNDAY. When grace on a note or bill expires on Sunday or other nonbusiness day, it becomes due, and should be presented for payment or acceptance on the latest business day within or before the period of grace.
3. ———: ———: ———: ———. The rule of the common law respecting the presentment of instruments with grace which expire on Sunday is not abrogated in this state by section 1 of the act of 1873 entitled "An act to designate certain days to be observed as holidays in respect to bills of exchange, promissory notes, and bank checks." (General Statutes, sec. 8, ch. 32.)
4. ———: ———: ———: ———. *First Nat. Bank v. McAllister*, 33 Neb., 646, overruled.
5. ———: ———. Effect of the act of 1893, amendatory of section 8, chapter 41, Compiled Statutes, not determined.

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

*Cobb & Harvey* and *G. M. Lambertson*, for plaintiff in error.

*Field & Holmes, contra.*

POST, C. J.

This was an action against the plaintiff in error as indorser of a certain promissory note for $2,000, bearing date of November 4, 1892, and payable at its banking house in the city of Lincoln ninety days after date. Said note, as counsel agree, matured February 2, 1893, and payment was demanded and notice of dishonor given February 4, the third day of grace, to-wit, February 5,

being Sunday. The foregoing transactions occurred previous to the act of 1893 amendatory of chapter 41, Compiled Statutes; hence the question distinctly presented is whether, under the statutes then existing, in case the last day of grace on a bill or note fell on Sunday, demand of payment on the last preceding business day was sufficient for the purpose of charging the drawer or indorser.

It is by section 8, chapter 41, Compiled Statutes, 1891, then in force, provided: "That the following days, to-wit: The first day of January, February twenty-second, and the twenty-second of April, which shall be known as 'Arbor Day,' the twenty-fifth day of December, the thirtieth day of May, and July fourth, and any day appointed or recommended by the governor of this state or the president of the United States, as a day of fast or thanksgiving, and when any one of these days shall occur on Sunday, then the Monday following shall, for all purposes whatsoever as regards the presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks, or promissory notes made after the passage of this act, be deemed public holidays, and be treated and considered as is the first day of the week, commonly called Sunday; *Provided*, that when any one of these days shall occur on Monday any bill of exchange, bank check, or promissory note made after the passage of this act, which but for this act would fall due and be payable on such Monday, shall become due and payable on the day thereafter." (*First Nat. Bank of Hastings v. McAllister*, 33 Neb., 648.) It was, by section 9, chapter 41, Compiled Statutes, further provided that the first Monday in September should "be deemed a holiday in like manner, and to the same extent as the holidays provided for in section eight." These provisions were examined in *First Nat. Bank of Hastings v. McAllister*, 33 Neb., 646, with the conclusion that the several holidays above enumerated are for the purpose of presenting for payment or acceptance

of commercial paper, and protest and notice of dishonor, grouped with Sunday, and that when the third day of grace falls on Sunday or a legal holiday presentment on the following Monday is sufficient. That decision has been the subject of much adverse criticism by the profession and business men of the state, and led to the adoption by the next legislature, in 1893, of an amendment of section 8 in terms providing that in every case in which the date of maturity or last day of grace of any negotiable instrument shall fall on Sunday or a legal holiday, it shall be lawful to make demand, etc., on the following business day. Of so conclusive a nature are the arguments directed against the rule asserted in the case cited that we have been constrained to re-examine the subject upon its merits, with a conclusion adverse to the decision therein announced. It may, in the first place, be assumed that a result so equivocal and incongruous as different days for the presentment of each note or bill could not have been within the contemplation of the legislature. Such a purpose is opposed to the primary conception of a promissory note, and should not, unless apparent from the language of the act or the necessary implication therefrom, be imputed to the law-making power. Another proposition as to which there can be no controversy is that the statute, like others of its class, must be construed in the light of the law-merchant. When, uninfluenced by statute, a bill or note without grace, or any non-negotiable instrument, falls due on Sunday or a legal holiday, it is payable on the business day next following, since the maker is not required to pay before the maturity of the debt. But with days of grace, which the law regards as an indulgence, the rule is different, and when grace on a note or bill expires on Sunday or other nonbusiness day, such instrument is due and should be presented for payment or acceptance the day preceding. "Thus," as said by Mr. Daniel, "if grace expired on Sunday it would fall due on Saturday, and if a holiday (such as Christmas day) fell on Saturday before

the Sunday of its maturity, it would fall due on Friday preceding. The latest business day within or before the period of grace is the day of payment, even though all grace be excluded." (1 Daniel, Negotiable Instruments, sec. 627; Story, Bills, sec. 220; 1 Parsons, Notes & Bills, 401, 402, 403; Randolph, Commercial Paper, sec. 1090.)

It remains to be determined to what extent, if at all, the rule of the common law has been abrogated or modified by statute in this state. The provision above set out was enacted as section 1 of "An act to designate certain days to be observed as holidays in respect to bills of exchange, promissory notes, and bank checks," approved February 18, 1873. (General Statutes, 427.) If we transpose the language therein employed in accordance with its grammatical sense, it will be found to provide, in substance, that certain enumerated days shall be deemed holidays, and when any of such holidays occur on Sunday the following Monday shall, for the purpose of the presentment and protest, etc., of commercial paper, likewise be deemed a holiday to such extent and for such purpose as is Sunday, the first day of the week, provided, that when any one of such holidays occurs on Monday, paper otherwise payable on said day shall become due and payable on the day following. Statutes of the character here involved will, according to the familiar rule, be strictly construed, and the common law held to be abrogated no further than expressly declared or than is required from the clear import of the language employed. Turning again to the statute in this case, we observe that it in terms modifies the common law rule only as respects instruments otherwise payable on holidays which occur on Monday, and which by the act in question become due and payable the day following. As indicated by the title of the act, the single subject of the section quoted is that of the designated holidays, and by no permissible construction thereof can the words "any one of these days" from their context be held to include Sunday. The effect of the amendment of 1893, being foreign to the question

here presented, is not considered in this connection. It follows, however, that *First Nat. Bank of Hastings v. McAllister, supra*, so far as it applies to instruments having days of grace which expire on Sunday, should be and is overruled. It follows, also, that the judgment of the district court, in conformity with this opinion, should be

AFFIRMED.

NORVAL, J.

I dissent from the judgment rendered, and adhere to the decision in *First Nat. Bank of Hastings v. McAllister*, 33 Neb., 646.

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## JAMES WILLIAMS ET AL. V. STATE OF NEBRASKA.

FILED JUNE 3, 1897. No. 9052.

1. **Robbery: EVIDENCE.** The prisoners, three in number, conspired to unlawfully extort money from the prosecuting witness, pursuant to which one of them, falsely pretending to be an officer, took the prosecutor into custody for an alleged misdemeanor, and demanded money, at the same time taking hold of the prosecutor by the collar, whereupon the latter took out of his pocket and delivered to his assailants the sum of $20, being at said time so frightened that he did not realize what he was doing. *Held*, Sufficient to sustain a conviction for robbery by putting in fear.

2. ———: ———. Evidence of certain collateral facts examined, and *held* inadmissible to support the charge of robbery.

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

*Albert S. Ritchie* and *Charles F. Tuttle*, for plaintiffs in error.

*C. J. Smyth, Attorney General*, and *Ed P. Smith, Deputy Attorney General, contra.*

POST, C. J.

Plaintiffs in error were by the district court for Douglas county convicted of the crime of robbery and sentenced to a term in the penitentiary, from which judgment they prosecute error to this court.

The first assignment of the petition in error relates to the sufficiency of the evidence to sustain the judgment. Among the facts which the state's evidence tends to establish are the following: On the 20th day of September, 1896, Thomas Thompson, a young man whose home was in Furnas county, in this state, arrived at the Union depot in the city of Omaha, where, while waiting for a delayed train, he was accosted by Stone, one of the defendants, and asked to take a walk in company with him, Stone. Having accepted the invitation, he proceeded with said defendant to what is described as the high school grounds, where the latter picked up a small padlock, remarking, "See what a curiosity I have found." At that point Wharton, another of the defendants, appeared and was soon engaged in a bet with Stone, the subject of their wager being the ability of the latter to open said lock without a key. Wharton, it seems, succeeded in opening the lock without difficulty, upon which he demanded and received from Thompson, who had consented to act as stakeholder, the sum of $10, being the amount of money wagered. At that time Williams, the third defendant, appeared upon the scene, representing himself as a police officer and accusing Thompson and his companions, Stone and Wharton, of violating the statute, or ordinance of the city against gambling. The further transactions of the party are thus briefly narrated by Thompson in his testimony: "Just then Williams stepped up and says, 'Gentlemen, what is the matter?' Wharton says, 'These two gentlemen (meaning Stone and I) are trying to rob me out of my money,' and Williams unbuttoned his coat and showed a police star and says, 'Gentlemen, I am an officer,' and walked up to

I and Stone and says, 'You are under arrest.' He led us up to the side of the building and says, 'Now, gentlemen; if you have robbed this fellow out of his money just fork that money up right away. I will take you to the police station any way.' So Mr. Stone commenced to plead, and said he didn't mean to cheat him out of his money. Williams says, 'I know such fellows as you. Just fork it up.' And Stone handed out some pocket-books and stuff and gave them to Williams, and then Williams asked me to give my money up. I told him I didn't have any. 'Well, give it up,' he says, and I took out my pocket-book with $2.82 and he took out of that $2.75 and held the pocket-book a while and held me by the shoulder. He was holding his hand on my shoulder when he spoke the first time, and the second time he shook me a little and said, 'You have got more money than that; fork it out.' I was getting scared and did not obey right away. He said something more, and I reached my hand in my pocket and took out $20 in greenbacks that I gave him. Then he says, 'Is that all?' I says, 'Yes, that is all.' So I commenced to plead that he would let my sister know if he was going to take me to the station; that my sister was at the depot, * * * and he gave me back my pocket-book with five cents and two pennies, and he says, 'You go down to the depot and stay until I come there. I will take these other gentlemen to the police station.' * * *

"Q. Why did you give the $20 to him at last?

"A. I was so scared I did not hardly realize what I was doing."

That the defendants were confidence men, engaged in a conspiracy to swindle Thompson they frankly admit. They further admit that their victim may have been induced to part with his money through fear of the threatened prosecution. The sufficiency of the foregoing evidence to warrant a conviction of the particular crime charged is, however, denied,—a question to which attention will now be directed.

Robbery is, by section 13, Criminal Code, thus defined: "If any person shall forcibly and by violence, or by putting in fear, take from the person of another any money or other personal property of any value whatever, with intent to rob or steal, every person so offending shall be deemed guilty of robbery and, upon conviction thereof, shall be imprisoned in the penitentiary not more than fifteen years and not less than three years." It is said that "The fear of injury to the person is that which is commonly excited on the commission of this offense, and where property is obtained by this means, it will amount to robbery, though there be no great degree of terror or affright in the party robbed. * * * And it is not necessary that actual fear should be strictly and precisely proved, as the law *in odium spoliatoris* will presume fear where there appears to be a just ground for it." (2 Russell, Crimes, 113*; *Long v. State*, 12 Ga., 293.) In *State v. Carr*, 43 Ia., 418, it was held not essential to the crime of robbery by the means here charged that the violence used be such as to put in fear a man experienced in the ways of the world. And in the instruction therein approved it was said that if the defendants took hold of the prosecuting witness, "and this was calculated to put such a man as he in fear, by means of which the robbery was effected, this is sufficient." The statement of the injured party, a youth evidently inexperienced and unsuspecting, that he was induced to part with his money through fear, being "so scared," as he says, that he did not realize what he was doing, and while one of the defendants was holding him by the shoulder, without doubt tends to support the charge of robbery by putting in fear, and is sufficient to sustain the judgment of conviction. It is argued that robbery was not the purpose of the conspiracy, and that the defendants Stone and Wharton are accordingly not answerable for the act of Williams in extorting the money from the prosecuting witness. Whatever may have been the original purpose of defendants, it is clear that all were present, apparently aid-

ing and abetting in the commission of the act charged, and may be said to be jointly chargeable therewith.

The state was permitted, over the objection of defendants, to prove the finding in their rooms, in a distant part of the city, of certain blank checks upon banks in different parts of the country, a large revolver, a "flash roll," and other instruments suggestive of the confidence man. It was claimed for such checks and the "flash roll" that they tended to prove a unity of purpose on the part of the defendants and were admissible as evidence of a conspiracy by them, while the theory upon which the revolver was received in evidence does not appear. The attorney general has not, we observe, assumed to defend the ruling here assailed, and we are satisfied that it is indefensible, both upon reason and authority. The rule, says Mr. Greenleaf, "excludes all evidence of collateral facts or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute." (1 Greenleaf, Evidence, sec. 52.) The fact that the defendants jointly owned a revolver which was, at the time of the assault, in their room several blocks distant tends in no degree to characterize the transaction in question either as respects the force employed in order to effectuate their purpose, or the extent to which the prosecuting witness was actuated by fear in the surrender of his money. It may be said, too, of the other articles mentioned that, although they tend strongly to prove a purpose to defraud, they shed no light upon the real question at issue, and their admission in evidence was presumptively prejudicial to the rights of the accused. For the error here pointed out the judgment is reversed and the cause remanded.

REVERSED.

## GEORGE C. HAZELET ET AL. V. HOLT COUNTY.

FILED JUNE 3, 1897. No. 8977.

1. **Pleading.** The word "made," as used in a pleading, *held* to be equivalent to and to express the same meaning as "executed."
2. **Official Bonds:** BREACH: PLEADING. An official bond was copied in full in a petition immediately following an allegation of its execution and delivery. *Held*, To be a sufficient pleading of the covenants and promises of the obligors to the bond. The petition further held to sufficiently state certain breaches of the promises of the bond.
3. **County Clerk:** FEE BOOK: FEES: EXCESS. It is a duty in respect to which the statute is mandatory, that a county clerk shall keep a fee book and shall enter therein every item of fees received or earned by him in the manner and with the particular information in regard to it prescribed by statute; also to make a correct report, as required by law, of the same to the county board, and to pay, without demand, any excess received over and above the amount stated and which may be allowed by law, into the county treasury.
4. ———: FEES: EXCESS: ADJUSTMENT: FRAUD: RES JUDICATA. A county board, in its examination of reports of a county clerk, of fees received by him, and in the adjustment of the account between him and the county, acts ministerially; and if, through fraud or mistake, he is allowed to retain fees which he should not, such adjustment is no defense or bar to an action by the county to recover such fees.
5. ———: ———: ———: INTEREST. Interest may be recovered on such a claim and against the sureties in the bond, without a demand being made for payment of the principal, as it should have been paid into the county treasury without demand.

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

*J. C. Crawford* and *H. M. Uttley*, for plaintiffs in error.

*H. E. Murphy*, *W. R. Butler*, and *M. F. Harrington*, *contra.*

HARRISON, J.

At the general election held in Holt county in 1889 George C. Hazelet was elected county clerk of said county,

and subsequently there was executed and delivered by him as principal and the other plaintiffs in error as sureties a bond conditioned for his faithful performance of the duties of the office, which bond was approved. Hazelet, on the day of January, 1890, designated by law, assumed the duties of the office, and continued in the performance thereof until the close of the term, January 6, 1892. The present action was commenced by the county of Holt to recover certain sums alleged to have accrued in its favor by reason of breaches of the covenants or conditions of said bond. The county obtained a judgment in the trial in the district court, and Hazelet and his bondsmen have prosecuted error proceedings to this court.

The first point presented in the argument is that there is no sufficient statement of a cause of action in the petition; hence the judgment based thereon is not sustained and must be set aside. In this connection we are directed to the following portion of an allegation of the petition, viz.: "On the 23d day of December, 1889, the defendant George C. Hazelet, as principal, and the defendants Joseph S. Bartley, Milton Doolittle, Arthur C. Crossman, Howard Miller, C. N. Forney, Jacob Smith, Seth Woods, Arthur L. Morse, J. H. Colburn, Clarence H. Walrath, John Forrest, Charles L. Sturdevant, W. H. Hendrix, C. A. Jarvis, J. C. Purnell, and H. L. Putnam, as sureties, made and delivered to plaintiff an obligation in writing." It is claimed that it is not pleaded therein that the bond was executed by plaintiffs in error, that the word "made" has no such significance as to warrant its use in expressing the fact of the execution of the bond, and that it did not express it; therefore, the execution of the instrument was not stated, and the petition was defective for the lack of such statement. The use of the word "made" to set forth the execution of the bond is in exact compliance with the wording of a form for petition in an action on official bonds given in Maxwell, Pleading & Practice, page 202, form No. 123,—from which the form of the petition

in the case at bar was probably obtained, the pleader having apparently closely followed the plan and arrangement of such form. It is said in Black's Law Dictionary that "execute" means "To make; as to execute a deed, which includes signing, sealing, and delivery." "Make: To execute with the requisite formalities; as to make a bill, note, will, deed, etc." (Webster's International Dictionary; *Brown v. Westerfield*, 47 Neb., 399.) The criticism is one to which the petition is not open. It must therefore be overruled.

A copy of the bond was given in the body of the petition, and evidently relied on by the pleader as a statement of certain of the facts necessary to show a cause of action. This, it is argued, was insufficient. It is also urged that breaches of the conditions of the bond were not pleaded. The petition did contain a statement that the principal therein had been elected to the office, for the faithful performance of the duties of which the bond in question was conditioned; also that the principal and sureties executed and delivered the bond. The instrument, as copied in the petition, was to be construed as a part of it, and the conditions as therein contained were sufficient allegations of the covenants and obligations of the parties principal and sureties. In the opinion in the case of *Clement v. Hughes*, 17 S. W. Rep. [Ky.], 285, an action on a guardian's bond, there is the following statement: "In this instance the petition avers that the guardian executed bond with the appellants as his sureties, and then the bond is copied as a part of the petition *in hæc verba*. This was sufficient. Where the writing is copied, the covenant of the party, of course, appears, and it supplies the otherwise necessary averment as to what the obligor covenanted to do." "It is sufficient to set forth the very words of an instrument; and if it be so pleaded the court will judge of their legal effect." (*Elliott v. Roche*, 67 N. W. Rep. [Minn.], 539; *Grimes v. Cullison*, 41 Pac. Rep. [Ore.], 355; *Budd v. Kramer*, 14 Kan., 101; Maxwell, Pleading & Practice, 89; 1 Chitty, Pleading, 306; *Pefley v. Johnson*, 30 Neb., 529.)

There were allegations in the petition of the non-performance by Hazelet of acts which the conditions of the bond and the law required him as county clerk to do. These were sufficient to show breaches of the conditions of the bond. We conclude that the petition, liberally construed, as the Code requires, was not defective in the particulars designated and argued in the brief for plaintiffs in error.

The allegations of the petition as to which the jury awarded the county a recovery were that Hazelet had received for making road books and assessors' books, during the year 1890, $100 for preparing each set of books, and like sums for the performance of similar duties during the year 1891; that during the year 1890 he had received a fee of $2 for each of 179 certificates of incumbrances on property furnished to the sheriff in actions of foreclosure, preparatory to appraisements and sales, and in 1891 he had received $2 for each of 312 of such certificates; that he had not entered either of the sums received for making road and assessors' books on his fee book as fees earned and collected, and of the amounts collected for the certificates of incumbrances he had entered in the fee book but twenty-five cents of the sum collected for preparing and furnishing each one. By section 42 of chapter 28 of the Compiled Statutes it is prescribed that every county clerk whose fees shall exceed $1,500 per annum shall pay the excess into the county treasury. In section 43 of the same chapter it is made obligatory on certain officers, including county clerks, to make quarterly reports under oath to the county board, showing the different items of fees received, from whom, at what time, and for what service, the amount received since the last prior report, and the whole sum received for the current year; and section 44 of the chapter requires each of the officers referred to in the act to keep a fee book, in which must be entered each and every item of fees collected, showing in separate columns the name of the party from whom received, the amount received, the time, and for what service the fee was charged. "There is no room

for doubt, under the sections above referred to, that it is the duty of each county clerk to keep a fee book, and to enter therein every item of fees received or earned by him for official services, and to make an accurate report of the same to the county board. The statute in that respect is mandatory. It does not exempt any officer governed by its provisions from reporting all the legal fees by him collected, and the courts are powerless to relieve him from performing that duty." (*State v. Hazelet*, 41 Neb., 257.) The case from the opinion in which we have just quoted was one in which an application was made for a writ of *mandamus* to compel the respondent, who is a plaintiff in error in the case at bar, to enter in his fee book fees collected by him as county clerk of Holt county for preparing and furnishing to the sheriff certificates of incumbrances in appraisals of lands to be sold under executions and orders of sale, and it was determined in that case that the clerk must enter such fees in the book as provided in the statute, and generally that the county clerk must enter in the fee book all his fees. It is clear that it was the duty of the officer to enter the amounts in question in his fee book, except, as we shall hereinafter see, the item for preparing road books. In regard to the amounts received for the certificates of liens, it is not contended that this was done, but as to the sums for the assessors' and road books, which were amounts retained by the county clerk of the fees collected for other services as such officer, it is asserted that the duty of entering them in the fee book was performed. It appears that the entries made in respect to these amounts retained were on pages of the fee book where appeared quarterly statements, of one of which we will give a copy herein. It was as follows:

"Page 318 of the fee book kept by defendant G. C. Hazelet, marked 'Plaintiffs' Exhibit K.' March 31, 1890, to fees for the month of January, $461.20. To fees for month February, $387.95. To fees for month of March, $435.60. Total fees for first quarter, $1,284.75. Defi-

ciency, $123.72, the amount the clerk is entitled to credit upon the foregoing statement of fees as follows, to-wit: Clerk's salary three months, $375. Deputy's salary three months, $200. Assistants' salary for three months, $375. Postage and express, $58.47. Making assessors' books, $100. Total, $1,108.47.

"I hereby certify that the above is a correct abstract of the legal fees received by me and the disbursements made as county clerk of Holt county, Nebraska, for the quarter commencing January 2, 1890, and ending March 31, 1890, as appears from the records of my office.

"Dated this 31st day of March, 1890.

"G. C. HAZELET,
"*County Clerk of Holt County, Nebraska.*

"Subscribed and sworn to before me this 1st day of April, 1890. JOHN MCBRIDE,
"*Clerk District Court, and Seal.*"

In the one for the succeeding quarter appeared an entry of credit similar to the one in the foregoing copy, except that the one was for "making assessors' books," and the other "road books;" and the others with which we have to deal appeared in subsequent quarterly statements in similar form and in the same connections as credits claimed by the clerk and retained of fees collected. It was agreed that the fee books should not be sent to the supreme court, but remain in the office of the county clerk unless they were required in the supreme court in an examination of the questions to be decided. It was further agreed "that the items in dispute do not appear in such fee books upon any pages except the ones which are copied into this record as exhibits."

From the foregoing facts it is clear that the only entry of either of these items in the fee book was in the quarterly statement, and as a credit claimed, not as a fee collected. The county clerk was required by law to prepare and deliver the books to the assessors, and the county board was authorized to pay him for preparing the books

such sum as it deemed just and equitable. (Compiled Statutes, ch. 77, art. 1, sec. 48.) If allowed, it became a part of his fees, or salary received, to be entered in the fee book as a fee collected; entering it in the statement as a credit without also showing it as a fee collected was not a compliance with the statute, which required it to be entered in the fee book; and by the entry made in the statement and retaining the $100 for each year of fees which he had received, and the omission of the further and proper entry of the amount in the list of fees received the clerk effected the reception of the sum stated over and above $1,500, the amount which by law he was entitled to as fees or salary. The county clerk was required by statute to prepare what was designated in this record "road books;" it was made of his duties, but for so doing it was not provided that he should receive any compensation other or further than he was entitled to generally as fees of the office, therefore any sum which might have been allowed him for the performance of such duty would have been illegal and unauthorized, and the retention of the sum of $100 each year by entering it as a credit in his quarterly statement was without warrant of law, and was an appropriation of the fees to a purpose or payment not contemplated by law. The clerk's duties as an officer were prescribed by the law, and his maximum compensation or salary was fixed, and he must perform the duties for the compensation as provided. (*State v. Silver*, 9 Neb., 85; *Bayha v. Webster County*, 18 Neb., 131; *Heald v. Polk County*, 46 Neb., 28.) That the county board examined the accounts which contained these claims for credits, and apparently sanctioned the acts of the clerk in crediting to himself and retaining the amounts herein in controversy, did not constitute them allowances to the county clerk or bar the county of a right to recover them in this action. In its examination of the reports of the clerk, and adjustment of the accounts between him and the county, the county board acted ministerially, and not judicially. Their approval of the reports or accounts was

not a judicial determination of any of the questions or matters considered, nor was it so conclusive that if a mistake had occurred it could not be corrected.

There were mistakes in the settlements of the board with the county clerk, in that he had not entered in his fee book the fees received for the certificates of liens furnished to the sheriff, nor the amounts he retained as payment for the preparation of the assessors' books, and in that he retained of the fees collected, amounts which he claimed as credits which he asked for preparation of "road books." (*Kemerer v. State*, 7 Neb., 130; *State v. Roderick*, 25 Neb., 629; *Heald v. Polk County*, 46 Neb., 28; *Bush v. Johnson County*, 48 Neb., 1.) These were not claims filed against the county, allowed by the board, and no appeal taken from such allowance. Had they been, they would have come within the rule announced in *Sioux County v. Jameson*, 43 Neb., 265, *Heald v. Polk County*, 46 Neb., 28, and *Cuming County v. Thiele*, 48 Neb., 888, that "Where a claim is presented to a county board for its examination and allowance or rejection, in the examination of such claim the board acts judicially, and its order or judgment allowing or disallowing the claim is conclusive unless reversed in appellate proceedings." (*Sioux County v. Jameson, supra.*) Here fees were retained under guise of credits claimed, and improperly sanctioned by the board in the examination and settlement of the accounts. The approval of the board was not final. (*Kemerer v. State, supra; Heald v. Polk County, supra;* and other cases cited to the same proposition.)

It is argued that if the county was entitled to recover the principal sums, it should not have been awarded interest on them, as it was. That the rule, "Where money is paid to one, who receives it believing that it is his due, he is not liable for interest upon it before demand is made, and refusal to pay, nor until he shall have reason to be satisfied that he ought to repay it," is applicable, and as no demand was pleaded or proved, the county should not have recovered any interest. The money here was com-

posed of fees in excess of the amount which the clerk could legally retain, and which it was his duty, prescribed by law, to pay without demand into the treasury of the county. His retention of the money rendered him liable for it and interest on it. The recovery of the interest was from the date of the termination of the clerk's term of office. In this allowance there was no error.

No available errors have been presented; hence the judgment of the district court must be

AFFIRMED.

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## GEORGE C. HAZELET ET AL. V. HOLT COUNTY.

FILED JUNE 3, 1897. No. 9076.

1. **Official Bonds: PLEADING.** The questions raised and argued herein in relation to the insufficiency of the petition in the action are governed by the conclusions announced in an opinion in the companion case having the same title, and the conclusions need not be restated. (See *Hazelet v. Holt County*, 51 Neb., 716.)
2. **Unauthenticated Bill of Exceptions.** If a bill of exceptions is not authenticated by the certificate of the clerk of the trial court, it will not be examined in the supreme court.
3. ———: REVIEW. In the absence of a proper bill of exceptions, all assignments of error which require for their determination a reference to such a bill must be overruled.

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

*J. C. Crawford* and *H. M. Uttley*, for plaintiffs in error.

*H. E. Murphy*, *W. R. Butler*, and *M. F. Harrington*, *contra.*

HARRISON, J.

This action was instituted by the county of Holt to recover of George C. Hazelet, formerly county clerk of the county, and his bondsmen, certain sums which it was

alleged he had collected of fees as county clerk during a term of office of two years, commencing in the month of January, A. D. 1888, and retained in excess of the compensation fixed by law, and which excess he was by law required to pay into the county treasury. Issues were joined and as the result of the trial the county was given a judgment, to reverse which error proceedings have been prosecuted to this court for Hazelet and his bondsmen.

Counsel urge that the statements in the petition were insufficient to constitute a cause of action. This is one of two actions of a similar nature between the same parties which have been considered together, in part, and in one an opinion has been prepared in which the objection to the petition, that it did not state a cause of action, was discussed and determined. (*Hazelet v. Holt County*, 51 Neb., 716.) The point therein raised was the same as in the case at bar, and what was therein stated is equally applicable and pertinent herein and need not be repeated. Following the conclusion which was reached in that case the petition in this must be held sufficient.

The document in this record which is designated the bill of exceptions lacks the certificate of the clerk of the trial district court; hence is not authenticated and will not be examined. (*Andres v. Kridler*, 47 Neb., 585; *Oltmanns v. Findlay*, 47 Neb., 289.)

All of the further assignments of error presented in argument necessitate for their determination a reference to the bill of exceptions. As it is not properly before us, the errors, if any, do not affirmatively appear and must be overruled. (*Everingham v. Harris*, 51 Neb., 627; *Royse v. State Nat. Bank*, 50 Neb., 16; *Gray v. Elbling*, 51 Neb., 726.)

We may add here, however, that in the main, if not entirely, the questions in this case are identical with those discussed in the companion case in which an opinion is filed at this time, and the doctrines therein announced

are applicable and governing herein. It follows that the judgment of the district court must be

AFFIRMED.

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FRED W. GRAY, APPELLEE, V. GEORGE ELBLING, IMPLEADED WITH W. H. KENT, APPELLANT.

FILED JUNE 3, 1897. No. 7348.

**Unauthenticated Bill of Exceptions.** A bill of exceptions unauthenticated by the certificate of the clerk of the trial district court will not be considered.

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

*Good & Good*, for appellant.

*Frank Dean, contra.*

HARRISON, J.

This action was instituted by the appellee in the district court of Saunders county to foreclose a mechanic's lien which it was alleged had accrued in his favor and been perfected on certain property in the town of Wahoo, owned by George Elbling. Issues were joined of which there was a trial, in which Elbling was successful and was awarded a decree, which, on appeal by the lienholder to this court, was reversed and the cause was remanded to the district court, where Elbling filed an amended answer, and W. H. Kent, who was made a party defendant, filed a cross-petition or bill setting up the existence of a mortgage on the premises in his favor, also its priority as a lien over the mechanic's lien of appellee. There were some other changes in the parties defendant, made necessary by the death of George Elbling, the owner of the property, but these we need not particularly notice. As the result of a second trial in

the district court, the appellee was accorded a foreclosure of his lien and its priority to the mortgage of W. H. Kent was established, a foreclosure of the mortgage as a second lien on the property being part of the decree entered. The holder of the mortgage has appealed to this court, it being asserted that the proof did not show the lien of appellee to be the first, but did establish the priority as a lien of the mortgage of appellant. This is, in part, based on the argument that the trial court, over objections, admitted incompetent evidence, which, if not considered, as it could not be if the proper rules were applied, the evidence would not and did not sustain the finding of the court.

To determine the force of any and all the arguments urged would necessitate a reference to and an examination of the evidence preserved in a bill of exceptions. There is in the record what purports to be a bill of exceptions, but it is not authenticated by the certificate of the clerk of the district court; hence it is not before us for inspection, and it further follows that the objections to the decree of the district court must be overruled. (*Evvringham v. Harris*, 51 Neb., 627; *Royse v. State Nat. Bank*, 50 Neb., 16; *Andres v. Kridler*, 47 Neb., 585; *Oltmanns v. Findlay*, 47 Neb., 289.)

We will say further that what is designated the bill of exceptions does not appear to have been settled or allowed by either the trial judge or the clerk of the district court. There is a stipulation attached by which it was agreed that the clerk might settle and sign the bill, but it was not done. The decree of the district court is

AFFIRMED.

POST, C. J., not sitting.

## WHITFIELD SANFORD ET AL. V. LOUIS MODINE.

FILED JUNE 3, 1897. No. 7312.

1. **Sufficiency of Bill of Exceptions.** A bill of exceptions is sufficient if it contains all of the record of the proceedings to be reviewed necessary to explain the exception taken. (*Dietrichs v. Lincoln & N. R. Co.*, 12 Neb., 225.)
2. **Contracts: CROPS: MALICIOUS PROSECUTION: EVIDENCE.** The contract set forth in the opinion construed to place in the owner of certain land the title and ownership of the crops grown on the land which, by virtue of the contract, parties therein named acquired the right to plant and cultivate.

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

*Clark & Allen*, for plaintiffs in error.

*Simpson & Sornborger, contra.*

HARRISON, J.

The defendant in error instituted this action against plaintiffs in error to recover damages for an alleged malicious prosecution. As the result of a trial of the issues joined he obtained a verdict and judgment in the sum of $50. The case has been removed to this court by error proceedings.

The plaintiffs in error desired a review in this court of the action of the trial court in giving a paragraph of the charge to the jury, by which a contract in evidence was construed, and in preparing a bill of exceptions included therein the portions of the evidence in relation to said contract and no more. In settling the bill of exceptions the trial judge certified "That this, the defendant's bill of exceptions, contains all of the testimony adduced or offered by plaintiff and defendants on the hearing of said cause, touching the contract between the defendant Sanford and the plaintiff and the other Modines, all of the objections to its admission as evidence, all of the

rulings of the court on such objections, and all of the exceptions to such rulings taken and made at the time." Counsel for defendants in error objected to the allowance of the bill of exceptions on the ground that it did not contain all the evidence, and on other grounds which we need not specifically state. In section 309 of the Code of Civil Procedure it is provided that "No particular form of exception is required. The exception must be stated, with so much of the evidence as is necessary to explain it and no more, and the whole as briefly as possible;" and in section 311, which is in reference to the preparation and allowance of the bill of exceptions, it is prescribed that the draft of the bill "must contain all the exceptions taken upon which the party relies." The bill in the present case contained all the evidence which was necessary to explain the exception taken or to make clear the point which was to be presented. This was sufficient to fulfill the requirements of the Code; hence no further or more extended bill was essential. (*Dietrich v. Lincoln & N. W. R. Co.*, 12 Neb., 230.)

In the argument in the brief filed for plaintiff in error some complaint is made of paragraph No. 14 of the instructions. There was no assignment of any error to the giving of this; hence whether it was error to give it cannot be considered.

The paragraph of the instructions which is the main subject of the discussion in the brief filed is one numbered 6, given by the court on its own motion, in the following language: "That by the terms of the contract signed by Whitfield Sanford, N. P. Modine, and plaintiff introduced in this case in evidence, that the relation of landlord and tenant was created thereby for the year 1890, and that said Whitfield Sanford, by the provisions, terms, and conditions of such lease or agreement, had a lien upon all the crops grown upon the said leased premises for his rent, or to secure the payment thereof. That a sale of the property or crops raised thereon for the year 1890 by the Modines would not be a crime under our

statutes, but would subject the Modines to a civil liability only." The contract between the parties was as follows:

"This agreement made this 8th day of February, 1889, betwen Whitfield Sanford, party of the first part, and C. E. Modine, John Modine, and L. E. Modine, parties of the second part, witnesseth: That the party of the first part does agree hereby with the parties of the second part that they shall have full permission to till and cultivate the following described land, to-wit: the southeast quarter of section ten (10), and all the plowed land on the northeast quarter of section ten (10), in township thirteen (13), range five (5), E., in Saunders county, in the state of Nebraska, except such portion of the prairie as the party of the first part may desire to break, so far as the same may be done in a husbandlike manner upon their performing the conditions of this agreement on their part to be performed. That the said parties of the second part covenant and agree to and with the party of the first part, that they will till, and in all respects cultivate the land above described, during the cropping season of the year 1889 in a husbandlike manner and according to the course of good and correct husbandry; that they will not commit any waste or damage, or suffer any to be done; that they will keep the fences and buildings situate on the said land in good repair, reasonable wear thereof and damages by the elements excepted; that they will do, or cause to be done, all the necessary work and labor in and about the cultivation of said land; that they shall provide or furnish all the seed or seeds necessary to be sown or planted on said land; that they shall furnish all the implements, teams, wagons, farming tools, machinery and appliances requisite to the performance of their part of this contract; that they will do all the work necessary to be done in proper season on or about the said land in order to properly care for and preserve the timber, trees, shrubs, and bushes thereon in a good and husbandlike manner. Said party of the second part agrees to carry and transport all the pro-

ceeds and crops produced on the said land of every name, kind, and description to such place as the party of the first part shall direct in the village of Valparaiso until the party of the first part shall have received thereupon one hundred and seventy-five (175) dollars. Said party of the first part, in consideration of the party of the second part doing all the work and performing all the covenants and agreements on their part to be done and performed by the terms of this contract and the payment by the party of the second part to him of the sum of one hundred and seventy-five (175) dollars by raising and delivering said crops as aforesaid or otherwise by January 1, 1890, agrees to bargain, sell, grant, and convey unto the parties of the second part, their heirs and assigns, all that remains of the proceeds and crops produced on the said land of every name, kind, and description; and said party of the first part agrees that the payment of the sum of money at the time it becomes due as aforesaid shall act as such performance of condition that this contract shall then operate as a bill of sale of said crops and proceeds, provided that the said parties of the second part shall have performed the other conditions of this contract by them to be performed; but in no case shall the said parties of the second part have any interest in or ownership of any part of said crops and proceeds prior to the time full payment of the money agreed by them to be paid shall have been fully paid as agreed upon. Said party of the first part agrees that said parties of the second part may occupy the buildings situate on said land during the cropping season of the year 1889, and if they perform the agreements herein on their part to be performed then the said second parties shall have the use and occupancy of said buildings until March 1st, 1890.

"In witness whereof, the parties hereto have set their hands on this 8th day of February, 1889. The meaning and intent of the foregoing contract is that the party of the first part shall hold all of said crops until he realizes

one hundred and seventy-five (175) dollars from the same, and that thereupon he shall turn over the balance thereof to the parties of the second part as soon as, and upon condition that, they shall have fully performed their part of this agreement. The parties of the second part further agree to dig a well twelve feet deep on said land and curb the same upon condition that the party of the first part shall furnish lumber for curbing it and without further charge therefor. Settled for 1889 and for breaking done that year and the within named parties of the second part do hereby agree to work, cultivate and manage all of the two within named quarter sections of land for one year from and after March 1st, 1890, upon the same terms as stipulated in the within cropper's contract, except that they shall make all improvements they may need and all repairs at their own expense and deliver for the use of said Sanford as therein specified crops and proceeds of said land to the amount of two hundred and thirty dollars ($230), instead of one hundred and seventy-five dollars as per within contract. Dated this the 15th day of March, 1890."

As we read and understand the foregoing, call it a lease or a contract as you may please, or the parties to it landlord and tenants, or the latter croppers, the agreement was that the parties who worked the land, who planted, cultivated, and harvested the crops had no interest or ownership therein until such time as there had been the division of them contemplated by the express terms of the instrument. This was their agreement directly and plainly stated. There is no claim that it was for any reason as to this stipulation void or not enforceable, and as we know of none, we must accept the contract which the parties made for themselves. We cannot, by so-called construction, supplant it by a different one which would be a contract, not of the parties, but the workmanship of the court. The owner of the land was, by the agreement, the owner of the crops until the performance of the conditions required of the other

parties by the express terms of the agreement. In *Yates v. Kinney*, 19 Neb., 275, wherein the respective rights of the parties to a somewhat similar instrument were under consideration, the statement in the contract therein set forth in respect to the ownership of the crop being that the crop is considered the property of the first party, the owner of the land, until it is divided. Yates was the owner of the land, Kinney the lessee, and Carey one to whom Kinney had mortgaged the crops. The action was by Yates to enjoin the tenant and mortgagee from committing waste, and appropriating the crops to their own use. It was said in the opinion: "The question presented by the fourth assignment of error has been virtually decided by this court in *Dworak v. Graves*, 16 Neb., 706, in which it was held that a tenant might assign his lease or sell his share of the crop raised upon the leased premises without the consent of the lessor, unless prohibited by the terms of the lease, and that such assignment or sale would carry to the assignee or purchaser the rights of the lessee under the contract or lease. It would logically follow that the same rights or interests might be mortgaged. But it is insisted that, as by the terms of the lease the crop is considered the property of plaintiff until it is divided, a different rule would have to be applied, and that no such transfer or mortgage could be made which would not violate the property rights of plaintiff. It is evident that Kinney had some interest in the crops. The fact that the extent of that interest depended upon his compliance with the terms of his lease would not deprive him of the right to sell or mortgage it. By the terms of the mortgage, if by no other means of knowledge, Carey had notice that Kinney's interest was an undivided one and he was charged with notice of the rights of plaintiff. He could take no higher or greater title than Kinney had, and could assert no right as against plaintiff that Kinney had not." It seems clear from the foregoing authority and good logic and reason that whatever right or interest, if such it might be called,

was possessed by the defendant in error and parties jointly interested with him in the crops by virtue of the contract hereinbefore set out, it was what may be termed incomplete and not such as authorized them to retain possession, to sell or dispose of the crops, or to deal with them in any manner which would disturb or infringe upon the complete ownership and control of the plaintiff in error. It was no more than the right to call on him to deliver to them a certain portion of the crops when they had completed the performance of their agreements as contained in the contract.

In the case of the *Consolidated Land & Irrigation Co. v. Hawley*, reported in 63 N. W. Rep. [S. Dak.], 904, a contract in its terms and conditions very similar to the one in the case at bar was in question, the action being one in which the company had made a written agreement with one Bucholtz by which he was to work or till a farm owned by the company during the farming seasons of 1891 and 1892, and it was provided in the contract what share each party should finally have of the crops, but that they should "be and belong absolutely to the company until the division provided for in the contract should be made." It was stated, "This leaves only the question of the ownership of the grain, and this must be determined upon the legal effect of the written contract, there being no conflict as to the facts. Ordinarily the relations of these parties to each other would make them joint owners of the crop raised, but it was competent for them, by prior agreement, to determine what their relations to each other and the crops should be. There were no affirmative undertakings on the part of the appellant, but there were a number on the part of Bucholtz, of great advantage to appellant; and, presumably to secure the full discharge of these, it was agreed that 'the ownership, title, and possession of the crops * * * and the grain realized from the threshing shall be and belong to the party of the first part, absolutely, until a division thereof, as aforesaid, and until the said party of the first

part shall deliver to, and turn over to, the said party of the second part, on said farm, the three-fourths thereof.' These were proper subjects for agreement between the parties, and there can be no doubt as to their intention. Their legal effect, as declared in many cases, was to leave the legal title and control of the crops in the lessor until the lessee's covenants to him were fulfilled, or the crops divided. By their express stipulation they agreed between themselves that they should not be joint owners of the crops, but that the lessor should hold and own them until a division was made; and there is no pretense that such division had been or ever was made, or that appellant had turned over to Bucholtz any part of such crops. As already intimated, it is not important to name this instrument a 'lease,' or simply a 'contract,' or these parties 'landlord and tenant' or 'owner and cropper.' If there were no stipulations in the instrument by which their respective rights were fixed, then the law would have to determine the same, and, as a means thereto, would define their relations to each other; but the parties themselves have done this by an agreement so unequivocal in its intent and meaning that it must control, unless it was such an agreement as the parties, under the circumstances, were not allowed to make. No reason is suggested in argument, and none occurs to us, which would forbid such stipulation. Contracts or leases very similar in terms to this have often been construed as above indicated. (See *Esdon v. Colburn*, 28 Vt., 632; *Wentworth v. Miller*, 53 Cal., 9; *Lloyd v. Powers*, 4 Dak., 62; *Moulton v. Robinson*, 27 N. H., 550; 4 Am. & Eng. Ency. Law, p. 895, note.)" (See, also, *McClelland v. Scroggin*, 35 Neb., 536.)

It follows that there might have been a disposition of the crops by the defendants in error which, as to the rights of the owner, might, according to its intent, have been criminal in its nature. The construction given to the contract by the trial judge in paragraph 6 of his charge to the jury, and the conclusion therein drawn and stated,

was erroneous; its effect might have been to cause the jury to conclude that inasmuch as there could be no criminal liability, in the commencement of any action of a criminal character, the plaintiff in error must have been actuated by malice; hence it was calculated to prejudice the rights of plaintiff in error. The judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

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## CATHERINE PROPST V. CASS COUNTY.

FILED JUNE 3, 1897. No. 7317.

1. **Eminent Domain:** DAMAGES. If private property is to be appropriated to public use, steps must be taken in the manner prescribed by law to appraise the damages and provide for their payment.
2. ———: ———: HUSBAND AND WIFE: TRUSTS. A husband who had from the use of intoxicants become wholly, or partially, incapacitated for the transaction of business, conveyed real estate to his wife for the purpose of preserving it for the use and benefit of the family and to place it beyond his power of disposal that it might not be squandered or wasted. *Held*, That the title to the property was in the wife, and that in appropriating a portion of it to the use of the public for a highway, the county must provide for the payment of the damages to the wife; that there was no trust relation between the husband and the wife which would render his waiver of the damages caused by such appropriation a release of them available as a defense in an action by the wife against the county to recover the damages.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J. *Reversed.*

*A. N. Sullivan*, for plaintiff in error.

*H. D. Travis, contra.*

HARRISON, J.

On the 3d day of November, 1877, Martin Propst conveyed to Catherine Propst, his wife, the plaintiff herein,

certain land situate in Cass county, this state, the reason and purpose of the conveyance being, it is stated, to preserve the property for the use of the family, and to prevent it being squandered by Martin Propst, who had become so addicted to the use of intoxicants as to wholly or partially incapacitate him for the transaction of business. It appears that on the 25th of August, 1893, he was placed under guardianship on account of his incapable condition, produced by long continued excessive drinking of intoxicating liquors. The deed of conveyance was duly recorded, the date of its filing for record being December 27, 1877. During the early months of 1892, the proceedings terminating on May 18 of the last mentioned year, a public road or highway was located by the county board, a portion of it over and across the land to which we have referred, by which action some six acres of the land were appropriated to the public use. No damages were assessed or allowed in favor of plaintiff. A notice of the proceedings to locate the road was published in a newspaper of general circulation, but such notice was not seen or read by plaintiff, and did not come to her knowledge. It may be said that the evidence does not disclose that she had any actual notice of the location of the road until the actual appropriation of her land by the county, and it was agreed that she filed a claim for damages within a few weeks after she knew all the facts in regard to the proceedings to establish the road and its location. It was shown that Martin Propst, during the pendency of the proceedings, filed a claim for damages, which he subsequently withdrew and signified his waiver of any claim for damages; of such actions of Martin Propst the plaintiff had no knowledge at the time, nor until long afterward and near the date when she filed her claim. The claim which she made was disallowed by the county board, from which adjudication she appealed to the district court, where she was unsuccessful, and has presented the case to this court for review.

It is stated in the brief of counsel for the county:

"We concede that if the public received the benefit of the location of the road, it must bear the burden of compensation for the land taken, and if the plaintiff did not have actual notice of the appropriation of the land and actually consent to the appropriation of the land to a public use, that only the statute of limitations will bar a recovery for its reasonable value." It is agreed that notice of the location of the road, and to all persons to file claims for damages caused thereby, was duly published; also that plaintiff knew, when it was being done, of the opening of the road and its physical establishment; but, however these things may have been, it was the duty of the county, before appropriating plaintiff's property, to appraise the damages and make provision for payment. This was not done and she could, notwithstanding the time prescribed in the published notice had expired, file her claim for damages, and is entitled to recover just and fair compensation for the damages to her property. It is provided in section 21, article 1, of our constitution: "The property of no person shall be taken or damaged for public use without just compensation therefor." In regard to this provision it was said in the opinion in the case of *Livingston v. County Commissioners of Johnson County*, reported in 42 Neb., 277, the subject under discussion being the exercise of the right of eminent domain, or appropriation of the land of the individual to the public use in the location of a public highway by the commissioners, that "To give section 21 of article 1 of the constitution full effect it is necessary that a corporation which purposes to appropriate private property for public use shall take such steps as may be necessary to determine the amount of damages resulting from such appropriation, and provide payment therefor. This duty should be in no way dependent upon whether or not a claim for damages has been filed by the person whose property is to be taken. If the amount of damages assessed for the taking of the property is deemed by the property owner inadequate, he may make a showing of that inadequacy before

the county commissioners, who are authorized by section 26, chapter 78, Compiled Statutes, to increase the amount allowed by the appraisers, and thereafter may exercise his right of appeal; but in the first instance he is not required to take affirmative action as a condition upon which depends his right of compensation for taking his property for public use." In the decision in the case of *Hodges v. Board of Supervisors of Seward County*, 49 Neb., 666, in which the same subject was considered, it was stated in respect to the section of our constitution to which we have just alluded: "It requires that where private property is taken or damaged for public use just compensation must be ascertained and paid before the appropriation. That this rule applies to counties and municipalities exercising the right of eminent domain has been frequently asserted by this court, and it is too well settled to require discussion;" citing in support of the doctrine announced the following: *Schaller v. City of Omaha*, 23 Neb., 325; *Harmon v. City of Omaha*, 17 Neb., 548; *Hammond v. City of Harvard*, 31 Neb., 635; *Wagner v. Gage County*, 3 Neb., 237; *Zimmerman v. Kearney County*, 33 Neb., 620; *Pawnee County v. Storm*, 34 Neb., 735; *Welton v. Dickson*, 38 Neb., 767; *Livingston v. County Commissioners of Johnson County*, 42 Neb., 277.

It is further contended that the plaintiff had no other or further right or title in or to the land than that of trustee for Martin Propst, her grantor, and the waiver by him of any claim for damages was sufficient and operated an extinguishment of the claim. The deed to the plaintiff was a direct conveyance. There was no trust, either expressed or implied. It was made that she might have the title to the land, to hold and preserve it. The main purpose was to put it beyond the power of the husband, the grantor, to further convey, incumber, or deal with or about it. To allow the waiver of the claim for damages to be effective would be the destruction of the ends sought to be reached by the conveyance. The deed to plaintiff was of record. The county had full notice of

the title and in whom it rested. There was no right or title in Martin Propst which could render his waiver of claim for damages of any avail as a defense against this claim of the plaintiff.

The findings and judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

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## SCHOOL DISTRICT OF BEATRICE V. THOMAS P. THOMAS.

FILED JUNE 3, 1897. No. 7295.

1. **Building Contracts: RIGHTS OF SUBCONTRACTOR.** A subcontractor, between whom and the employer of the contractor there is no privity of contract, cannot, as a matter of right,—merely because employed by the contractor to perform a portion of the labor contracted for,—if not paid by the contractor, demand payment of the employer, and, on refusal, maintain suit against the employer therefor.

2. ———: ———: **ERECTION OF SCHOOLHOUSES.** A contract with a school district for the erection of two schoolhouses provided that estimates of the sums due the contractor be made by an architect as the work progressed and 85 per cent of such estimates paid at the time made and presented; 15 per cent of the amount of estimates to be retained by the school district for a stated period of time, for the expressed purposes of insuring the district that all claims of subcontractors and laborers or others be fully paid by the contractor; also to insure the faithful and full completion of the buildings according to contract. *Held*, Not to constitute the school district primarily liable to a subcontractor for the sums thus retained, nor to constitute the district a trustee of such funds for the benefit of the subcontractor, nor to authorize the subcontractor to interfere in a suit at law by him against the district, in the retention of such funds by it or application in the subservience of the purposes to which they were assigned by the contract.

3. ———: ———: ———: **BONDSMEN.** The contractor abandoned the work and his contract. His bondsmen took charge and management of the completion of the buildings and fulfillment of the contract, and an additional contract was entered into between them, the subcontractor, and the school district. *Held*, This latter contract became of force and binding on all parties, including the school district; also that it provided for payment of all subsequent estimates of amounts due on the buildings for work by a subcon-

tractor to be made directly to him, and this to apply to the whole sum of any and all such estimates, inclusive of the 15 per cent which was to be retained by the district under the original contract and by the original contractor under the contract of the subcontractor.

4. ———: ———: ———. The evidence *held* to show that during a short time the district had charge of the work on the buildings it had paid the defendant in error in full for all work performed and material furnished by him during such time. *Held, further*, That the evidence discloses that the extras, both labor and material, were included in estimates made during the progress of the work and paid for conformably to the terms of the contract, viz., 85 per cent at the times of estimates and 15 per cent retained.

5. **Excessive Judgment:** REMITTITUR. *Held*, That the verdict and judgment were $1,021.97 in excess of the true amount. Defendant in error is given leave to file a remittitur of said sum as of the date of the judgment, within a stated time; if condition is complied with, the judgment, as modified, to stand affirmed. On non-compliance with the condition, the judgment to stand reversed and the cause remanded.

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

*L. M. Pemberton* and *George A. Murphy*, for plaintiff in error.

*R. W. Sabin* and *Alfred Hazlett, contra.*

HARRISON, J.

During the year 1891 the plaintiff in error, the school district of Beatrice, entered into a contract with one W. C. Smith to erect for it two schoolhouses, the amount to be paid therefor, as expressed in the contract, being the sum of $14,605. W. C. Smith, at or about the same time, entered in a contract with the defendant in error by which the party last mentioned agreed to do all grading and excavating, also all stone and brick work necessary to be done in or about the erection of the two schoolhouses, and was to receive therefor the sum of $8,200. At sometime during the progress of the work by the parties on the schoolhouses, W. C. Smith abandoned the contract and absconded, and the completion of the work

was assumed by parties who had signed and become his sureties on a bond conditioned for a proper completion of the schoolhouses; but they did not finish the buildings. The district finally assumed the burden and completed them, availing itself of the assistance of defendant in error. This action was instituted in the district court of Gage county by defendant in error to recover the sum of $2,585.50, alleged to be the balance due him for services performed and material furnished on and for the buildings under the original contract; also while the bondsmen of Smith, the first contractor, were in charge of the erection of the buildings and while the district had the management. There was included in the amount claimed some items for extra labor and material aggregating $1,152.20. Issues were joined and as the results of a trial the defendant in error was awarded a verdict and judgment in the sum of $1,596.82. The school district asks a review in this court of the proceedings had during the trial.

During the progress of the work under the contract there had been labor performed and material furnished by defendant in error as subcontractor, on which estimates had been made by the architect and delivered to the main contractor, aggregating an amount of which the fifteen per cent retained by the school district was in total $817.50. This last mentioned amount was one of the items of the defendant in error's claim of which he sought a recovery in this action. One question to be settled is, could he assert and maintain this portion of his demand? It cannot be said that he was entitled thereto because of any contract with the district, for he had none with it. His contract was with Smith, the original contractor. By the terms of the contracts defendant in error was to receive payment for his services and materials from the contractor, and the contractor was to be paid by the school district. That a party contracts with one to perform labor and the one employs another to do the work does not authorize the latter after

performance as a matter of right to demand payment of the original party employer and on refusal maintain suit for it. (Clark, Contracts, pp. 508-511.) Neither can it be said that the retention of the amount of the estimates as they were made, presented, and in part paid, raised the right in the subcontractor to demand any part of such sum as his due because it had its source in labor performed or materials furnished by him; nor did the district become a trustee for the subcontractor and thus a right originate by which the subcontractor became vested with a claim against the district for such sum.

It is also argued that the rule "Where a party makes a promise to another for the benefit of a third person, such third person may avail himself of the promise and bring an action thereon, although the consideration did not move direct to him," is applicable and may be invoked by the defendant in error as against the school district. There were no portions or elements of the contract between Smith, the original contractor, and the district which can by any allowable process of construction be said to contain any promise by the district, made for the benefit of the subcontractor, on which he would be entitled to institute a suit against the district; hence the doctrine to which reference has been made is of no force here.

The agreement of the district with the original contractor to the extent it provided for the retention of the fifteen per cent of the amounts of estimates had several purposes, to insure the district against the claims of laborers and material men, that they should be paid by the contractor, also to enforce the completion of the buildings according to contract, all prior to the payment of the fifteen per cent retained. With the due course of fulfillment of either purpose, the defendant in error could not interfere in a direct suit at law, instituted by him against the school district. After the contractor abandoned this contract and departed this, so far as the record discloses, for another and unknown clime, his bondsmen

proceeded with the work under his contract, and at or about the time they assumed control, the following was executed and became of force, the subcontractor having insisted that if he continued in the performance of his contract in respect to the buildings, it must be arranged that he receive his pay directly from the school district:

"We, the bondsmen of W. C. Smith for the erection of the two schoolhouses in Beatrice, now under course of construction, hereby authorize and instruct T. P. Thomas, who has the excavation, stone and brick work from said Smith on said buildings, to go ahead with his part of said contract; and in consideration that said Thomas goes ahead and carries out his contract with said Smith, we agree to carry out the contract of said Smith with said Thomas, and as fast as the estimates are made upon the work of said Thomas, we authorize and order the school board of the city of Beatrice to pay the money on such estimates directly to said Thomas.

"Dated October 30, 1891."

On the instrument, over the signatures of all but one of the members of the school board, appeared the following: "We hereby accept the above order, but by doing so we do not in any manner release the bondsmen of said Smith, nor relieve them or him from liability on his contract or on his said bond." It is urged that this conferred the right on the subcontractor to collect the fifteen per cent, which had been retained by the school district, of the estimates made and paid in part as provided in the contract during the time the original contractor remained in charge. This, we think, is not tenable. The instrument, which we have just quoted, clearly refers to future and not past transactions, and could by no fair or even strained construction of its terms be given a meaning by which it could be said to be a direction or authorization by the bondsmen to pay the fifteen per cent due, or to become so on any of the past transactions to the subcontractor, and an agreement by the district so to do.

With regard to the other questions raised and argued

of and concerning the force and true import of the document which we have quoted, we will say that we are satisfied from the evidence that, although it lacked the signature of one of the trustees of the school district, that it became the contract of the district, or one by the terms and for the due performance of which the district was bound; and we are further convinced that the district was to make payments of all estimates in favor of the subcontractor, made after the execution and prevalence of this agreement, additional as it was to the original contract, and such payments to him were to include not only the first payment, or eighty-five per cent, but also the fifteen per cent of all such estimates, provided he completed all work and furnished all material contemplated by his contract.

Some labor was performed and material furnished by defendant in error after the bondsmen quit the work and the school district took charge of it. One of the questions presented is with reference to this part of the account and its payment, whether only eighty-five per cent or all of it. It is clear from the evidence bearing on this point that the whole of the account was paid.

It was also of the litigated quesions whether the extra labor and material performed and furnished by defendant in error were included in estimates made during the progress of the work, and payments therefor made under and conformably to the terms of the contract or were not so included and the whole sum due therefor remained unpaid to be recovered in this suit. The evidence in the record before us, whatever the fact may have been, establishes that extras, both labor and material, were included in the estimates made and for which there were settlements as the buildings progressed. There were methods of calculation within the evidence by which the jury could reach approximately the verdict rendered, each of which must have included the allowance to defendant ant in error of the $817.50, the fifteen per cent retained of the aggregate of estimates made, part paid to the original

contractor which should not have been figured in the verdict. There must also have been included the amount of the fifteen per cent retained of the total sum of the estimates made during the time the bondsmen of the contractor were managing and directing the work. This per cent of such estimates amounts to $517.50, which, with interest added to the date of the verdict, gives us the sum of $574.85, which is all that the defendant in error was entitled to recover under any allowable calculation warranted by the pleadings and evidence.

The verdict was for $1,596.82, which, we must conclude, was $1,021.97 in excess of the proper amount. The defendant in error may file a remittitur within forty days of the last mentioned sum, $1,021.97, as of the date of the verdict, October 17, 1893. If he does so, the judgment, as thus modified, is affirmed. If he does not comply with the above stated condition the judgment stands reversed and the cause remanded.

JUDGMENT ACCORDINGLY.

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## LOUIS GUTHRIE, ADMINISTRATOR, V. MISSOURI PACIFIC RAILWAY COMPANY.

FILED JUNE 3, 1897. No. 7283.

1. **Negligence: PERSONAL INJURIES: QUESTION FOR JURY: DIRECTING VERDICT.** On a question of negligence where there is a conflict in the evidence or the facts are left in dispute, or fair minds might draw different inferences or conclusions from the facts proved, it should be submitted to the jury; but where the facts are undisputed or there is no conflict in the evidence, and but one reasonable inference can be drawn from the facts, the question is one for the court.

2. ———: ———: **CONTRIBUTORY NEGLIGENCE.** Where it is clearly established that there has been contributory negligence on the part of an injured party which was the proximate cause of the injury, there can be no recovery therefor.

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

*E. M. Bartlett* and *James Hassett*, for plaintiff in error.

*B. P. Waggener*, *James W. Orr*, *A. R. Talbot*, and *Chris Hoeppner*, *contra.*

HARRISON, J.

This action was instituted by Lewis G. Guthrie, as administrator of the estate of George S. Guthrie, deceased, against the defendant company to recover damages for the alleged negligent killing of George S. Guthrie by the company at a street or highway crossing in South Omaha known as "Morrill's Crossing," on the 25th of November, 1892, when he was crossing the tracks with a team of horses and wagon and was struck by one of the company's engines and train of cars and was killed. Issues were joined and tried. At the close of the introduction of the testimony, at the instance of the company, the trial judge instructed the jury as follows: "The jury are instructed that the plaintiff has failed to make out or prove any cause of action in his favor against the defendant, and that the uncontradicted evidence conclusively discloses on the part of plaintiff's intestate contributory negligence contributing to the injury complained of. You will therefore return a verdict for defendant." A verdict was returned in accordance therewith. After the plaintiff's motion for a new trial was presented and overruled, judgment was rendered on the verdict. The plaintiff asks of this court the reversal of the judgment.

The arguments advanced in furtherance of the purpose of the error proceedings are all on subordinate questions or points of the main burden of complaint,—the action of the trial judge in instructing the jury to return a verdict favorable to the company. It is said that the evidence was conflicting, that the question to be determined was in regard to negligence, was one of fact for examination

and settlement by the jury, and not one of law for the court. To determine the force of this necessitates a review of the important and material incidents and occurrences at "Morrill's Crossing" on November 25, 1892, as disclosed by the evidence. There was testimony that tended to establish that the train of the company, by which George Guthrie was struck was at the time running at a rate of speed in excess of that allowed by the ordinance of the city of South Omaha, wherein the crossing was located. Let it be conceded that in this particular the company was negligent; we then have for consideration and determination the further query of whether there was contributory negligence on the part of plaintiff's intestate which bars this action. There was considerable testimony introduced on the subject of whether there were any cars standing on the switches at or near this crossing on the day and when the plaintiff's intestate was killed, which would obstruct the view of the tracks from the crossing in the direction from which the engine and train by which he was struck approached, also in relation to permanent objects which might have had a similar effect. The evidence in regard to there being any cars on the switches at the time was conflicting, but in contemplation of the vital facts as established by the testimony those become immaterial or without force in the adjudication of the main question presented. It was disclosed by the testimony that at "Morrill's Crossing" there were five tracks, three of which were sidetracks or "switches" and two main lines or tracks; of these the main line tracks were in the center, parallel and adjacent; to the east of them was situate one of the sidetracks, and on the west were two. The train by which Guthrie was struck was coming from the north, on the easterly of the two main line tracks. Guthrie was driving a team of horses attached to a farm wagon, was sitting on the spring seat, and coming in a northeasterly direction to the crossing, with the intention of going over the tracks, to do which he changed his direction from toward the

northeast to almost or quite due east. At this time J. H. Brush was driving a team hitched to a wagon south toward the crossing, and along between the track on which the train was approaching and the one sidetrack on the east, intending to turn when he reached the crossing and drive over the two main line tracks and the two sidetracks to the west side. He had reached the crossing and turned his team to the west, so that they were starting to the west and over the track on which the train was coming from the north. It was a cold day. He had on a buffalo skin overcoat, with the collar turned up over his ears, and evidently did not hear the train coming behind him. He had noticed Guthrie coming across toward him from the west, and when Brush was just starting over the easterly main line track, Guthrie, who was then on the second sidetrack, counting from the west, and with the one main line track between where he was and the track on which was the train, stopped his horses, stood up in his wagon, and motioning to Brush with one hand told him the train was coming, at which Brush turned his horses' heads to the eastward and backed them so that they, the wagon, and he were out of the way of the train. Guthrie, immediately after warning Brush of the approach of the train, started his team and struck, or struck at, one or both of the horses with the ends of the lines or driving reins, and attempted to go over the tracks before the coming train would reach the crossing, but did not succeed. The engine struck the wagon and one of the results was the killing of Mr. Guthrie. In its approach to this crossing the train came around a curve about two thousand feet distant therefrom, and the engineer on the engine saw both Brush and Guthrie very soon after leaving the curve, and, from what he noticed of their actions, concluded that Guthrie was aware of the coming train, and that Brush was not. When he saw the last named person turn his team toward the track as if to cross it, the engineer states that he applied the air to the brakes with full force, as it is done when, as he expressed it, an

"emergency stop" is desired. Just before this, and when about nine hundred feet distant from the crossing, he had given warning by blowing the whistle. When Guthrie had succeeded in calling Brush's attention to the train, and Brush had withdrawn his horses from the track and beyond danger of being struck, and these facts became apparent to the engineer, he released the brakes, turned on the steam, and commenced to increase the speed of the train. As Guthrie had prior to this time stopped, and been instrumental in warning Brush, to the knowledge of the engineer, the last mentioned person had at this immediate time been watching Brush and his actions, but on again directing his notice to Guthrie he discovered him in the act of urging his team over the tracks in front of the engine, then about 200 feet away. The engineer states that he did all that could be done to stop the train, but could not before it reached the crossing, struck the wagon, and passed beyond. It is clear from the material facts in the testimony, and as to which there was no conflict, that the plaintiff's intestate saw the approaching train and was in a place where he could not have been harmed by it; that for some reason, which the evidence does not show and which we cannot know, Guthrie concluded, after having stopped and warned Brush, and seen that he had taken heed of the notice and pulled back from the track, to risk the attempt to cross in front of the train, and in consequence lost his life. There was in this act such a want of ordinary care as constituted negligence on his part which precluded a recovery in this action. We do not lose sight of the rule that where there is a conflict in the evidence, or where the facts are left in dispute by the testimony, or where fair minds might draw different inferences or conclusions from the facts, the case should be submitted to the jury; but it is also true that where the facts are undisputed, there is no conflict in the evidence, or but one reasonable inference or conclusion can be drawn from them, a question of law is presented for the determination of the court, and where, under an

application of the rule just stated, it is clearly established that there has been contributory negligence on the part of an injured party which was the proximate cause of the injury, there can be no recovery. (*Knapp v. Jones*, 50 Neb., 490; *Underhill v. Chicago & G. T. R. Co.*, 45 N. W. Rep. [Mich.], 508; *Guta v. Lake Shore & M. S. R. Co.*, 45 N. W. Rep. [Mich.], 821; *Marks v. Petersburg R. Co.*, 13 S. E. Rep. [Va.], 299; *State v. Baltimore & O. R. Co.*, 21 Atl. Rep. [Md.], 62; *Allen v. Maine C. R. Co.*, 19 Atl. Rep. [Me.], 105; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S., 697; *Mynning v. Detroit, L. & N. R. Co.*, 35 N. W. Rep. [Mich.], 811; *Boyd v. Wabash W. R. Co.*, 16 S. W. Rep. [Mo.], 909; *State v. Maine C. R. R. Co.*, 1 New Eng. Rep. [Me.], 287; 1 Thompson, Negligence, 406.) There was no error in the action of the trial court in instructing the jury as it did, and the judgment must be

AFFIRMED.

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GEORGE F. COTTON, ADMINISTRATOR, V. FIRST NATIONAL BANK OF SUPERIOR.

FILED JUNE 3, 1897. No. 7263.

1. Lien of Judgment: EXPIRATION. A judgment ceases to be a lien on the land of the judgment debtor after five years, if execution is not sued out within such time.
2. ——: ——: PLEADING. *Held*, That the cross-petition failed to state sufficient facts to show the judgment set up therein had not become dormant.

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

*H. W. Short* and *S. W. Christy*, for plaintiff in error.

*Searle & Coleman, contra.*

NORVAL, J.

The First National Bank of Superior, on the 23d day of August, 1895, instituted an action in the court below to foreclose a real estate mortgage executed on June 25, 1889, by F. P. Bonnell and Alice L. Bonnell, his wife, covering certain real estate situate in Superior. George F. Cotton, administrator of the estate of T. P. Coin, deceased, and others were made parties defendant. The administrator filed an answer and cross-petition setting up the recovery of a judgment on June 5, 1888, by Daniel W. Barker and said T. P. Coin, in the county court of Nuckolls county, against said F. P. Bonnell, for the sum of $980 and costs taxed at $9, the filing of a transcript of said judgment on the following day in the district court of said county, and praying that said judgment be declared the first lien against the mortgaged premises. This is a proceeding to review the judgment of the court below sustaining a general demurrer to the answer and cross-petition.

A single question is presented by the record, and that is, whether the judgment obtained by Barker and Coin against F. P. Bonnell is a lien upon the real estate described in the mortgage. It is disclosed by the averments of the cross-petition that this judgment was rendered on June 5, 1888, or more than five years prior to the commencement of this action to foreclose the mortgage, and the pleading contains no allegation that an execution has ever been issued upon such judgment, from which counsel for the bank argue that the judgment had become dormant, and, therefore, was not a lien upon the lands of the judgment debtor within the county. In the light of section 482 of the Code of Civil Procedure, we are convinced that this argument is unanswerable. It declares that "If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years shall have intervened between the

date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor." In considering this provision in *Flagg v. Flagg*, 39 Neb., 229, it was said: "It is obvious that in case a judgment creditor fails for more than five years after the date of his judgment to sue out an execution, the judgment becomes dormant and ceases to be a lien upon the real estate of the defendant. We see no escaping the conclusion that where a judgment becomes dormant, its lien is thereby lost as against a mortgage made by the debtor during the life of the judgment."

It is conceded by counsel for the administrator, if there was nothing intervening to suspend the running of the statute of limitations, the judgment in question was dormant, and the demurrer to the cross-petition was properly sustained; but it is strenuously urged that the pleading assailed discloses that the enforcement of the judgment was enjoined from the last of the year 1890 to the spring of 1893, at the suit of Bonnell, which prevented the judgment from becoming dormant. If the premises were true, then, under the provisions of section 509 of the Code of Civil Procedure, the conclusion drawn by counsel would be irresistible. But the cross-petition does not aver that the collection of this judgment was ever prevented by injunction. It merely alleges "that during 1890 the defendant, Franklin P. Bonnell, to prevent this cross-petitioner from collecting said judgment, commenced injunction proceedings in the district court of Nuckolls county to obtain an order to perpetually enjoin the collection of said judgment." The pleading further charges that said Bonnell, in 1893, dismissed his said suit. It is not disclosed that a temporary injunction or restraining order was ever allowed in said action to stay the enforcement of the judgment, or that an injunction bond was ever given. For aught that appears in this record, the judgment creditors could have sued out

an execution on said judgment had they so desired. The suit was to perpetually enjoin the judgment; no restraining order was ever asked in the cause, so far as the record shows. No execution having been issued on the judgment, and the failure to take out one not having been occasioned by the granting of an injunction or by any other act of the debtor, the judgment was dormant when the foreclosure case was commenced and the decree therein was rendered. The cross-petition did not state a cause of action for another reason. It did not aver that the mortgaged premises were, or ever had been, owned by Mr. Bonnell, the party against whom the transcripted judgment was entered. If the premises belonged to the wife, the judgment sought to be enforced was not a lien thereon. There was no error committed in sustaining the demurrer, and the judgment is

AFFIRMED.

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GEORGE F. COTTON, ADMINISTRATOR, V. FIRST NATIONAL BANK OF SUPERIOR.

FILED JUNE 3, 1897. No. 7264.

Lien of Judgment: EXPIRATION. This case involves the same questions determined in *Cotton v. First Nat. Bank of Superior*, 51 Neb., 751, just decided.

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

*H. W. Short* and *S. W. Christy*, for plaintiff in error.

*Searle & Coleman, contra.*

NORVAL, J.

This is a companion case to *Cotton v. First National Bank of Superior*, 51 Neb., 751, decided herewith. The records in the two cases are substantially alike, and for the reasons stated in the opinion filed in that case, the judgment herein will be

AFFIRMED.

ACADEMY OF THE SACRED HEART, APPELLEE, V. H. B. IREY, COUNTY TREASURER, APPELLANT.

FILED JUNE 3, 1897. No. 7310.

**Taxation:** SCHOOL PROPERTY: EXEMPTION. Under section 2, article 1, chapter 77, Compiled Statutes, all property used directly, immediately, and exclusively for school purposes is exempt from taxation.

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

*J. L. Kaley* and *A. C. Troup*, for appellant.

*Mahoney & Smyth, contra.*

NORVAL, J.

This action was brought by the Academy of the Sacred Heart against H. B. Irey, the treasurer of Douglas county, to enjoin the collection of alleged illegal taxes levied upon plaintiff's property. The county treasurer appeals from the decree rendered against him.

Plaintiff is a corporation organized in 1882 for educational purposes, under and in pursuance of the provisions of sections 15 to 18, inclusive, of chapter 16 of the Compiled Statutes of this state. In the same year the lots described in the petition were donated and conveyed to plaintiff for the purpose of establishing a school for the education of girls and young ladies in the higher branches, and the corporation ever since has been the owner of the premises. Shortly after acquiring the property, plaintiff erected a five-story building on a portion of the lots, at a cost of over $100,000, and the same has hitherto been used solely for school purposes. The lots are all included in a single enclosure, and have been by plaintiff improved and beautified by the planting out thereon of several hundred trees and shrubs, by flower beds and the making of driveways and walks, artistically laid out. A portion of the lots have been used by plaint-

iff as a vegetable garden, which has supplied the tables for the officers, teachers, students, and others connected with the school. No portion of the premises has been held for speculation, but the entire tract has been devoted to the purposes for which it was originally intended. The lots upon which the school building proper is located were not assessed, but the remainder were taxed for all purposes. The trial court held the entire property exempt from taxation, and the correctness of this decision is the question presented for judicial investigation.

Section 2, article 9, of the constitution provides: "The property of the state, counties, and municipal corporations, both real and personal, shall be exempt from taxation, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery, and charitable purposes, may be exempted from taxation, but such exemption shall be only from general law." In 1879, the legislature, in the mode above indicated, enacted that there should be exempted from taxation in this state, *inter alia*, such property as may be used exclusively for educational purposes. The language is as comprehensive as it is possible to use. The legislature has, in pursuance of the power conferred upon it by the constitution, exempted from the burdens of taxation property used exclusively for the purposes of education. The test applied by this court in *First Christian Church of Beatrice v. City of Beatrice*, 39 Neb., 432, was whether the property is used directly, immediately, and exclusively for one of the purposes enumerated in the statute creating the exemptions, in which case it was ruled that lots owned by a religious society, but not used for religious purposes, and entirely separate and distinct from that on which its church edifice is situated, are not exempt from taxation, notwithstanding it was the intention of the society in the future to build a church edifice on said property not so occupied. The doctrine of that case is not only sound, but it is supported by the decisions of the courts of last resort of many of the sister states.

It is the exclusive use of the property which determines its exempt character. If it is devoted exclusively to educational purposes, it is not liable to taxation, unless such use is not direct, but remote. If property is used only partially for the purposes of education, exemption from the burdens of taxation cannot be claimed. The sole constitutional and statutory requirement to create the exemption is that the property shall be devoted exclusively for school or some other specified exempt purpose, which condition the proofs in this case disclose has been fulfilled, and the property in question was illegally assessed and taxed. (*Omaha Medical College v. Rush*, 22 Neb., 449; *Warde v. Manchester*, 56 N. H., 508; *State v. Fisk University*, 10 S. W. Rep. [Tenn.], 284; *Red v. Morris, Tax Collector*, 10 S. W. Rep. [Tex.], 681; *Monticello Seminary v. People*, 106 Ill., 398; *State v. Ross*, 4 Zabr. [N. J.], 497; *Trustees of Wesleyan Academy v. Inhabitants of Wilbraham*, 99 Mass., 599; *Massachusetts General Hospital v. Inhabitants of Somerville*, 101 Mass., 319; *Detroit Home and Day School v. City of Detroit*, 76 Mich., 521; *Trustees of Griswold College v. State*, 46 Ia., 275; *Mulroy v. Churchman*, 52 Ia., 238; *St. Mary's College v. Crowl*, 10 Kan., 442; *Hennepin County v. Brotherhood of the Church of Gethsemane*, 27 Minn., 460; *Ramsey County v. Macalester College*, 53 N. W. Rep. [Minn.], 704; *Cassiano v. Ursuline Academy*, 64 Tex., 673; *State v. Collector of Chatham*, 20 Atl. Rep. [N. J.], 292.) It is true a portion of the lots has been each year used as a vegetable garden, but that did not, under the authorities cited above, make the property any the less exempt, since the products of the garden were used to supply the school tables with vegetables, no part being sold. During the entire existence of the academy, vegetables from the garden, not exceeding in value $50, have been exchanged for groceries for the use of the institution. That alone does not subject the property to taxation. The entire property being within the exemption clause of the statute, the decree will be

AFFIRMED.

# CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILROAD COMPANY V. LUCINDA BRADY, ADMINISTRATRIX.

FILED JUNE 3, 1897. No. 7327.

**Railroad Companies:** NEGLIGENCE: HIGHWAY SIGNALS: INSTRUCTIONS. It has been settled by the repeated decisions of this court that, in an action against a railroad company to recover damages resulting from the failure of its servants to ring a bell, or to sound a whistle at a public crossing, it is error to instruct the jury that the omission of the defendant to give the signals required by statute is *prima facie* evidence of negligence.

ERROR from the district court of Madison county. Tried below before ROBINSON, J. *Reversed.*

*John B. Barnes, Thomas Wilson*, and *S. L. Perrin*, for plaintiff in error.

*Robertson, Wigton & Whitham, contra.*

NORVAL, J.

On the 5th day of December, 1891, James Brady, plaintiff's intestate, while riding in a wagon loaded with hay, drawn by a team of horses along Philip avenue, in the city of Norfolk, was run over by one of defendant's passenger trains, thereby receiving injuries from which he died. This action was brought by his administratrix to recover damages for his death. From a verdict and judgment for the plaintiff for $4,500, the defendant prosecutes error to this court.

One act of negligence imputed to the defendant was the failure and omission of its employes to ring the bell and sound the whistle of the locomotive in accordance with the statute. On this branch of the case the court gave, on its own motion, the following instruction:

"6. The court instructs the jury that, by the laws of this state, every railroad company is required to have a bell, of at least thirty pounds weight, and a steam whistle

placed and kept upon each locomotive, and to cause the same to be rung or whistled at the distance of at least eighty rods from the place where the railroad crosses a public highway, and to keep the same ringing or whistling until the highway is reached. If you believe, from the evidence, that the defendant's agents or servants in charge of the engine in question omitted to ring a bell or sound a whistle continuously for the distance of eighty rods before reaching the highway crossing, such omission constitutes a *prima facie* case of negligence on the part of defendant; and if you further believe, from the evidence, that the deceased was struck and injured at the railroad crossing in question, as charged in the petition, in consequence of the omission to ring the bell or sound the whistle, while he was himself exercising all reasonable care and caution in that behalf, then the plaintiff is entitled to recover in this action."

This instruction was duly excepted to by the defendant at the time, and its giving is made the basis of one of the assignments of the motion for a new trial and the petition in error. Section 104, chapter 16, Compiled Statutes, provides: "A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect." Construing the foregoing statute, this court has, in more than one case, held that it was erroneous to give an instruction substantially like the one quoted above, and that the failure to give the statutory signal for a street or highway crossing does not necessarily raise an inference of negligence. (*Chicago, B. & Q. R. Co. v.*

*Metcalf*, 44 Neb., 848; *Omaha & R. V. R. Co. v. Krayenbuhl*, 48 Neb., 553; *Omaha & R. V. R. Co. v. Talbot*, 48 Neb., 627; *Missouri P. R. Co. v. Geist*, 49 Neb., 489.) The writer is convinced that the better reason and the decided weight of the authorities are against the rule adopted by this court in the above cases, but yields to the judgment of his associates so often reaffirmed. The sixth instruction is therefore erroneous, in directing the jury that the failure to give the statutory signals is *prima facie* evidence of negligence. For the giving of this instruction, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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## C. L. STULL V. CASS COUNTY.

FILED JUNE 3, 1897. No. 7228.

1. **Review: LACHES: JURISDICTION.** Where the petition in error and transcript are not filed in this court within one year from the rendition of the judgment or final order complained of, no jurisdiction of the cause is acquired, and the proceeding will be dismissed out of this court.

2. ———: ———: ———. The omission to file in the supreme court the transcript required by law within the statutory period is not excused by the fact that plaintiff in error was unable to obtain a bill of exceptions in time. *Omaha Loan & Trust Co. v. Ayer*, 38 Neb., 891, followed, and *Allis v. Newman*, 29 Neb., 207, disapproved.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J. *Proceeding in error dismissed.*

*Byron Clark*, for plaintiff in error.

*H. D. Travis, contra.*

NORVAL, J.

The county board of Cass county located a highway over and across the lands of C. L. Stull. He presented a

claim for damages in the sum of $650, and upon consideration thereof said board allowed him $200. He appealed to the district court from the assessment of damages, where, on the 13th day of March, 1893, there was a recovery for $200 and costs. Subsequently, the county attorney filed a motion to retax the costs, which, on May 6, 1893, was sustained, and all the costs were taxed against Stull, who has brought the record here for review.

The cause must be dismissed for want of jurisdiction, since the petition in error and transcript were not filed with the clerk of this court until September 19, 1894, which was more than a year after the overruling of the motion for a new trial and the entry of judgment on the verdict, and more than a year subsequent to the order made by the court below retaxing the costs. (Code, sec. 592; *French v. English*, 7 Neb., 124; *Clark v. Morgan*, 21 Neb., 673; *Patterson v. Woodland*, 28 Neb., 250; *Benson v. Michael*, 29 Neb., 131; *Sharp v. Brown*, 34 Neb., 406.) It is disclosed that on the 6th day of April, 1894, the parties entered into a stipulation in writing, signed by their attorneys, and attached the same to the original bill of exceptions in the cause, whereby "all objections as to service of this bill of exceptions out of time and filing of same in supreme court after one year since trial of case are waived, as court reporter was unable to furnish it in time for regular service and filing in supreme court in the time required, and at time of service was mislaid by the county attorney and found today." The foregoing did not excuse the failure to file a certified transcript of the pleadings and judgment within the statutory period, since it only purported to waive the filing of the bill of exceptions out of time. Moreover, jurisdiction of the subject-matter cannot be conferred by the stipulation or agreement of parties. The statute is mandatory as regards the time of taking appeals and proceedings in error, and the time for doing so cannot be extended by agreement of parties. The fact that the bill of exceptions could not be obtained for filing in this court within one year after the rendition

of the judgment did not relieve plaintiff of the necessity of having a transcript of the record, or so much as was obtainable, filed in this court and the cause docketed. We are aware that this statement is opposed to *Allis v. Newman*, 29 Neb., 207, but the decision therein is in conflict with the numerous adjudications of this court in other cases. (See *Sturtevant v. Wineland*, 22 Neb., 702; *Schuyler v. Hanna*, 28 Neb., 601; *Omaha Loan & Trust Co. v. Ayer*, 38 Neb., 891; *Fitzgerald v. Brandt*, 36 Neb., 683; *Moore v. Waterman*, 40 Neb., 498; *Record v. Butters*, 42 Neb., 786; *Renard v. Thomas*, 50 Neb., 398.) The decisions in these cases are followed, and that in *Allis v. Newman, supra*, disapproved. Proceeding in error

DISMISSED.

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CHRISTIAN JACOBSON, TREASURER OF SCHOOL DISTRICT NO. 77, BUFFALO COUNTY, APPELLANT, V. LYMAN CARY, COUNTY TREASURER OF BUFFALO COUNTY, ET AL., APPELLEES.

FILED JUNE 3, 1897. No. 9135.

**Bond of School District:** COLLECTION OF TAXES FOR PAYMENT: LOSS OF FUNDS IN INSOLVENT BANK. A school district issued a bond under and in pursuance of subdivision 15, chapter 79, Compiled Statutes, and a sufficient amount was raised by taxation and paid to the county treasurer by the taxpayers of the district in accordance with law, for the purpose of paying said bond according to its terms, but before the maturity of the bond, the treasurer, without the knowledge and consent of the holder of the bond, lost the money by depositing the same in insolvent banks. *Held*, Such loss did not fall upon the bond-holder, and that the tax levied by the county board upon the property of the school district to pay the balance due on said bond was proper.

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

*Marston & Marston*, for appellant.

*Fred A. Nye, contra.*

NORVAL, J.

This cause was submitted under rule 2, upon printed briefs accompanied by an agreed printed abstract of the record. The suit was brought by the treasurer of school District 77 of Buffalo county, in his official capacity and as a taxpayer of said district, to restrain the collection of a tax levied by the county board of said county upon the taxable property of said district, to pay its outstanding bonds. The cause was determined in the court below upon the petition and answer, and from a decree dismissing the petition, plaintiff appeals.

The undisputed facts, as shown by the pleadings, may be summarized thus: In April, 1885, said school district issued its bond for $400, payable in ten years, with semi-annual interest at seven per cent, and prior to the maturity of the bond the proper authorities levied a sufficient tax on the property of said school district to pay the interest as it accrued, as well as the principal when due, and the taxes so levied were duly collected and paid to the county treasurer; "that prior to April 19, 1895, all interest had been promptly paid by taxes levied and collected from said district, and that June 10, 1895, $200, and January 22, 1896, $75 was paid on the principal, leaving $125 due, and that in addition to these two amounts there had been collected by taxation from said district and paid to, and received by, the county treasurer $170.80, for the purpose of paying the balance of said bond, which sum was by the said county treasurer, pursuant to the provisions of chapter 18, article 3, sections 18, 19, 20, and 21, of the Compiled Statutes of Nebraska, 1895, and the order of the county board, deposited prior to August 31, 1894, in banks as follows:

| | |
|---|---|
| Kearney National, Kearney | $49 37 |
| First National, Kearney | 39 26 |
| Amherst | 19 08 |
| Buffalo County National, Kearney | 40 84 |
| First National, Ravenna | 22 25 |
| Total | $170 80 |

which was in said banks when they suspended and passed into the hands of receivers, and still remains, except $45.85 received by said treasurer as dividends, and that said money was deposited by the said county treasurer and lost without the knowledge or consent of the holder of said bond;" that the county board, on June 12, 1896, for the purpose of paying said bond, levied a tax of ten mills on the dollar of the assessed valuation of the taxable property of said district, which levy has been extended upon the tax books of the said county and was about to be collected by the defendants.

It will be observed that sufficient money to discharge the bond in question has been raised by taxation and paid into the county treasury; that before the maturity of the bond he deposited $170.80 of the money so received by him in certain banks, which subsequently suspended; that the money so deposited was lost without the knowledge or consent of the bondholder. The sole question presented is upon whom must the loss fall? This bond was voted and issued, and the money deposited in the banks was derived from taxes levied under and in pursuance of subdivision 15, chapter 79, Compiled Statutes, 1895. Sections 13 and 17 of said subdivision read as follows:

"Sec. 13. It shall be the duty of the board of county commissioners in each county to levy, annually, upon all the taxable property in each school district in such county, a tax sufficient to pay the interest accruing upon any bond issued by such school district, and to provide a sinking fund for the final redemption of the same, such levy to be made with the annual levy of the county and the taxes collected with other taxes, and when collected shall be and remain in the hands of the county treasurer, a specific fund for the payment of the interest upon such bonds, and for the final payment of the same at maturity. It shall be the duty of the county clerk to furnish a copy of his register to the county treasurer.

"Sec. 17. The tax and funds so collected shall be

deemed pledged and appropriated to the payment of the interest and principal of the registered bonds herein provided for, until satisfied, and the treasurer shall be liable on his official bond for the faithful disbursements of all moneys so collected or received by him," etc.

Counsel for the respective parties agree that the money collected from the taxpayers of the district to pay this bond was not a "current fund" which the treasurer was authorized or required to deposit in bank under the provisions of the depository law. It would seem to follow, especially in view of section 17 quoted above, that the treasurer who deposits said money in banks is liable on his official bond for the loss of the funds. (See *Ward v. School District*, 10 Neb., 293.)

This brings us to the question, who is liable to the holder of this bond for the balance due thereon? Counsel for plaintiff insists that the taxpayers of the district have done no wrong, have not been remiss in any duty, have paid their money to the person required by statute, and hence fully discharged their obligation under the law and the bond. If the payment of the money to the county treasurer was, in law, payment to the bond-holder, the district is discharged from liability. The money belonged to the district until paid to the owner of the bond. The county treasurer was not the agent of the latter, but under the law was the proper custodian of the money for the district, and he held the money as a specific fund for the payment of the bond according to its terms. The money was deposited and lost before the obligation matured, and the owner of the bond had a right to demand payment. The school district, and not the latter, should bear the loss, if any there shall ultimately be. The decree is right and is accordingly

AFFIRMED.

COMMERCIAL BANK OF ST. LOUIS, APPELLEE, V. EASTERN BANKING COMPANY ET AL., APPELLANTS.

FILED JUNE 3, 1897. No. 7319.

1. **Review:** SERVICE OF SUMMONS: CONFLICTING EVIDENCE. Where, collaterally, there was a question presented as to whether there had been service of the summons on which the judgment questioned was founded, and that question, upon fairly conflicting evidence, was decided by the trial court, its findings, on appeal in this court, will not be disturbed.

2. **Statutes:** CONSTRUCTION. A court will not give a retrospective effect to a statute unless it is clear from the language used that the legislature intended to give it that effect.

3. **Lien of Judgment in Federal Court:** REGISTRATION: STATUTES. Where, by virtue of the holdings of the federal court, a lien had attached to land in Nance county by reason of the rendition of a judgment against the owner of such land by the circuit court of the United States then sitting in Douglas county, the lien of such judgment as against said land was not destroyed by an act of congress afterward passed providing how a judgment lien thereafter might be created as against land situated as was the land of the judgment defendant.

APPEAL from the district court of Nance county. Heard below before SULLIVAN, J. *Affirmed.*

The opinion contains a statement of the case.

*Hall, McCulloch & Clarkson*, for appellants:

Even if there was a judgment, no steps having been taken to enforce it until long after the passage of the act of congress relating to registration of judgments of the federal courts, any lien which might have theretofore existed was wholly destroyed, and the levy and sale made under the execution of 1890, upon land, the title to which had not been in the judgment debtor since 1887, gave no title whatever. (2 Freeman, Judgments [4th ed.], sec. 342; *Moore v. Holland*, 16 S. Car., 15; *Woodson v. Collins*, 56 Tex., 168; *Houston v. Houston*, 67 Ind., 276; *Gimlel v. Stoltc*, 59 Ind., 446; *Tarpley v. Hamer*, 9 Smeads & M.

[Miss.], 310; *Whitehead v. Latham*, 83 N. Car., 232; *Horbach v. Miller*, 4 Neb., 31; *Dartmouth Savings Bank v. Bates*, 44 Fed. Rep., 546; *First Nat. Bank of Washington v. Clark*, 40 Pac. Rep. [Kan.], 270.)

*Webster, Rose & Fisherdick, contra:*

Where the service is merely defective or irregular, the court acquires jurisdiction, and the judgment is valid until set aside or reversed in appropriate and direct proceeding. (*Knox v. Harshman*, 133 U. S., 152; *Isaacs v. Price*, 2 Dillon [U. S. C. C.], 351; *Salisbury v. Sands*, 2 Dillon [U. S. C. C.], 277; *Walker v. Robbins*, 14 How. [U. S.], 585; *Tallman v. Ely*, 6 Wis., 259.)

The judgment when rendered was, and continued to be, a lien on the lands of Tewksbury throughout the district, from the first day of the November term, at which it was rendered, at least to March 28, 1889, when the state act complementary to the act of congress relating to filing of transcripts of judgments of federal courts was passed with emergency clause. (*State v. Stein*, 13 Neb., 533; *State v. Palmer*, 10 Neb., 205; *Burlington & M. R. R. Co. v. Saunders County*, 17 Neb., 320; *State v. Cathers*, 25 Neb., 255; *Woodson v. Collins*, 56 Tex., 174.)

A lien which has once attached must remain until it is discharged by act of the parties, removed by subsequent legislation, or has expired by statutory limitation. (2 Black, Judgments, sec. 417; *Davidson v. Root*, 11 O., 98; *Bowman v. Hovious*, 17 Cal., 471; *West's Appeal*, 5 Watts [Pa.], 89; *Hays's Appeal*, 8 Pa. St., 182; *Gatewood v. Goode*, 23 Gratt. [Va.], 880.)

RYAN, C.

This is an appeal from a decree of the district court of Nance county, by which plaintiff's title to certain real property in said county was confirmed to the exclusion of the rights of appellant Burke. Briefly stated, the facts involved are as follows: On January 27, 1887, there was rendered in favor of the plaintiff, in the circuit court of

the United States for the district of Nebraska, a judgment in the sum of something over $3,000 against J. F. Tewksbury, then the owner of the real property in dispute in this action. By purchase Burke acquired the title of Tewksbury on January 19, 1889. Afterward an execution was issued under the aforesaid judgment, whereunder there was a sale through which plaintiff derived its title. The questions presented are, first, whether there was a valid judgment rendered against Tewksbury in the federal court; and second, if there was a valid judgment, was there a necessity that a transcript of it should have been filed in the office of the district court of Nance county to perpetuate its lien until the execution sale could be made.

It is urged that the judgment in the federal court is void because that court had no jurisdiction of Tewksbury, for the reason that, as is alleged, there was no service of summons on him. There were three parties named as defendants in the summons, and the return indorsed thereon was as follows:

"I hereby certify and return that on the 22d day of March, 1886, I received this summons, and on the 25th day of March I served the same upon the within named, E. Holland, Edward Cooper, and J. S. Tewksbury, in Weeping Water, Cass county, state and district of Nebraska, by delivering to and leaving with them a certified copy thereof, with all the indorsements thereon—J. S. Tewksbury acknowledging service hereon.

"ELLIS L. BIERBOWER,
"*U. S. Marshal for District of Nebraska.*
"By A. G. HASTINGS,
"*Deputy U. S. Marshal.*"

On the summons was also this indorsement:

"DISTRICT OF NEBRASKA, SS.

"I hereby accept service of a copy of the within summons this 25th day of March, 1886.

"J. S. TEWKSBURY.
"By TEWKSBURY & COOPER."

It was testified by Mr. Tewksbury that he and Mr. Cooper were not partners when the above acknowledgment of service by Cooper was signed, though they had been shortly before that time. He also testified that no service was ever made on him of any summons in said action. The judgment was by default. Aside from the above described proofs tending to show service of summons, it was testified by Mr. Hastings that it was his recollection that after looking at the return, and his attention being called to it, that, after the acceptance of service was indorsed by Mr. Cooper, Mr. Tewksbury on the same day returned to Weeping Water, and immediately thereafter was given a copy of the summons by Mr. Hastings. Mr. Wooley testified that in the spring of 1886, possibly in April, he met Mr. Tewksbury and Mr. Cooper on the street in Weeping Water, and they stopped the witness to talk about the suit in Omaha in the United States court. This witness could not say which, but one of the parties had a copy of the summons, and showed it to witness and talked about there being a suit with Holland on that $3,000 note. On cross-examination this witness identified the suit more satisfactorily as the one whereon was sold the land now in controversy. He further said the conversation between himself and Cooper and Tewksbury might have been in March or April, 1886. This witness further testified that on the trial of another action in December, 1886, wherein he himself was an attorney and Mr. Tewksbury was a party and a witness, that he, Mr. Wooley, asked Tewksbury if he had not been made a party defendant in the suit in the federal court, and Mr. Tewksbury admitted that he had, and that in said action he had been sued. It is therefore apparent that the question as to whether or not there had been service of summons on Mr. Tewksbury in the action in the federal court wherein judgment was rendered against Tewksbury was a disputed question of fact, heard and determined upon fairly conflicting evidence. It is a set-

tled rule that under such circumstances the finding of the district court must stand.

The other contention of appellant is dependent upon the construction which he insists should be given a certain act of congress. It has already been stated that the judgment was rendered January 27, 1887, in the federal court. On the 1st day of August, 1888, there was passed an act by congress of which the part material to our purposes is the first section, which provides: "That judgments and decrees rendered in a circuit or district court of the United States, within any state, shall be liens on property throughout such state in the same manner and to the same extent, and under the same conditions only, as if such judgments and decrees had been rendered by a court of general jurisdiction of such state; provided, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable whenever the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state." (U. S. Statutes at Large, v. 25, p. 357, sec. 1.) The appellant insists that by the enactment of this federal statute the transcripting of a judgment of that court in the office of the clerk of the district court of Nance county became indispensable to the continued existence of a judgment lien, and that, therefore, it of necessity results, from the conceded failure to file such a transcript, that the lien which existed previous to August 1, 1888, ceased to exist because of the enactment by congress of the statute of which the first section is above quoted. To sustain this position there has been cited *Dartmouth Savings Bank v. Bates*, 44 Fed. Rep., 546, a case decided in the United States circuit court for the district

of Kansas. There is found in section 419, chapter 80, General Statutes of Kansas, 1868, these provisions: "Judgments of courts of record of this state, and of courts of the United States rendered within this state, shall be liens on the real estate of the debtor within the county in which the judgment is rendered, from the first day of the term at which the judgment was rendered. * * * An attested copy of the journal entry of any judgment, together with a statement of the costs taxed against the debtor in the case, may be filed in the office of the clerk of the district court of any county, and such judgment shall be a lien on the real estate of the debtor within that county from the date of filing such copy." In the opinion in the case last above cited it was not disclosed whether the judgment therein under consideration was rendered before or after August 1, 1888, the date of the approval of the federal statute. By virtue of the provisions above quoted from the statutes of Kansas, judgments of the federal courts and of the courts of that state, in so far as securing liens outside the county in which judgment might be rendered were concerned, were placed upon the same grounds as early as 1868, and ever since that date this equality has remained. In *Bank v. Bates, supra*, Caldwell, J., in the course of his opinion, stated the reason on which had been predicated the rule that a judgment in the federal court in any state operated to create a lien on the property of the debtor situated anywhere in the district in which such judgment was rendered, for congress possesses no power to require any county officer to file or docket the transcript of a judgment rendered by a court of the United States. It was, said he, to remedy this that the act of 1888 was passed, which, while it made no attempt to require any county officer to register, docket, or index a judgment rendered by a federal court, nevertheless provided that if by a proper statute of the state such authority was conferred upon any county officer so to do, the effect as to creating a lien on property of the debtor in the county wherein such transcript

should be registered, etc., was to be the same as would result from the adoption of the same course with reference to the judgment of a state court. As this particular legislation had existed in Kansas since 1868, it was only required that congress should pass the act which it did in 1888, to give federal sanction to what had been attempted twenty years before by the legislature of that state, and that was to require the transcripting of a federal judgment to cause it to become a lien on property of the debtor situated outside the county wherein such judgment should be rendered. The opinion in *Bank v. Bates* merely held that the state statute was the proper complement of the law of congress to effect the purpose of both statutes, but whether this was with reference to a judgment rendered before August 1, 1888, we are not informed. This case, therefore, falls short of establishing what in argument was claimed for it. The discussion of it, however, renders it comparatively easy to state what was held in *First Nat. Bank of Washington v. Clark*, 40 Pac. Rep. [Kan.], 270, a case cited by appellant to sustain his contention that the federal statute passed in 1888 operated to relieve from the existing lien of a federal judgment all lands of the debtor not included within the boundaries of the county in which such judgment had been rendered. In this case the supreme court of Kansas discussed, but refused to commit itself with reference to, the proposition that a judgment of a court of the United States, under any circumstances, rendered in one county in Kansas, of its own force operated as a lien on all lands of the defendant situate in any other county of that state. What was in reality decided with reference to the statutes hereinbefore quoted is thus clearly stated in the conclusion of the opinion: "The statute of this state can have none the less force because passed long prior to the act of congress. In the most favorable view to the defendants in error, both acts must be treated as having been in full force and effect on the 1st day of August, 1888. As the law stood then, and ever since, it was

necessary, in order to make a judgment of the United States circuit court a lien on the lands of the judgment debtor prior to actual levy, that a copy of the journal entry should be filed with the clerk of the district court of Washington county. This was not done and the land was not actually seized by the marshal until December 6, more than four months after the passage of the act of congress. We are clearly of the opinion that this afforded more than ample time for compliance with the state statute, and that the lien of the federal judgment, if it ever had any (as to which we express no opinion), was lost before the execution was levied." In view of the fact that no journal entry was ever filed in the office of the clerk of the district court of Washington county, and of the further fact that the supreme court of Kansas, in this case, refused to consider whether, under the circumstances indicated, the lien of the federal judgment was operative against land in Washington county, it is very clear that the decision was controlled by the provisions in the state statute, unaffected by the federal statute. It therefore affords no sanction to the proposition as to which it was cited.

In this state the statute authorizing the filing of a transcript of a federal judgment in the office of the clerk of the district court of a county other than the county in which such judgment is rendered was approved March 28, 1889. The statute passed by congress provided: "Whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done in a particular manner or in a certain office or county, or parish in the state of Louisiana, before a lien shall attach, this act shall be applicable whenever, and only whenever, the laws of such state shall authorize the judgments and decrees of the United States court to be registered," etc. In this language there is evidenced no intention to make the operation of the law retrospective, neither is there any provision giving time to register federal judgments already in exist-

ence with a view to preserving the liens thereof. In *State v. Stein*, 13 Neb., 529, it was said: "A court will not give a retrospective effect to a statute, unless it is clear from the language used that the legislature intended to give it that effect." (See, also to the same effect, *State v. Palmer*, 10 Neb., 204; *State v. City of Kearney*, 49 Neb., 337; *McIntosh v. Johnson*, 51 Neb., 33.) It results from the application of this rule that the lien which had attached before the adoption of the act of August 1, 1888, was not impaired by that enactment. The judgment of the district court is

AFFIRMED.

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STATE OF NEBRASKA, EX REL. WAYNE COUNTY, V. STEPHEN B. RUSSELL.

STEPHEN B. RUSSELL V. STATE OF NEBRASKA, EX REL. WAYNE COUNTY.

FILED JUNE 3, 1897. NOS. 8950, 9095.

**County Clerk: DUTIES: FEE BOOK: MANDAMUS.** Under the provisions of chapter 28, Compiled Statutes, it is the duty of the county clerk to enter in the proper fee book a full statement of the several amounts paid him for his services as clerk of the board of county commissioners and for making out the tax lists during his incumbency of office, and the performance of these duties may be compelled in an action of *mandamus* brought by the county as relator after the expiration of the term of office of such clerk.

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

*A. A. Welch*, for Wayne county.

*Charles Offutt* and *Frank Fuller*, for Stephen B. Russell.

RYAN, C.

On the application of Wayne county there was issued a peremptory writ of *mandamus* requiring the performance of certain acts by the respondent, who by his peti-

tion in error seeks the reversal of this judgment of the district court of Wayne county. On this petition in error the cause numbered 9095, Russell v. State, ex rel. Wayne County, was docketed in this court. There was a refusal to grant other relief sought, and from this part of the judgment Wayne county has prosecuted error proceeding in a cause numbered 8950, docketed in this court under the title State, ex rel. Wayne County, v. Russell. As both these proceedings arose out of a single action prosecuted in the district court, the questions presented will be considered in this court as being presented in a single case.

In effect, it was recited in the alternative writ that Wayne county had a population of less than 25,000, and, until 1895, had less than 8,000 inhabitants; that the respondent, Stephen B. Russell, at the general election held in November, 1889, had been elected county clerk of said county; that his term began January 9th, 1890; that in November of 1891, 1893, and 1895, he had been reelected, and at the proper time in January following each election said Russell had duly qualified, and for the terms for which he had been elected had been county clerk as aforesaid; that in January of each of the years 1892, 1893, 1894, 1895, and 1896, the county commissioners of said county had allowed the sum of $400 for said years respectively in favor of said Russell as clerk of such board of county commissioners; that said Russell had presented claims of which there had been an allowance on which warrants had been issued for the whole of the years 1892, 1893, 1894, 1895, and for the first two quarters of 1896, and that no part of said salary had been entered on the fee book required by law to be kept by said clerk, neither had the same been reported to the board of county commissioners, except the sum of $400 received for the year 1892. It was further, in substance, recited in the alternative writ, that said county clerk, during each of the years 1892, 1893, 1894, and 1895, had prepared the tax lists of said county, and for his services in respect

thereto had presented bills, computed at four cents per line, to the aforesaid board for allowance for each of the four years last above mentioned; that each of said bills had been duly audited and allowed by said county board and in due course had been paid; that no part of said sums received for making said tax lists had been entered on the fee book of said county, neither had either sum been reported to the said board, nor had said clerk accounted therefor. It was also recited in the alternative writ that in January of each of the years 1892, 1893, 1894, and 1895, the said clerk had been allowed for each of the respective years for the employment of a deputy the sum of $700; that for each of said years, therefore, the said Russell was entitled to retain no more that $2,200, that is to say, his own salary of $1,500 per annum and $700, the salary of his deputy. The alternative writ required that the respondent should enter on the fee book of the county clerk of Wayne county for the years above noted the several amounts fully described as having been received by said clerk for preparing the tax lists, the amounts received for salary as clerk of said board, or, that on October 19, 1896, the respondent should appear and show cause why he refused to make the required entries. The respondent answered admitting that he had been elected and had served as clerk as above recited. He also admitted that he had been allowed and paid for services as clerk of the aforesaid board as recited in the alternative writ. He also conceded the correctness of the recitations that respondent had been paid for his services in preparing the tax lists of said county for the years described in the alternative writ. It was also admitted by the respondent that he had entered on the fee book neither the amounts paid him as clerk as above described nor the amounts received for preparing the tax lists of Wayne county. There was an admission that the respondent had been allowed salaries for his deputy as recited in the alternative writ. As to this item, there was no admission that the same had not been entered on

the fee book, hence, the general denial contained in the answer put that fact in issue. The cause was submitted and determined solely upon the pleadings, no evidence being introduced by either party.

It is clear there are presented two distinct subjects of inquiry in these proceedings, and these are: The duty of the county clerk to enter on the proper fee book, first, the compensation paid him for services as clerk of the board of county commissioners; and, second, his duty in that regard with respect to the compensation paid him for preparing tax lists each year. Before entering upon the discussion of these questions it may be proper to note that no pleading other than the writ and the answer is allowed. (Code of Civil Procedure, sec. 653.) An examination of the abstract of the writ hereinbefore made will show that only the questions above indicated are presented for review; hence there has been, and will be, omitted any consideration of other propositions than the two above stated. The district court held that the respondent was not required to enter on the fee book the amounts allowed him as compensation for services rendered as clerk of the board of county commissioners. To reverse this holding the county has prosecuted error proceedings to this court. The district court held that the compensation allowed and paid for making tax lists should have been entered on the fee book, and the correctness of this holding is questioned by the respondent.

The provisions of section 42, chapter 28, Compiled Statutes, in so far as they are applicable to the case under consideration, are, that every county clerk whose fees shall in the aggregate exceed the sum of $1,500 per annum shall pay the excess into the county treasury. It is required by section 43 of the chapter above noted that the county clerk shall, on the first Tuesday of January, April, July, and October of each year make a report to the board of county commissioners under oath showing the different items of fees received, from whom, at what time, and for what service, and the total amount of fees

received by such officer since the last report and also the amount received for the current year. It is provided by section 44 of the same chapter as follows: "Each of the officers named in section 1 of this act (being section 44, chapter 28, Compiled Statutes) shall keep a book, which shall be provided by the county and which shall be known as the fee book, and shall be a part of the records of such office, and in which shall be entered each and every item of fees collected, showing in separate columns the name of the party from whom received, the time of receiving the same, the amount received, and for what service the same was charged." Section 45, chapter 28, Compiled Statutes, prescribes a penalty for the failure to keep a correct account and make report of fees which ought to be collected, and section 46 provides what disposition shall be made of the fees paid into the county treasury conformably with the provisions of said chapter 28. One of the definitions of the word "fee," as given in Webster's International Dictionary, is: "Reward or compensation for services rendered or to be rendered; especially payment for professional services of optional amount, or fixed by custom or law; charge; pay; perquisite; as, the fees of lawyers and physicians, the fees of office, clerk's fees, sheriff's fees, marriage fees, etc." In the Century Dictionary the word "fee" has, among other definitions, that of "money paid or bestowed; payment; emolument." In Winfield's Adjudged Words & Phrases, it is said: "The meaning of the word 'fee' is, a recompense allowed by law to officers for their labor and trouble. (*Harbor-Master, etc., Mobile v. Southerland*, 47 Ala., 517.) Fees are a compensation allowed by law for specific services by an officer. (*Williams v. State*, 2 Sneed [Tenn.], 162.) The word 'fee' is used in two senses; in one, to denote the charges of the officer for his personal services; in the other—which is the more general and popular use—all the expenses attending the levy and included in it. (*Camp v. Bates*, 13 Conn., 9.)" It is quite evident that it is no misuse of the term to describe as fees the

recompense of the clerk for services rendered the board of county commissioners, or for making out tax lists of the county. As the clerk is by statute required to turn into the county treasury the excess over $1,500 for his services each year, there exists a good reason for requiring him to make under oath and enter in a fee book the several amounts which constitute the compensation which he is entitled to receive for services rendered as an officer. We therefore hold that it was the duty of the respondent to enter on the fee-book provided for that purpose the several amounts received by him as well for services as clerk of the board of county commissioners as in making out the tax lists of the county. (*Hazelet v. Holt County*, 51 Neb., 716.)

In view of what has already been said, it may be unnecessary to be more definite on this point, and yet, to avoid misapprehension, we choose to incur the risk of repeating by pointing out that there is not involved in this case the question of enforcing by *mandamus* the requirement of making payment. The cases of *Heald v. Polk County*, 46 Neb., 28, and *Bush v. Johnson County*, 48 Neb., 1, are therefore not in point. It was contended on the trial by the respondent that a demand had not been shown, but this showing was unnecessary in view of the fact that the clerk has refused to perform the duty required. His conduct amounts to a positive refusal, hence no demand of performance was necessary. (*State v. Baushausen*, 49 Neb., 558.) In respect to the contention that *mandamus* will not lie to compel an officer whose term has expired to perform a duty expressly enjoined by law, it is deemed proper to refer to *State v. Barnes*, 16 Neb., 36, wherein it was held that a district judge whose term had expired could be compelled to settle a bill of exceptions. Not only is the case cited in point, but it is obvious that if the clerk could not be compelled to report after his term had expired, there would be no remedy as to a failure to act at the expiration of the final quarter of each term. The right to this relief after

the expiration of a term of office was recognized in *State v. Cole*, 25 Neb., 342, *State v. Stearns*, 11 Neb., 104, *State v. Boyd*, 49 Neb., 303, and in other cases which might be cited. It is, however, urged that as a writ of *mandamus*, under the provisions of section 646, Code of Civil Procedure, can issue only on the information of the party beneficially interested, it should not issue in this case, because the county is not a party,—that is, is not a natural person. This is giving the statute a much narrower construction than the use of the word "party" justifies. This very question was considered and decided adversely to this contention in *State v. Kelly*, 30 Neb., 574, and a reference to the numerous cases brought on the relation of counties and school districts adds emphasis to the holding therein expressly announced.

The judgment of the district court is affirmed in so far as it required the respondent to enter in the proper fee book the several amounts of compensation received by him for making the tax lists of Wayne county. That part of the judgment which denied the right of the county to insist that the respondent should enter in the fee book the amount paid him for services rendered as clerk of the board of county commissioners is reversed, and the cause is remanded to the district court for further proceedings not inconsistent with the views above expressed.

JUDGMENT ACCORDINGLY.

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## S. H. H. CLARK ET AL., RECEIVERS, V. IRA HUGHES.

FILED JUNE 3, 1897. No. 7356.

1. **Negligence of Vice-Principal: INJURY TO EMPLOYE: PLEADING.** A petition will be held sufficient when there is therein stated a cause of action founded on the negligent acts of a vice-principal, even though on the trial there was not sufficient evidence to sustain the additional averments that the principal had continued the

employ of the vice-principal with knowledge of his incompetency to discharge the duties required to be performed by such vice-principal.

2. ———: RAILROAD COMPANIES: CONDUCTOR: BRAKEMAN. A conductor in charge of a freight train sustains toward brakemen thereon employed the relation of a vice-principal, and towards them his negligence in the line of his duty is, presumably, the negligence of his principal.

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

*M. A. Reed* and *James H. Woolley*, for plaintiffs in error.

*Edgerton & Brigham, contra.*

RYAN, C.

In the district court of Hall county there was a verdict and judgment against the receivers of the St. Joseph & Grand Island Railroad Company in accordance with the prayer of the petition of Ira Hughes, the plaintiff in said court. By their petition in error and their arguments the receivers urge that the petition of Hughes, in which it was alleged that he was injured while making a coupling of the freight train, predicated the liability of the receivers solely on the fact that they were continuing in their employ the conductor in charge of said train, knowing that he was wholly incompetent to manage such a train. This contention depends upon the following paragraphs of the petition, to-wit:

"Third—On the 16th day of January, 1894, the plaintiff was in the employ of the defendants as a brakeman on number 16, a freight train operated by defendants on said railroad, and said train was under the control and management of one Meyers (whose first name is unknown to plaintiff) and said Meyers was the conductor on said train and was in the employ of and the agent of the defendants.

"Fourth—That said conductor was wholly incompetent to manage, control, and operate said train, but notwithstanding such incompetency and inability the defendants,

disregarding their duty to their employes, carelessly and negligently retained said conductor in their employ.

"Fifth—That on the day aforesaid, at the town of Fairbury, on the line of said road, said train had been divided in sections to clear a crossing, and the plaintiff, in the performance of his duty as brakeman, signalled the engineer in charge of the engine attached to the forward section of said train to back the forward section, in order that the plaintiff might couple the two sections, and in response to said signal said forward section was slowly backed, and when the rear of the forward section was within a few feet of the forward end of the rear section, plaintiff signalled the engineer to stop, and by order of the said conductor stepped between the sections to make the coupling; whereupon said conductor, without any warning to plaintiff, well knowing that plaintiff was between the said sections, wrongfully, negligently, and carelessly signalled the engineer to back up, and in response to said signal the forward section of said train was backed violently against the rear section, and by reason of said negligence and carelessness on the part of said conductor, and without any fault or negligence on the part of said plaintiff, plaintiff's left hand was caught between the draw-heads of the rear car of the forward section and the forward car of the rear section and crushed and mangled, to his damage in the sum of $1,999."

In the above quotation there were two grounds on which the responsibility of the railroad company's representatives were alleged. If there was stricken out the fourth paragraph there would be found to remain sufficient averments to charge a liability for the acts of the conductor as a vice-principal. (*Chicago, B. & Q. R. Co. v. Anderson*, 38 Neb., 112; *Sioux City & P. R. Co. v. Smith*, 22 Neb., 775; *Chicago, St. P., M. & O. R. Co. v. Lundstrum*, 16 Neb., 254; *Union P. R. Co. v. Doyle*, 50 Neb., 545.) In the answer it was admitted that "On the 16th day of January, 1894, the above named plaintiff was in the em-

ploy of the defendants as brakeman on freight train No. 16 on said road, and that said train was under the control of conductor E. W. Meyers." Under the authorities just cited the admission in the quotation just made obviated the necessity of proof to establish the relation of servant and vice-principal as between the brakeman and the conductor therein referred to.

It is strenuously insisted that there was no evidence which sustained the assumption that there was proved any negligence of the conductor to which was attributable the injury of the brakeman. The petition, by its averments hereinbefore quoted, accurately stated the facts as to the coupling necessary to be made, and that Hughes, in order to make such coupling, had signalled the engineer to back the forward section toward where the brakeman was standing, at the forward end of the rear section, to be coupled. There was evidence that the engineer obeyed this signal, but stopped when the fragments of the train lacked about two feet of being close enough to each other to admit of making the desired coupling. The brakeman's evidence was that he was about to step off the track to give the signal to back further, when the conductor, who was standing close by, gave the signal to back, and immediately, with an imprecation upon the brakeman, directed him to make the coupling. Pursuant to this direction, the brakeman took hold of the link, when, instantaneously, as he says, the sections came together and his hand was caught. If the jurymen believed the brakeman,—and we cannot say they should have done otherwise,—there was sufficient evidence to justify the finding that it was owing to the negligence of the conductor that the accident happened. There was a considerable time devoted to the proposition that by common usage the brakeman alone had a right to signal the engineer to move that part of the train to which the engine was attached as required to enable the coupling to be made. As to the existence of this alleged rule there was a conflict among the witnesses, a part of

whom admitted that the brakeman might properly ask the conductor, standing near the train, to make the required signal. If this was proper, it could not be said that the engineer should not have obeyed the signal given by the conductor, and that his obeying it was negligence to which alone was logically attributable such injury as was inflicted on the brakeman.

There were some complaints of errors in giving, and other alleged errors in refusing to give, certain instructions. In the motion for a new trial each of these classes was grouped, and in each group there was an instruction as to which no criticism could properly be made of the court's action in respect thereto. The judgment of the district court is

AFFIRMED.

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## HERSH & SON V. W. L. CARMAN ET AL.

FILED JUNE 3, 1897. No. 7350.

1. **Mechanic's Lien:** WAIVER: NOTE. From the mere acceptance of a note for the amount for which a claim for a mechanic's lien had been filed it is not necessarily to be inferred that such lien has been waived.
2. ———: FORECLOSURE: PETITION. A petition for the foreclosure of a mechanic's lien which shows the due filing of a claim for said lien, the taking of a promissory note for the amount thereof, and, in that connection, repudiating such note as having been given and taken under a misapprehension of the effect of accepting it, is not open to attack by a general demurrer.

ERROR from the district court of Thayer county. Tried below before HASTINGS, J. *Reversed.*

*J. B. Skinner*, for plaintiff in error.

*O. H. Scott, contra.*

RYAN, C.

On April 14, 1894, plaintiff filed in the district court of Thayer county a petition for the foreclosure of a

mechanic's lien. A duly verified claim for such a lien had been filed on June 24, 1892. This action was therefore begun within the two years of the filing of the claim for such a lien allowed by statute. On February 6, 1894, the purchaser of the lumber had executed to plaintiff a promissory note for the amount remaining due, which note, by its terms, was to mature on February 6, 1895. To account for the existence of this note there were in the petition these averments as to its execution: "It was then and there understood and agreed between the defendant and the plaintiff in error that the lien of plaintiff would continue on said premises until the full payment of the said note. Plaintiff entered into such agreement, being mistaken with respect to his own existing private legal rights, and was unaware that the terms of the said contract was in contravention of the continued existence and final enforcement of said lien. He therefore brings said note into court and tenders its surrender and cancellation." These allegations indicate very clearly that it was the intention of neither the maker nor the payee that the execution of the note should operate to waive the existing mechanic's lien. On the contrary, these averments showed an intention to perpetuate this lien beyond the time prescribed by law for its duration. There was sustained a general demurrer to this petition, and the plaintiff electing to stand on his petition, there was a judgment dismissing his action and for costs. His petition in error presents the correctness of the ruling of the district court in the respect indicated.

In *Hoagland v. Lusk*, 33 Neb., 376, it was held by this court that a mechanic's lien is not lost by the taking of the note of the debtor for the balance due on account, nor in such case, by giving to the latter a receipt in full. In *Chapman v. Brewer*, 43 Neb., 890, there was approved a proposition laid down in the above case that the acceptance by a material-man of a note and a chattel mortgage as collateral security for materials previously furnished for the erection of a building under a contract

with the owner is not a waiver of the lien of the materialman, unless such was the intention of the parties. It was conceded in the case just cited that upon this question there was an irreconcilable conflict in the authorities, but a great many authorities were cited in support of the position taken by this court. It might be that the rights or equities of some of the defendants in this action could be shown to be superior to those of plaintiff, but such question must be presented by answer. The plaintiff sufficiently indicated by his averments that by the taking of the note he did not intend that a waiver of his right to foreclose his existing lien should be inferred. He duly tendered in court the note to be destroyed and disavowed all claims of right under it. Having repudiated all rights by virtue of this note, plaintiff made such averments as were necessary to entitle him to the foreclosure of his lien and accordingly prayed judgment. A petition of this form and substance was not open to a general demurrer. The judgment of the district court is therefore reversed and this cause is remanded for further proceedings not inconsistent with the views above expressed.

REVERSED AND REMANDED.

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GEORGE H. EASTMAN, APPELLEE, V. ORRIN R. CAIN ET AL., APPELLEES, AND ETHAN C. WOLCOTT, APPELLANT.

FILED JUNE 3, 1897. No. 7335.

**Mortgages:** FORECLOSURE: SALE: PARTIES: ALIAS SUMMONS. When a decree of foreclosure had been entered against all the defendants in pursuance of which a sale had been made and confirmed, the service on another proposed defendant of an alias summons, authorized solely to bring him into court, did not justify the foreclosure of his rights without the filing of any pleading whereby such rights were called in question.

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

*Ethan C. Wolcott*, for appellant.

*E. R. Duffie, contra.*

RYAN, C.

On the 9th day of October, 1890, George Eastman filed his petition in the district court of Douglas county praying the foreclosure of a certain real estate mortgage. The makers of this mortgage, Orrin R. and Sarah J. Cain, and Josiah S. McCormick, as the holder of some claim upon the mortgaged property, were alone made defendants. On June 9, 1891, a decree was entered, in pursuance of which there was a foreclosure sale, which was duly confirmed on the 15th day of October, 1892. On March 20, 1893, there was a motion filed by plaintiff in the above cause in which were recited the above proceedings, supplemented with this language: "After the filing of the petition in said case, but before the service of the summons, said mortgaged premises were conveyed to Ethan C. Wolcott, who now holds, or claims to hold, the equity of redemption in said lots and who was not made a party defendant in this action, his deed not being of record when the petition was filed. The plaintiff therefore moves the court for leave to amend his petition by making said Ethan C. Wolcott a party defendant that summons may be issued and he be brought into court and his rights determined and adjudicated." This motion was sustained and a summons was accordingly issued and served on Mr. Wolcott, who, on a special appearance restricted to that purpose, moved to quash the summons of which service had been made upon him. This motion was overruled on May 5, 1894, and five days thereafter there was a decree whereby the interest of Wolcott in the mortgaged real property was foreclosed. This was unwarranted by any pleading on file at that time. The motion was for the issue of summons that Wolcott might be brought into court. When it was de-

termined that he was properly in court there could be administered as against him only such relief as was warranted by the pleadings on file. While it would, perhaps, have been proper to have stated in a supplemental petition the facts which had been stated in the motion, and thereon to have asked relief as against Wolcott, this was not done. As against him the decree was unsupported by any averment and not justified by any prayer. The judgment against Wolcott is therefore reversed.

REVERSED AND REMANDED.

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## THOMAS WALTON V. SARAH E. CAMPBELL.

FILED JUNE 3, 1897. No. 7369.

1. **Appeal from County Court.** From the mere fact that there was filed in the district court a copy of a petition and an answer entitled in the county court and indorsed as therein filed, it will not be assumed that there was a judgment in, or an appeal from, such county court.
2. **Action for Breach of Covenant of Warranty: DAMAGES.** In an action for breaches of covenants of warranty in a deed for the conveyance of real property, while there may be a recovery for costs and attorneys' fees incurred but not paid in making a defense against an action hostile to the title purported to be conveyed by the warranty deed, this principle should not be extended to cover interest on such attorneys' fees and costs under the proofs made in this case.
3. ———: ———: **EVIDENCE.** Where a cause has been tried in the district court on the theory that an averment of eviction under a title paramount has been sufficiently established by proof of a yielding to such asserted title by purchase of the adversary interest, this court, while it may accept that theory, will not extend its operation so as to countenance an assumption that the yielding was earlier than the date of the quitclaim deed obtained by purchase of the paramount title.
4. **Covenants of Warranty.** Covenants of warranty not broken when made, pass with the title, unaffected by the fact that the conveyances are by quitclaim deeds.

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

The facts are stated in the opinion.

*Ricketts & Wilson*, for plaintiff in error:

The warrantor did not have sufficient notice of the pending action, and is not bound by the adjudication. (Rawle, Covenants [ed. 1887], secs. 119, 120; *Somers v. Schmidt*, 24 Wis., 417; *Paul v. Witman*, 3 W. & S. [Pa.], 410; *Davis v. Wilbourne*, 1 Hill [S. Car.], 27.)

As the law does not grant a recovery for a contingent liability, no interest is recoverable unless *mesne* profits have actually been paid to the holders of the paramount title. (*Cheney v. Straub*, 35 Neb., 526; Rawle, Covenants [ed. 1887], sec. 196; *Burton v. Reeds*, 20 Ind., 91; *Wacker v. Straub*, 88 Pa. St., 32; *Hutchins v. Roundtree*, 77 Mo., 500.)

Expenses of defending the ejectment suit cannot be recovered except upon proof that they were incurred after due notice was given to guarantor of the pendency of that suit, and an opportunity to defend tendered him. (*Mercantile Trust Co. v. South Park Residence Co.*, 22 S. W. Rep. [Ky.], 314.)

Notice to warrantor of a suit for eviction should be in writing. (*Gilbert v. Turnpike Co.*, 3 Johns. Cases [N. Y.], 108; *In re Cooper*, 15 Johns. [N. Y.], 533; *Mason v. Kellogg*, 38 Mich., 132; Rawle, Covenants [ed. 1887], sec. 119.)

*Pound & Burr, contra:*

The covenant of warranty ran with the land, and Mrs. Campbell could sue upon it. (*Moelle v. Sherwood*, 148 U. S., 21; *Kyle v. Kavanaugh*, 103 Mass., 356; *Baylor v. Scottish-American Mortgage Co.*, 13 C. C. A., 659; *Rego v. Van Pelt*, 65 Cal., 254; *Flaniken v. Neal*, 67 Tex., 633; *Saunders v. Flaniken*, 77 Tex., 662; *Jenks v. Quinn*, 137

N. Y., 223; *Beddoe v. Wadsworth*, 21 Wend. [N. Y.], 120; *Brady v. Spurck*, 27 Ill., 478; *Thomas v. Bland*, 91 Ky., 1; *Scoffins v. Grandstaff*, 12 Kan., 467; *Brown v. Staples*, 28 Me., 502; *Gunter v. Williams*, 40 Ala., 561; *Redwine v. Brown*, 10 Ga., 311; *Mygatt v. Coe*, 142 N. Y., 78; *White v. Whitney*, 3 Met. [Mass.], 81; *Carter v. Denman*, 23 N. J. Law, 270.)

Interest was recoverable. (*Chency v. Straub*, 35 Neb., 521; *Rhea v. Swain*, 122 Ind., 272; *Wilson v. Peelle*, 78 Ind., 384; *Wright v. Nipple*, 92 Ind., 314; *Mitchell v. Hazen*, 4 Conn., 495; *Hulse v. White*, 1 N. J. Law, 173; *Harding v. Larkin*, 41 Ill., 413.)

Expenses of the ejectment suit are part of the measure of damages, irrespective of notice. (*Morris v. Rowan*, 17 N. J. Law, 304; *Harding v. Larkin*, 41 Ill., 413; *Cheney v. Straub*, 35 Neb., 521.)

Parol notice of the ejectment suit was sufficient to make the judgment therein conclusive upon guarantor. (*Miner v. Clark*, 15 Wend. [N. Y.], 425; *Cummings v. Harrison*, 57 Miss., 275; *Hersey v. Long*, 30 Minn., 114; *Davenport v. Muir*, 3 J. J. Marsh. [Ky.], 310; *Ferrea v. Chabot*, 63 Cal., 564; *Somers v. Schmidt*, 24 Wis., 1; *Williams v. Burg*, 9 Lea [Tenn.], 455.)

The law does not require the notice to be in any particular form. (*Hersey v. Long*, 30 Minn., 114; *Williams v. Burg*, 9 Lea [Tenn.], 455.)

RYAN, C.

In the record of this case we find a copy of a petition and of an answer which purport to have been filed in the county court, as well as in the district court, of Lancaster county. In the caption of each of these pleadings there occur the words "In the county court of Lancaster county, Nebraska." There is nothing to show that there ever was a judgment in the aforesaid county court with respect to the issues presented by said pleadings; neither does it appear that the case tried in the district court, and sought to be reviewed in this court, was a continuation

of, or in any way connected with, an action in the county court. We shall, therefore, ignore the arguments presented with reference to the alleged want of jurisdiction of the county court, and the alleged departure in the district court from the issues claimed to have been tried in the county court.

By her amended petition filed in the aforesaid district court, Sarah E. Campbell alleged that on November 6, 1876, Thomas and Martha Walton, in consideration of the payment of $200, had conveyed lot 12, block 32, in Dawson's Addition, in the city of Lincoln, to R. J. Campbell. The covenants of warranty contained in the deed whereby said conveyance was made were in the ordinary form, as set out in the petition, and the breach of these covenants was the cause of action stated. We shall hereinafter describe specifically such matters as in the course of this discussion shall require a specific statement. For the present it is sufficient to say the answer contained a general denial, and that by a reply the affirmative averments of the answer were traversed. There was a verdict and judgment as prayed in the petition. There was an averment in the answer that the defendant in error lost her title, if she did lose it, by reason of her negligent failure to make a proper defense in an action wherein her grantor was a defendant. There is found no evidence upon which this negligence could be predicated, for the proof of this matter was excluded, and the ruling in this respect is not called in question by the petition in error.

Another paragraph of the answer was as follows: "And these defendants, for a further and fourth defense, say that they were never notified that plaintiff's title to said lot was questioned or attacked, and had no notice of the pendency of any suit against the same." Until after the filing of this answer there had been mentioned both Thomas Walton and his wife; hence the pleadings up to that time referred to two defendants. Thenceforward there seems to have been but one defendant, Mr.

Walton. It is not shown why this was, but as no importance seems to be attached to this circumstance, it will not be noted farther than to explain the use of the word "defendants," which occurs in the above quotation. The proofs were addressed only to facts with which Mr. Walton was connected, and were to this effect: R. J. Campbell testified that the action against himself and the defendant in error was brought by Frank M. Miles, in 1877 or 1878, as he thought; that whenever he met Walton on the street he talked with Walton about it; that Walton contended that they could not beat witness out of it; that witness told Walton witness was not fretting about it, because if witness lost the title he considered he had a good man to go back to, and that if witness lost the property he expected to go back on Walton; that Walton said that if witness went back on him for the purchase money, witness ought to transfer the title to Walton; that Walton talked this in the house of witness and, as he himself said, came there to talk that matter over. This witness said he was safe in saying he talked fifty times with Walton about this lawsuit while it was going on. Sarah E. Campbell, the defendant in error, testified that during the time the suit was pending in the United States circuit court Mr. Walton was at the home of defendant in error, and that it was talked that if the property was lost, Walton ought to have the title transferred back to him. Mrs. Campbell, in this connection, testified that Mr. Walton said: "If the Burrs had anything to do with it, let it go." She further testified that the theme of the conversation was: "If we had no title, how could we make any title back? How could I give one?" It is not just clear what Burrs were meant by the reference used in connection with that name by Mr. Walton. L. C. Burr was alleged, in the pleadings in the federal court, to be a party interested in the suit, as well as one of the attorneys of Mr. Miles. In this action the jury may have assumed that, as Mr. Burr was interested adversely to the title which Mr. Walton had covenanted to defend, it

was to him that Mr. Walton alluded. The evidence was not, therefore, of casual conversations between the Campbells and Mr. Walton, but was with reference to a discussion sought by Walton with respect to the suit pending, in which Walton was told distinctly that in case the title failed he would be called upon to make it good. There would appear from this testimony to have been made no objection on Mr. Walton's part as to his liability, but that the utmost he claimed was that in event of a loss of the property, and impliedly of his answering for such loss, the property should be conveyed to him. Not only did this conversation go this far, but, in addition, Mr. Walton suggested that if a certain contingency existed the defendant in error should let the property go. While it has been held that a written notice is necessary under such circumstances, we believe the better rule to be that a notice of the character of that shown in this case is sufficient to conclude the warrantor by the pending adjudication adverse to the title which he had warranted. (*Davenport v. Muir*, 3 J. J. Marsh [Ky.], 310; *Ferrea v. Chabot*, 63 Cal., 564; *Miner v. Clark*, 15 Wend. [N. Y.], 425; *Cummings v. Harrison*, 57 Miss., 275; *Chicago City v. Robbins*, 2 Bl. [U. S.], 418; *Hersey v. Long*, 30 Minn., 114.) This general statement of our conclusion is intended not only to apply to the discussion by plaintiff in error of the sufficiency of the proof of notice to sustain the verdict, but as well to meet the objection to the refusal to instruct as requested with respect to the legal propositions which should govern in the consideration of this branch of the case.

It is urged that, as Mrs. Campbell claimed to have acquired title only by virtue of a quitclaim deed, the covenants sued on did not inure to her benefit. In the petition it was alleged that in 1876, Thomas Walton and his wife, though they had no title, assumed to convey the lot in question to R. J. Campbell with covenants of warranty. It was further alleged that on May 26, 1888, there was an ouster from possession in a suit wherein

Frank M. Miles was plaintiff. From the averments it is fair to assume that Walton, while he had possession of the premises but no title, executed a conveyance with covenants of warranty to R. J. Campbell. The fact that possession passed by virtue of this deed was sufficient to cause the covenants to run with the title, for the covenants could not be said to be broken when made. (*Scott v. Twiss*, 4 Neb., 133.) There has been cited no case holding that the running of covenants with the title is dependent on the presence or absence of covenants of warranty. The rule of our statute is that: "Every conveyance of real estate shall pass all interest of the grantor therein, unless a contrary intent can reasonably be inferred from the terms used." (Compiled Statutes, ch. 73, sec. 50.) As the covenants run with the title it logically follows that whatever conveys the title is effective to carry with the title such covenants as were not broken when made, and, therefore, that Mrs. Campbell, as a subsequent grantee, was a proper party plaintiff.

The matters which constituted the claim for damages on account of the breaches of covenant were thus stated in the petition: "Plaintiff further alleges that some months prior to the 26th of May, 1888, said Frank M. Miles began an action in the circuit court of the United States, claiming the real title to these premises and to the possession thereof, and made this plaintiff a party to this action, of which defendant had due notice from plaintiff and others, and that plaintiff necessarily expended and was compelled to pay out for necessary costs and attorney's fees in defending said action against Frank M. Miles the sum of $200, and that plaintiff has sustained damages by reason of the premises in the sum of $200, and interest at the rate of seven per cent per annum from June 26, 1888, to date, and that the same now remains due and unpaid from the defendants, and each of them, to this plaintiff, and that by reason of this failure of the covenants in said deed heretofore mentioned, and of the succession of this plaintiff to said R. J. Campbell's cause of

action, this plaintiff has been further damaged in the sum of $200, paid to said Walton as the purchase price of said property." The prayer was for judgment in the sum of $400, with interest at seven per cent per annum from November 6, 1876. The averments of the damages sustained must control the recovery rather than the mere prayer of the petition. We shall therefore consider the elements of these damages as stated in the portion of the petition above quoted. The first of these elements was for attorney's fees and costs expended in the case wherein Miles was plaintiff and the Campbells were defendants. The proofs were simply that the reasonable attorney's fees for which Mrs. Campbell was liable were of the sum of $200. There was no attempt to prove that these had ever been paid; hence we do not think, on the proofs made, that interest should be allowed with respect to this item. It was alleged that the other item of $200 had accrued by reason of the failure of the covenants of warranty, but in what way this had been accomplished there was no attempt to explain or specify. In the petition there had been averments that on or about the 26th of May, or June, 1888, the said Miles had ousted and dispossessed plaintiff by due process of law. There was no proof of these averments, as made. The evidence was to the effect that after the rendition of the judgment in favor of Miles a man came to Mr. Campbell and said to him that he was a deputy United States marshal and had in his possession some sort of a writ which required possession to be given up to Miles. The answer of Mr. Campbell was that he would not give up possession, and on this line there was no further evidence. It was shown by the testimony of Mr. and Mrs. Campbell that after the litigation had ended between themselves and Frank M. Miles they paid him $500 for a conveyance of the property to them by quitclaim deed. The deed was introduced in evidence and bears date September 17, 1892. In *Cheney v. Straube*, 43 Neb., 879, it was said that after a judgment against his title a covenantee is not required

to prolong the controversy until dispossessed by legal process, but may surrender to the holder of the paramount title. We shall not undertake to determine what might be held to be the rule under other circumstances, but shall follow the line upon which this case was tried in the district court, wherein it seems to have been assumed that the averments of actual ouster were sufficiently proved by evidence showing the recognition of the right to an eviction by a purchase of the title adjudged paramount to that of the defendants. The equivalent for the alleged eviction must, however, be accepted with all its disadvantages, and one of these is that the date at which the ouster must be assumed to have occurred is the date of the deed from Miles to Mrs. Campbell. Giving to the general averment that the damage caused by the failure of the covenants of warranty the liberal construction that thereby was covered the expenditure of $200 to purchase peace with Miles,—a construction adopted by us because it seems to have been adopted in the district court,—and we are justified in assuming that on the date of the quitclaim deed from Miles the possession of the Campbells under the title derived from Walton, ended. Their cause of action, therefore, accrued at this time, and, what is still more to our present purpose, the damages suffered by the failure of the title, $200, according to the averments of the petition, are to be deemed to have come into existence at this date. There should, therefore, have been allowed interest on this item only from September 17, 1892, at seven per cent per annum. The verdict was returned in this case for the sum of $762.25 on October 23, 1894. The interest on $200 at seven per cent per annum to that date from September 17, 1892, was $29.40. To this, if the two sums of $200 each be added, it will be seen that in no event should the verdict have been in excess of $429.40. If, within forty days from that on which this opinion shall be filed, the defendant in error shall enter a remittitur of the excess of the judgment above $429.40, as of the date when such

judgment was rendered, it will be affirmed, otherwise it must be reversed.

JUDGMENT ACCORDINGLY.

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ISAAC R. ALTER ET AL. V. BANK OF STOCKHAM ET AL.

FILED JUNE 3, 1897. No. 7189.

1. **Action for Conversion.** An action for the conversion of personal property is an action at law and should be so tried when by either party there is presented no equitable ground for relief or of defense.
2. **Review: CONFLICTING EVIDENCE.** A verdict reached upon consideration of conflicting evidence will not be disturbed even though the proofs made by the prevailing party are not entirely satisfactory in character or preponderance.

ERROR from the district court of Hamilton county. Tried below before BATES, J. *Affirmed.*

*Hainer & Smith*, for plaintiffs in error.

*A. W. Agee* and *H. M. Kellogg, contra.*

RYAN, C.

This action was begun in the district court of Hamilton county by Isaac R. Alter and Herbert H. Glover as plaintiffs, doing business under the firm name and style of Alter & Glover. The Bank of Stockham was the sole defendant. It was alleged in the petition that plaintiffs, on September 26, 1889, had sold to Bernhard and Herman Wiens 309 steers at the agreed price of $8,500; that a note had accordingly been given on that day, by its terms due six months thereafter; that to secure the payment of said note the makers thereof had executed to plaintiffs a chattel mortgage; that said mortgage had been duly filed for record; that when said note fell due it had not been paid, and that at the time this suit was brought

there was still unpaid on said note the sum of $1,606.05, with ten per cent per annum interest thereon from May 21, 1890. It was further alleged in the petition that on October 28, 1889, Bernhard and Herman Wiens had mortgaged said cattle to the defendant, the Bank of Stockham; that in the mortgage last named the priority of plaintiffs' mortgage was recognized by the recitation in said mortgage to the bank that "all of the above steers have a previous mortgage on them;" that on March 10, 1890, Bernhard Wiens had executed another mortgage to the bank upon 140 of said cattle, wherein plaintiffs' mortgage was referred to in this language: "Second mortgage on 140 head of steers now fattening in my yards." It was alleged that the mortgages to the bank were given and taken without the consent of the plaintiffs, and with full knowledge of the rights of the plaintiffs. There was alleged in the petition three several sales of the cattle covered by plaintiffs' mortgage, one of which was of 41 head of steers on January 8, 1890, another of 127 head on March 8, 1890, and the third of 141 head on May 21, 1890. This action was to recover from the bank the amount above alleged to be due from Bernhard and Herman Wiens to plaintiffs. It is necessary to consider only one of the sales, for the allegations as to all the sales were, as to our purpose, practically in the same language. The averments as to the first sale were in this language: "On or about January 8, 1890, the said defendant bank, although having full knowledge of plaintiffs' right in and to said steers, and that no part of the sum secured by plaintiffs' mortgage had been paid, took possession of 41 head of said steers so mortgaged and belonging to said plaintiffs, and shipped the same to Martin Bros., commission merchants at Omaha, Nebraska, and caused to be sold the entire interest in said steers without regard to plaintiffs' mortgage thereon, on account of said Bernhard Wiens in the name of B. Wiens, for the net sum of $1,330, after deducting all charges for commission, freight, and other charges,

which net proceeds, to-wit, $1,330, were by said Martin Bros., under the direction of the defendant bank, deposited to its credit in the Union Stock Yards Bank of South Omaha." As we understand these averments in connection with antecedent allegations of the petition that the cattle, before shipment, were in Hamilton county, the defendant was sought to be held liable for converting to its own use the cattle shipped by the bank, and afterward having sold the same and kept the proceeds of the sale. As was held in *State v. Hill*, 38 Neb., 698, the cause of action arose upon the conversion. This action therefore was correctly held to be one at law, and accordingly was properly so tried. As there was no evidence to establish the conversion charged, there was no prejudicial error in directing the jury to find for the bank, as it did.

Bernhard Wiens and Herman Wiens, by their petition as intervenors, were permitted to allege that they purchased the cattle from Alter & Glover; that Isaac R. Alter, a member of said firm, managed the weighing of said cattle; that the said Bernhard and Herman Wiens relied upon the weights announced by said Alter; that according to said announcements the said 309 steers weighed 364,330 pounds, and in payment for these cattle, in accordance with these figures, the said Bernhard and Herman Wiens were required to, and accordingly did, execute their note to plaintiffs for the sum of $8,500; that in truth the actual weight was but 287,080 pounds, or an average of 909 pounds on each animal less than that fraudulently announced as aforesaid, and that, by reason of said fraud practiced by Isaac R. Alter, the said Bernhard and Herman Wiens were induced to give their note for the sum of $1,811.62 in excess of what it should have been executed for. The intervenors therefore prayed that they might have judgment against the plaintiffs for the sum of $454.85—being the amount which they had previously paid in excess of what the note should actually have been given for. By an answer to the petition of the intervenors issues were duly joined and there was a

prayer for judgment against said intervenors for the balance of their note. Instead of finding any sum due to the intervenors, the jury found that they were owing plaintiffs the sum of $828.91. Judgment was duly rendered on this verdict, which plaintiffs seek to have reversed by these proceedings in error. It is unnecessary to detail the evidence adduced by the intervenors to sustain their contention. In general terms it may be said that it proceeded on the theory that fraud was practiced as above pleaded and that this was not discovered till the cattle were shipped. The overweights were arrived at by showing what the cattle actually weighed in South Omaha when shipped; how they had been fed and had thrived, and what increase of weight of each animal would be probable under the circumstances. By this method there would have been justified a greater rebate than the intervenors obtained, provided the jury accepted their proofs as satisfactory. It must be confessed that this method of establishing the averments of the intervenors was not as direct and satisfactory as could have been wished, and yet it formed a sufficient basis for the verdict returned. On this branch the judgment of the district court is likewise

AFFIRMED.

HARRISON, J., dissenting.

I do not think that the evidence introduced in this case to show that there had been fraud practiced or a mistake made in weighing the cattle at the time they were purchased by the intervenors was competent for that purpose; hence must dissent from the conclusion expressed in the opinion that it formed a sufficient basis for the verdict returned.

## TECUMSEH NATIONAL BANK V. ANNA B. SAUNDERS.

FILED JUNE 3, 1897. No. 7028.

1. **Rehearing.** A rehearing will not be granted when it is clear that no other conclusion than that already reached is possible.
2. **Constitutional Amendments: SUBMISSION OF PROPOSITION: ELECTIONS.** A proposition to amend the constitution of this state can only be submitted at a general election at which there are elected senators and representatives.
3. ———: ———: ———: **RESULT.** To effect the adoption of an amendment to the constitution of this state submitted by the legislature it must receive more than one-half the highest number of votes cast at such general election, whether such highest number be for the filling of an office or for the adoption of a proposition.

MOTION by defendant in error for rehearing of case reported in 50 Neb., 521. *Rehearing denied.*

*T. Appelget* and *J. Hall Hitchcock*, for the motion.

RYAN, C.

An opinion was filed in this case February 3, 1897, and reported in 50 Neb., 521. There has been filed a petition and a motion for a rehearing, and thereon it is thought advisable that the views of this court be expressed as to other cases in which reversals were entered following the result of this case.

In *Austin v. Tecumseh Nat. Bank*, 49 Neb., 412, a petition in all essential particulars like that in this case had been held insufficient to sustain a judgment. On the oral argument of the cases it was argued that the same result must be reached as that which had been arrived at in the case above cited. In view of the unsatisfactory nature of such an adjudication, counsel for the defendant in error requested that all the cases might be considered upon the evidence rather than with reference to the petitions, at the same time stating that if the evidence was not sufficient they wished that fact determined; for, on

another trial, it would be impossible to make more satisfactory proofs than had been already made in the district court. There was no question made that the evidence was identical with that in each of the cases submitted by the same counsel as appeared in this case, and the entry of judgment in this case was, in this court, as we understood it, to be entered in all the cases just referred to. We might have determined this particular case upon the sufficiency of the evidence to sustain the averments of the petition in the district court, and, in its companion cases, might have reached the conclusion we did on the ground that the averments of the petition were insufficient to state a cause of action. We do not deem it necessary, however, to grant rehearings when it is clear we must again announce affirmances of judgments because of insufficient averments rather than of insufficient proofs—the essential defect being the same, under the ruling in *Austin v. Tecumseh Nat. Bank.*

From the former opinion NORVAL, J., dissented, and it is now urged that there was adopted at the general election of 1896 a constitutional amendment which increased the number of judges of this court to five and that, therefore, the concurrence of POST, C. J., and HARRISON, J., could not operate to reverse the judgment of the district court. In support of the contention that the amendment increasing the number of judges has in fact been adopted, a showing has been made that, at the time of the election above referred to, there were votes deposited for and against the said amendment in boxes used for receiving only those votes all over the state; that these votes were canvassed separately, and that the whole number of votes so cast was 122,475, of which 84,579 were in favor of the said amendment and 37,896 against. Without attempting to verify the correctness of the statements as to the number of the votes cast for and against this amendment, we shall accept the above figures as correct. It was shown, however, that the total number of votes cast for governor at the late election was 217,768, and we shall accept this

as the highest number of votes cast at said general election for any candidate.

Section 1, article 15, of the constitution of this state contains the following language: "Either branch of the legislature may propose amendments to this constitution, and, if the same be agreed to by three-fourths of the members elected to each house, such proposed amendments shall be entered on the journal with the yeas and nays, and published once each week in at least one newspaper in each county where a newspaper is published for three months immediately preceding the next election for senators and representatives, at which election the same shall be submitted to the electors for approval or rejection, and, if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this constitution." The claim of the defendants in error that there are now five judges of this court rests on the propositions that the voting on the constitutional amendment, conducted as it was, was in effect an election distinct from the election of senators and representatives, and that, therefore, the majority need be only of the number of votes cast with respect to such amendment. Some reliance seems also to be placed upon the facts that the candidates receiving the highest number of votes for said offices have duly qualified and have received from the governor certificates of their election. We shall now consider these propositions in the order above stated.

It is urged that the language "such election" in the phrase, "If a majority of the electors voting at such election adopt such amendment" refers to the vote for the approval or rejection of the proposed amendment, and that therefore the total number of votes cast at the election for senators and representatives is immaterial. If this construction is correct, the votes for and against the amendment, not being cast at a general election, must be held to have been cast at a special election, and that the only relation between these two elections was that they were held at the same time under the direction and

supervision of the same officers. If this is true, the election with reference to the constitutional amendment is abortive, for it was not, in that event, a general election, and the constitutional requirement is that the election must be of that class, restricted to those particular general elections at which senators and representatives are chosen. The case of *State v. Babcock*, 17 Neb., 188, is relied upon as establishing a rule different from that just announced. The syllabus in that case is now in this language: "The votes necessary to adopt an amendment to the constitution, under the provisions of section 1, article 15, of the same, must be a majority of all those cast in the state at that election for senators and representatives." By a reference to the original opinion filed in the above case it is found that the syllabus as originally prepared by Judge MAXWELL was written as follows: "The vote necessary to adopt an amendment to the constitution under the provision of section 1, article 15, of the same, must be a majority of all those cast in the state for senators and representatives." This quite explicitly declared that the majority must be of the votes cast for senators and representatives. Apparently to avoid this construction Judge MAXWELL, by interlineation, just after the word "state," wrote the words "at that election," so that the requirement of a majority should be of all the votes cast, consistently with the language of the constitution, at the election for senators and representatives instead of a majority of the votes cast for senators and representatives as otherwise might have been understood. The words "senators and representatives" are used in this part of the constitution merely to indicate the particular general election at which a constitutional amendment may be voted upon—the majority of the votes must be a majority of all those cast at such general election. That the above conclusion with reference to the case of the *State v. Babcock, supra*, is correct is borne out by the fact that the following language of Judge MAXWELL in respect to the adoption of constitutional

amendments was made use of in the second paragraph of the syllabus of *In re Senate File 31*, 25 Neb., 864: "The proposed amendment possesses no efficacy until approved by a majority of the electors of the state voting at the election, and the approval of the governor is unnecessary and adds nothing to the validity of such proposed amendments."

The contention that the issuance of the certificate of election to a candidate for a provisional office, evidences the creation of such office, is met by the holding in the case just cited. In the case which involved the consideration of a question quite like that now under discussion there has recently been filed an opinion by HARRISON, J., in which all the adjudications of this court on this subject have been reviewed with the same conclusion above reached. (*Bryan v. City of Lincoln*, 50 Neb., 620.) It is unnecessary at this time to do more than refer to this case, for the analogies, upon a perusal thereof, will be so apparent that comment and comparison could subserve no useful purpose of elucidation.

It has been urged that in *State v. Roper*, 47 Neb., 417, this court has recognized the rule that a majority of all the votes cast with reference to a given proposition was sufficient to effect its adoption, and that the majority of all votes cast at such election was not required. This contention has no merit, for in the case referred to the election considered was a special election, at which the only question voted on was whether the county seat of Red Willow county should be McCook or Indianola. There was, therefore, no standard of measurement possible other than the number of the votes cast on this single proposition. From a consideration of all the cases decided by this court which have a bearing upon this subject our conclusion is that to secure the adoption of an amendment to our constitution it is necessary that the favorable votes be in excess of one-half of the highest aggregate number of votes cast at said election, whether such highest number be for the selection of an officer or

upon the adoption of a proposition. The motion for a rehearing is therefore overruled.

REHEARING DENIED.

NORVAL, J., dissenting.

Being unable to concur in the conclusion reached by the majority upon the applications for rehearings in this and the several cases submitted therewith, I will briefly state my views upon the question involved.

The actions were against the Tecumseh National Bank, as successor of the Bank of Russell & Holmes, to recover moneys deposited by the several plaintiffs in the last named bank. The petition in each case filed in the court below is substantially the same as the one construed in *Austin v. Tecumseh Nat. Bank*, 49 Neb., 412, which was held not to state a cause of action. Doubtless, to render the Tecumseh National Bank liable for the delinquencies of the Bank of Russell & Holmes, more must be alleged and proven than the mere fact that the former succeeded the latter in business. It should be further shown, to establish a cause of action against the defendant below, that it was the successor of an insolvent bank, and as such came into the possession of the business and all the available assets of the first bank. (*Reed v. First Nat. Bank of Weeping Water*, 46 Neb., 168.) The petition in each of the cases substantially so alleges, and the proofs in the Saunders case support the averments. (*Hopper v. Moore*, 42 Ia., 563; *Hughes v. School District*, 72 Mo., 643; *Thompson v. Abbott*, 61 Mo., 176; *Eans v. Exchange Bank of Jefferson City*, 79 Mo., 182.) In the last case the question was presented whether the successor of a bank was liable for deposits therein. The petition, in every essential like those in *Tecumseh Nat. Bank v. Saunders* and the companion cases, was construed and held to state a cause of action. The court in the opinion say: "The only remaining question is, whether the petition alleges facts which show the liability of defendant for plaintiff's de-

mand? It expressly avers that after the National Exchange Bank went into liquidation the defendant organized as a banking corporation and came into possession of, and received as the successor of the said national bank for plaintiff's use, said sum of $1,500, deposited in the said national bank by the intestate. The demurrer admits the truth of these allegations, and if they are true, defendant is liable to plaintiff for money had and received to his use. If, as alleged, defendant is the successor of the said national bank, and the funds and property of the latter passed into the hands of the former, its liability to depositors of money in the latter bank has been expressly held in *Hopper v. Moore*, 42 Ia., 563. (See, also, *Hughes v. School District*, 72 Mo., 643; *Thompson v. Abbott*, 61 Mo., 176.) Any other doctrine, it seems to us, would be monstrous. As well contend that because one has his name changed by legislative enactment, he thereby avoids all obligations incurred in his former name. The names of banks may be changed. At the expiration of the old a new charter may be granted to the same bank, even with enlarged or restricted powers; literally it is not the same corporation, substantially it is, and to permit an escape from its liabilities by such continuances would not be very creditable to the law." After further investigation, I adhere to the opinion which I entertained in the former hearing, namely, that the petition herein states a cause of action and that the proofs sustain the judgment below.

The judgments in the companion cases were reversed on the sole ground that the evidence was insufficient to sustain the findings. The decisions were wrong, since all the evidence upon which those cases were determined by the trial court was not before us for review. A bill of exceptions was allowed by the clerk of the district court in each case, but the same does not purport to contain all the evidence adduced. The records disclose that, by stipulations of the parties in writing and orally in open court, it was agreed that the testimony introduced

in evidence on the trial in the case of Anna B. Saunders v. Tecumseh National Bank, except certain testimony, should be read in evidence on the trial of the other several causes, and that bill of exceptions in said cause should be used as a part of the bill of exceptions in said causes. Neither these stipulations, nor the request of counsel upon the original submission to this court that all the cases might be determined upon the evidence, formed any basis for the consideration by this court of the bill of exceptions in the Saunders case in the determining of the rights of the parties in the companion cases submitted therewith, since such bill was not attached to the bills in the other cases or filed therein. (*Credit Foncier of America v. Rogers*, 8 Neb., 34; *Aultman v. Patterson*, 14 Neb., 57; *State Ins. Co. of Des Moines v. Buckstaff*, 47 Neb., 1; *Wood Mowing & Reaping Machine Co. v. Gerhold*, 47 Neb., 397; *Lowe v. Riley*, 41 Neb., 812; *Tecumseh Nat. Bank v. Best*, 50 Neb., 518.) The second paragraph of the syllabus in the last case is as follows: "A bill of exceptions must contain all the evidence upon which questions of fact are to be determined, a reference in such bill to evidence to be found by reference to another bill filed in an independent case not being sufficient." In view of those decisions these cases could not properly be determined in this court upon the evidence; but the presumption must be indulged that the findings were supported by the proofs. For the reasons stated the several applications for rehearing should be sustained.

The former decisions of this court in the several cases under review were rendered by a divided court, two of the judges voting for reversal and one for affirmance of the judgments below, and from which it is urged that said decisions are of no binding force or effect, the argument being that it requires three judges of this court to pronounce a decision. The soundness of this contention depends upon the fact whether the following proposed amendments to the constitution submitted by the state legislature of 1895 to a vote of the electors were adopted

or rejected at the general election held in November, 1896:

"A joint resolution proposing to amend sections two (2), four (4), and five (5) of article six (6) of the constitution of the state of Nebraska, relating to number of judges of the supreme court and their term of office.

"*Be it Resolved and Enacted by the Legislature of the State of Nebraska:*

"Section 1. That section two (2) of article six (6) of the constitution of the state of Nebraska be amended so as to read as follows: 'Section 2. The supreme court shall, until otherwise provided by law, consist of five (5) judges, a majority of whom shall be necessary to form a quorum or to pronounce a decision.' * * *

"Section 2. That section four (4) of article six (6) of the constitution of the state of Nebraska be amended so as to read as follows: 'Section 4. The judges of the supreme court shall be elected by the electors of the state at large, and their term of office, except as hereinafter provided, shall be for a period of not less than five (5) years as the legislature may prescribe.'

"Section 3. That section five (5) of article six (6) of the constitution of the state of Nebraska be amended to read as follows: 'Section 5. At the first general election to be held in the year 1896 there shall be elected two (2) judges of the supreme court, one of whom shall be elected for a term of two (2) years, one for the term of four (4) years, and at each general election thereafter there shall be elected one judge of the supreme court for the term of five (5) years, unless otherwise provided by law; Provided, That the judges of the supreme court whose terms have not expired at the time of holding the general election of 1896, shall continue to hold their office for the remainder of the term for which they were respectively commissioned.'"

It is disclosed by the several petitions for rehearing that the total number of votes cast in the state at the general election held in the year 1896, and at which the

said amendments to the constitution were submitted for adoption or rejection, was 230,795, while said amendments only received 84,579 affirmative votes and 37,896 votes were cast in the negative; that in pursuance of statute the official returns of said election on said amendments were returned to, and canvassed by, the board of state canvassers, who declared the result as above indicated, and that said proposed amendments to the constitution were rejected "if said proposed amendments require an affirmative majority of all those voting at said election;" that in compliance with the provisions of the proposed amendment last copied above, two persons were elected as additional judges of this court contingent upon the adoption of said constitutional amendments, and they each qualified by taking and filing with the secretary of state the requisite oath of office. If the proposed amendments merely required for their adoption an affirmative vote of a majority of all the votes cast on the proposition, said amendments have become parts of the fundamental law of the state, and it is obvious the membership of this court consists of five judges, and that no two of them can render a valid judgment. The question for decision is as to requisite number of votes required to adopt an amendment to the constitution, and the determination thereof depends upon the construction to be given section 1 of article 15 of the state constitution, which, after providing for the proposal of amendments to that instrument by the legislature, and for the publication of such proposed amendments once a week in at least one newspaper in each county where a newspaper is published for three months immediately preceding the next election of senators and representatives, declares that "at which election the same shall be submitted to the electors for approval or rejection, and if a majority of the electors voting at such election adopt such amendments the same shall become a part of this constitution." One of these constructions must be placed upon the foregoing provision, namely, that the affirmative vote re-

quired to adopt an amendment to the constitution submitted by the legislature under section 1, article 15, of said instrument must be either: First, a majority of the votes cast on that proposition; or second, an affirmative vote at least equal to a majority of the electors who voted for senators and representatives; or third, a majority of all the votes cast at the election at which the amendment is submitted to the electors of the state for their approval or rejection. There is nothing in the phraseology or the grammatical construction of the section of the constitution under consideration which would warrant the conclusion that "a majority of the electors voting at such election" means that an amendment to the constitution submitted by the legislature is adopted if it merely receives a majority of the votes cast for and against it. If the language had been a majority of the electors voting "thereon", or a majority of the electors voting at such election "on said amendment", then the interpretation that an affirmative vote of a majority of the electors voting on such an amendment is sufficient to adopt the same would be permissible. But the section cannot be so construed, since the language of the constitution is "a majority of all the votes cast at such election." This is manifest from an examination of the language of section 2 of said article 15 of the constitution, which, after providing for a convention to revise and amend the constitution, declares that "no amendment or change of this constitution, agreed upon by such convention, shall take effect until the same has been submitted to the electors of the state and adopted by a majority of those voting for and against the same."

I am unable to appreciate the argument which would make the language just quoted and section 1 of article 15 synonymous. Under no rule of construction can it be said that the language used in the two sections is expressive of the same intention or meaning. One reads "a majority of the electors voting at such election," while the other merely requires "a majority of those voting for and

against the same" to adopt a constitutional amendment. The phraseology is materially different, and clearly indicates that it was the intention of the framers of our constitution that amendments to that instrument submitted to the people by a convention called for that purpose should be adopted by a vote different from the one required to carry an amendment proposed by the legislature. The mere reading of the language of the provisions of the two sections makes the difference plain and obvious, which it is the duty of the executive, legislative, and judicial branches of the state government alike to recognize. It is manifest that while an amendment to the constitution framed by a convention duly called for that purpose may be adopted by an affirmative vote of a majority of those voting on the proposition, an amendment prepared by the law-making body cannot be adopted by a majority of those voting thereon. This construction is in harmony with the interpretation placed by the legislature upon section 1, article 15, of the constitution. In 1889, amendments to the constitution were proposed by the legislature, the purpose of one of which was to increase the number of judges of this court from three to five, and of another was to raise the salary of each judge of the supreme court to $3,500 per annum, and the salary of each judge of the district court to $3,000 per annum. These amendments were voted upon by the electors of the state at the election of senators and representatives held in November, 1890. There were 86,418 votes for the amendment relating to the increase of judges of this court, and 53,022 votes against said amendment, being a majority of 33,396 in favor of the proposition; 69,192 votes were cast for the amendment relating to the increase of salaries of the judges of the supreme and district courts and 61,519 against it, being a majority in favor of that amendment of 7,673. The total vote of the state at the election said amendments were voted upon was 214,861. In pursuance of law, the votes on said amendments were returned to and canvassed by the legis-

lature of 1891 in joint convention, an abstract of the vote was made and the amendments "not having the requisite majority of the electors voting at the said election, as provided by the constitution of the state of Nebraska, are hereby declared lost." (House Journal, 1891, pp. 66-73.) Thus the legislature of 1891 construed said section 1 of article 15 of the constitution to mean that a proposed amendment to such instrument submitted to a vote of the people thereunder is not adopted by merely receiving a majority of the votes cast on the proposition. If the construction placed upon said section 1 by counsel for the petitioners for a rehearing is sound, then each of the amendments above referred to, proposed by the legislature of 1889, was adopted as a part of the constitution. I am not aware that anyone, either in or out of court, has ever made such a claim, or that any judge, either of this court or of the district court, has been censured by any person for failing to draw that increased salary contemplated by the proposed amendment voted upon in 1890. It is of quite recent date when the proposition was first advanced in this state that an amendment to the constitution framed by the legislature is adopted if it receive a majority of the votes cast for and against it. The language of this section 1 of article 15, as well as the adjudications in this state, are against such contention.

The second construction, namely, that it is sufficient to adopt an amendment to the constitution submitted by the legislature if it receive a majority of the votes cast for senators and representatives, is equally as untenable as the interpretation already noticed. Our constitution provides for a general election to be held annually on the first Tuesday after the first Monday in November in each year. At the election held in the odd numbered year the judges of the supreme and district courts and regents of the state university are required to be elected, while at the election in the even numbered year the governor and other executive state officers and senators and representatives are chosen. The words "next election of sena-

tors and representatives," as used in section 1, article 15, of the constitution, were intended to designate the general election at which members of the legislature are required to be chosen as the election at which amendments to the constitution framed by the legislature should be voted upon by the electors for their approval or rejection. The words "a majority of the electors voting at such election," as employed in said section, do not mean a majority of the electors voting for senators and representatives, nor an affirmative vote at least equal to a majority of those who voted for senators and representatives, but a majority of the electors voting at the election at which such amendment to the constitution is submitted to the people. This has been the construction invariably adopted by the court whenever the question has been before it for consideration. (*State v. Lancaster County*, 6 Neb., 474; *State v. Babcock*, 17 Neb., 188; *State v. Bechel*, 22 Neb., 158; *In re Senate File 31*, 25 Neb., 864; *State v. Anderson*, 26 Neb., 517; *State v. Benton*, 29 Neb., 460; *Douglas County v. Keller*, 43 Neb., 635; *Stenberg v. State*, 50 Neb., 127; *Bryan v. City of Lincoln*, 50 Neb., 620.) It would be a practical impossibility to determine whether a proposed amendment to the constitution was adopted if the vote on senators and representatives is the criterion. It would require a personal inspection of each ballot to ascertain that vote, since some who vote for senators do not vote for representatives, and *vice versa*.

*State v. Babcock*, 17 Neb., 188, has been mentioned as holding that the vote on senators and representatives is the criterion by which to determine whether a proposed amendment to the constitution has been adopted or rejected. One or two expressions contained in the opinion in that case, when considered alone, might be so construed. But the opinion, taken as a whole, clearly shows that the proposition laid down by the court was that the affirmative vote essential to adopt an amendment to the constitution proposed by the legislature must be a majority of all those cast in the state at the election at which

the same is submitted to the people. The opinion has been so considered and cited by this and other courts as upholding that proposition. In the body of the opinion the author observes: "The language of section 1, article 15, is that 'if a majority of the electors voting at such election adopt such amendments the same shall become a part of this constitution.' This would seem to require a majority of all the votes cast at that election, otherwise the words 'voting at such election' would be entirely without meaning. But these words evidently were intended as a restriction upon the right to change the fundamental law, and not permit a minority of the people of the state to incorporate new provisions therein." This language is plainly against the interpretation placed upon that decision by certain constitutional lawyers. If a proposed amendment may be adopted by reason of its having received a majority of the votes cast for and against it, or more than one-half as many votes as are cast for senators and representatives, then the very reason assigned by Judge MAXWELL for the insertion of said constitutional provision may be defeated, and the constitution become amended by the vote of the minority of the electors of the state. Again, the citing, with approval of the authorities mentioned in the opinion in *State v. Babcock, supra*, clearly indicates that it was not the intention to hold that an amendment would become adopted either by receiving a majority of the votes cast on that question, or an affirmative vote equal to a majority of the votes cast for senators and representatives. This opinion is not only fortified by the prior and subsequent decisions of this court, but is sustained by numerous adjudications upon a like point in other states. (*People v. Berkeley*, 102 Cal., 298; *People v. Brown*, 11 Ill., 478; *People v. Wyant*, 48 Ill., 266; *State v. Winkelmeier*, 35 Mo., 103; *State v. Mayor of St. Louis*, 73 Mo., 435; *State v. Francis*, 95 Mo., 44; *Taylor v. Taylor*, 10 Minn., 81; *Bayard v. Klinge*, 16 Minn., 221; *Everett v. Smith*, 22 Minn., 53; *Hawkins v. Carroll County*, 50 Miss., 735; *Cocke v. Gooch*, 5 Heisk. [Tenn.], 294; *People v. Trustees*, 70 N. Y., 28;

*Enyart v. Hanover Township*, 25 O. St., 618; *State v. Foraker*, 46 O. St., 677; *Stebbins v. Judge of Superior Court of Grand Rapids*, 66 N. W. Rep. [Mich.], 594; *State v. Swift*, 69 Ind., 505.) The precise question was determined in *State v. Foraker*, *supra*, by the supreme court of Ohio, where a constitutional provision identical with our own was construed. It was held that an amendment to the constitution required for its adoption not a majority of the votes cast for senators and representatives, but a majority of all the votes cast at the election at which the amendment was submitted to the electors of the state for their approval or rejection. The rule is tersely stated in McCrary on Elections, section 174, thus: "When the constitution refers a question to popular vote, to be determined by a 'majority of the legal voters of the county voting at a general election,' the requirement calls for a majority of those who vote on any ticket, nomination, or question at that election, not merely a majority of those who vote on the particular question presented."

For the reasons stated I entertain no doubt that the proposed amendments under consideration were never ratified by the people and, therefore, they are not part of the fundamental law. I regret that this court is forced to this conclusion, as each member thereof was favorable to the amendments and hoped they would be adopted by the constitutional vote. The business of this court demanded an increase in the number of judges, and taking the past as a criterion by which to foretell the future, it would seem, under the construction adopted, it will be almost, if not quite, impossible to change the present constitution, however meritorious may be the amendment proposed. In the language of Chief Justice Brownson, in his opinion in *Oakley v. Aspinwall*, 3 N. Y., 547: "It is highly probable that inconveniences will result from following the constitution as it is written. But that consideration can have no weight with me. It is not for us, but for those who made the instrument, to supply its defects. If the legislature or the courts may take that office upon themselves, or if under color of construction, or upon

any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set a boundary to the powers of the government. Written constitutions will be worse than useless. Believing, as I do, that the success of free institutions depends on a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power,—some evil to be avoided, or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on, until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them." The requirement of section 1, article 15, of the constitution is not satisfied by a majority of the vote cast for senators and representatives, or by an affirmative vote of not less than a majority of those who vote on the question of the adoption of an amendment to the constitution, if they are less than a majority of all who vote at the election for any purpose.

I fully concur in the views expressed by RYAN, C., in his opinion upon the constitutional question, and am authorized to state that the other judges, and commissioners, also, concur therein as well as that portion of this opinion upon the same subject.

## HENRY OLIVER V. JAMES F. LANSING.

FILED JUNE 3, 1897. No. 9147.

1. **Review:** REVERSAL: MANDATE: PROCEDURE BELOW: COSTS. On a former appeal of this case this court determined all the issues involved, except the value of a certain block of real estate, reversed the decree appealed from and remanded the case with instructions to the district court to ascertain the value of said block and enter a decree in conformity with the opinion, taxing all the costs to the appellee. *Held*, (1) That the case was not remanded generally for a new trial of all the issues made by the pleadings therein; (2) that the district court did not err in refusing to permit witnesses to be called and examined as to the value of said block, but might ascertain such value from the evidence embraced in the bill of exceptions and made a part of the record of the case on its first trial; (3) that the parties were not entitled to have a jury determine the value of said block; (4) that the order made by the district court taxing all the costs to the appellee could not be reviewed by him in this action on a cross-petition in error as this order was made in obedience to the mandate of this court and the appellee's remedy was to apply to this court by motion on rehearing for a modification of that order.
2. **Bias of Judge:** EVIDENCE. Evidence examined, and *held* not to sustain the contention that the district judge who tried the case was biased or prejudiced against the plaintiff in error or his counsel.

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

*Webster, Rose & Fisherdick* and *E. E. Brown*, for plaintiff in error.

*Burr & Burr, contra.*

RAGAN, C.

June 26, 1893, the district court of Lancaster county entered a decree in an action pending therein between Henry Oliver and James F. Lansing. From this decree Oliver appealed to this court, which reversed the decree appealed from and remanded the case to the district court with instructions to enter a decree in conformity with the opinion. (See *Oliver v. Lansing*, 48 Neb., 338.) All

points presented by the appeal were decided by this court except the value of a block in East Lincoln. As to that it was said in the opinion: "We conclude that there has been no satisfactory proof made that the value of block 9, in East Lincoln, at the time $16,000 was charged for it, was worth that sum. As there was no finding on this question of value this must be determined upon another trial in the district court." The district court, after receiving the mandate of this court, entered a judgment in the action, to reverse which Oliver now prosecutes here a petition in error.

1. When the case came on for hearing the second time before the district court, Oliver called witnesses and offered to prove by them the value of said block 9. The district court refused to permit these witnesses to testify and determined the value of said block from the evidence in the record of the case then before the court in a bill of exceptions duly settled and allowed at the former hearing. This action of the court is the first error assigned here. In this the district court was correct. This case was not remanded to the district court for a new trial generally, but every issue in the case involved in the appeal was settled by the opinion except the value of said block 9. As to the value of this block some fifty-seven witnesses had testified on the former hearing and it was entirely proper for the district court, when the case reached it under the mandate, to determine the value of said block from the evidence already introduced in the case. We are not saying that the district court in the case had no right to take further testimony as to the value of this block; but what we do decide is that the mandate of this court commanded the district court to ascertain the value of that particular block, and the court was invested with discretion to determine it from the evidence already in the record before it or to take additional evidence.

2. The case was first tried and decree rendered by Judge Hall, one of the judges of the judicial district in

which is situate said Lancaster county. When the case came on for hearing the second time before said judge, Oliver objected to Judge Hall's trying the case, on the ground of his alleged bias and prejudice, and moved to have the case heard before some other judge of the district. The overruling of this objection and motion and the determination of the case by Judge Hall is the second assignment of error argued here. The substance of the facts alleged by the plaintiff in error which he claims show that the learned judge was biased and prejudiced against him is, that sometime after the rendition of the former decree the learned judge, in a conversation with Oliver's counsel, expressed the opinion that the value of said block 9 was about $13,200; that, of the various witnesses who had testified as to its value, he thought the value placed thereon by a witness named Tuttle was about the correct one. At this time the case was pending on appeal in this court. It seems, also, that Mr. Oliver, after the rendition of the other decree, spoke to his honor, Judge Hall, about the value of said block 9; and the judge said to him substantially what he had said to his counsel. It appears, also, that after the reversal of the case in this court, Judge Hall criticised the counsel for Oliver because the judge seemed to be of opinion that some point was presented to the supreme court by counsel for the appellant that was not presented to the trial court; that the case was tried in the supreme court upon a theory different from the theory upon which the case was presented in the court below. But there is in all this not a symptom of bias or prejudice existing in the mind of the learned judge who tried this case, either against Oliver or his counsel; nor was there anything improper in Judge Hall's expressing an opinion as to the value of said block 9 at the time and place and under the circumstances he did. If a litigant does not wish to know the opinion of a judge as to some point in a case he has been trying, he will be pretty sure not to find out, if he does not ask the judge; and if he can satisfy him-

self of the propriety of questioning the judge about his opinion, he ought not to complain because he receives an answer.

3. When the case came on for hearing after the reception of the mandate, Oliver demanded that the district court submit the question of the value of said block 9 to a jury. The denial of this application by the district court is another error assigned. The court did not err in this respect. It was an action in equity and the district court was not bound to permit any question of fact involved in it to be tried by a jury. It might have submitted, if he thought best, any question of fact involved in the case to the determination of a jury; but had he done so, he would not have been bound by the finding made by such jury.

4. The district court, on its final hearing of the case, February 23, 1897, determined the value of said block 9 to be $13,200. This finding of the district court is abundantly sustained by the evidence; but the district court, instead of entering a new decree in the case, modified its decree of June 26, 1893, so as to reduce its judgment in favor of Lansing and against Oliver. This action of the district court was erroneous. Its decree of June 26, 1893, was not in existence when it attempted to modify it in February, 1897. This court had annulled that decree.

5. When this case was remanded to the district court after reversing the former judgment, it was remanded with directions to the district court to tax all costs in the case to Lansing. The district court obeyed this mandate, and its action in that respect is complained of here by cross-petition in error filed by the defendant in error Lansing. The judgment complained of by Lansing is not the judgment of the district court, but of this court, and Lansing cannot be heard to complain on error of the action of the district court because it entered a judgment in conformity with the mandate of this court. If Lansing was of opinion that the judgment of this court taxing all the costs to him was erroneous, he should have

brought the attention of this court to that order by a motion for rehearing. Not having done this, or if he has, the motion for rehearing having been overruled, the question is closed. The decree of the district court is reversed and a decree will be entered here in favor of Lansing and against Oliver for the sum of $5,610.36, with interest at seven per cent per annum thereon from June 26, 1893. All costs to be taxed to Lansing.

DECREE ACCORDINGLY.

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## STATE OF NEBRASKA, EX REL. JOHN F. BEARD, V. F. L. COOK, CLERK OF DISTRICT COURT.

FILED JUNE 3, 1897. No. 9157.

1. **Alimony:** MODIFICATION OF DECREE. The district courts of the state are invested with jurisdiction to hear and determine an application for the modification of a decree for permanent alimony.
2. ———: ———: RIGHT OF APPEAL. The order made on such an application is an appealable order.
3. ———: ———: ———: SUPERSEDEAS. Where such order directs the payment of money, whether it may be superseded is not a matter resting in the discretion of the district court. Such order may be superseded as a matter of right, on the execution of a supersedeas bond as required by the first subdivision of section 677 of the Code of Civil Procedure.
4. ———: ———: APPROVAL OF SUPERSEDEAS BOND. It is the duty of the clerk of the district court to determine whether the sureties on such a bond, when the same is duly tendered, are financially responsible for the amount of the penalty of such bond; and, if the clerk so finds, it is his duty to approve and file the bond.

ERROR from the district court of Burt county. Tried below before POWELL, J. *Reversed and writ allowed.*

*H. H. Bowes* and *W. G. Sears*, for plaintiff in error.

*Osborn & Aye, contra.*

RAGAN, C.

In the district court of Burt county, in a suit pending between John F. Beard and Anna M. Beard, his wife, the latter obtained a decree of divorce against her husband and an award of $5,000 alimony. Some time after this John F. Beard filed an application in the case reciting that he had paid of the sum awarded as alimony $3,435.75. He also set forth in the application certain facts which he claimed entitled him to be discharged from further payments on said decree, or at least that he should not be required to pay the entire sum remaining unpaid on said decree, and moved the court that it be modified. The court, on the hearing of this application, modified the decree by reducing the payments to be made by Beard to $350 per annum, but refused to abate anything from the amount awarded Mrs. Beard as alimony. From this order John F. Beard has appealed to this court. At the time of making such order, or within twenty days thereafter, Beard tendered to the clerk of the district court a supersedeas bond to stay the execution of said decree and requested the said clerk to approve the same. The clerk declined to approve the supersedeas bond, placing his refusal upon the ground that the district court, when applied to, had refused a supersedeas of the decree. Beard then made application to the district court for a writ of *mandamus* to compel the clerk of that court to take and approve a proper supersedeas bond in the case for staying the execution of said decree as modified, and on this being denied brings the case here for review. The district court was invested with jurisdiction to hear the application for the modification of the original decree. (Compiled Statutes, ch. 25, sec. 27.) And the order of the district court overruling the application to modify the decree as prayed was an appealable order, and the appellant was entitled to supersede this order by virtue of the first subdivision of section 677 of the Code of Civil Procedure. The fact that the district court refused to super-

sede the decree is immaterial, as the appellant was entitled to supersede the decree by virtue of the section just quoted. Whether the decree should be superseded was not a matter resting in the discretion of the district court. It was the duty of the clerk to pass upon the sufficiency of the sureties on the supersedeas bond tendered by the appellant, and if he deemed those sureties sufficient, to approve the bond. (Code of Civil Procedure, sec. 678.) Judgment of district court reversed, and the writ will issue as prayed.

REVERSED AND WRIT ALLOWED.

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## MINNIE E. GUTHMANN V. JACOB VALLERY, SR.

FILED JUNE 3, 1897. No. 8487.

1. **Landlord and Tenant:** LIFE ESTATE: RIGHTS OF REVERSIONER. The death of a tenant for life terminates the lease of the premises existing between him and his lessee, and the latter may at once quit possession without incurring any liability to the reversioner for rent.

2. ———: ———: ———. The lessee of a tenant for life is charged with notice of the extent of his landlord's title, and on the termination of the life estate he becomes a tenant at sufferance.

3. ———: ———: ———: RENTS. Such a lessee remaining in possession after the termination of the life estate, in the absence of an express contract with the reversioner, becomes liable to the latter for the reasonable value of the use and occupation of the premises, but not liable on the contract with the tenant for life.

4. ———: ———: ———: ———. A tenant for life leased the premises for one year and died before the expiration of the term. The lessee remained in possession without a contract with the reversioner, and after the expiration of the lease by its terms, paid the full amount of rent reserved therein to the administrator of the tenant for life. *Held*, (1) That the reversioner had no claim against the estate of the tenant for life for the money; (2) that the money paid by the lessee to the estate of the tenant for life was not the property of the reversioner; (3) that though the administrator had converted such money to his own use, or the use of another, he is not liable therefor to the reversioner.

ERROR from the district court of Cass county. Tried below before CHAPMAN, J. *Affirmed.*

*H. D. Travis,* for plaintiff in error.

*Matthew Gering, contra.*

RAGAN, C.

Charles Guthmann was seized in fee of certain real estate situate in Cass county. He devised the same by his will to his daughter, Minnie E. Guthmann, subject to a life estate therein in favor of his wife, Mary J. Guthmann, and died. His widow took possession of the real estate and leased it from March 1, 1893, to March 1, 1894, at an agreed rental of $150, and for such rent accepted the tenant's note due March 1, 1894, and on the 27th of July, 1893, the tenant for life died. Jacob Vallery, Sr., was appointed administrator of the estate of the life tenant and after the rent note matured he collected the same. The tenant of the tenant for life remained in possession of the premises until the expiration of the lease executed between said parties. The record does not show that this tenant remained in possession after the death of the tenant for life with the consent of the owner of the reversion, nor that the reversioner objected to the possession retained by such tenant. Minnie E. Guthmann, the owner of the reversion, sued Jacob Vallery, Sr., in the district court of Cass county to recover the rent of the premises from the death of the life tenant until the expiration of the lease made by her as fixed by the lease between the tenant and the life tenant. The trial resulted in a judgment dismissing Miss Guthmann's action, and she brings that judgment here for review on error.

One cannot convey to another a greater interest in real estate than he is himself possessed of, and the lease of the real estate made by the widow terminated at her death. Upon the termination of the life estate the tenant in possession became a tenant at sufferance, and he might then

have abandoned possession of the premises, as he was under no obligation to occupy as the tenant of the reversioner; and probably, although we do not decide the point, had he abandoned the premises, he would have been discharged from any liability for rent even to the administrator of the life tenant. (*Hoagland v. Crum*, 113 Ill., 365; 2 Blackstone's Commentaries, sec. 124.) On the termination of the life estate the reversioner became at once entitled to the possession of the real estate; and, it seems, that the life tenant's tenant in possession would not have been entitled to a notice to quit the premises or demand for the possession thereof from the owner of the reversion in order to enable the latter to maintain an action for possession. This is because the tenant, at the time he entered possession under his lease from the life tenant, was charged with notice of the extent of his landlord's title. The tenant of the owner of the life estate, having remained in possesssion of the premises after the termination of that estate without protest or objection from the owner of the reversion, became liable to the reversioner for the reasonable value of the use and occupation of the premises at the time they were occupied after the termination of the life estate. (*Hoagland v. Crum, supra; Wright v. Roberts*, 22 Wis., 165.) Whether the tenant, after the termination of the life estate, was liable to the estate of the life tenant for rent of the premises we do not decide; but whether liable or not, the tenant recognized his promise as binding and paid the full rent reserved to the administrator of the life tenant. It is clear that the reversioner has no claim against the estate of the life tenant for this rent or any part of it. The contract between the life tenant and her lessee was not made for or on behalf of the reversioner, nor was she a party to this contract. The lessee did not pay this money to the administrator of the estate of the life tenant for the use of the reversioner; and if the lessee has any claim against the estate of the life tenant by reason of having paid rent for a full term which failed, the rever-

sioner has not succeeded by assignment, or otherwise, to that claim, nor is she entitled to be subrogated to the rights of the lessee, if she have any, against the estate of the life tenant. The question then is, whether Vallery, because he collected from the lessee of the life estate the rents reserved by the lease after its termination, is liable to the reversioner for such rents. If Vallery is liable, it must be because he has appropriated to his own use, or the use of another, property which belongs to the reversioner without the latter's consent, or that he has exercised dominion over such property of the reversioner in exclusion and in defiance of his rights. But the rents which the lessee paid to Vallery were not the property of the reversioner. There was no contract existing between this lessee and the reversioner as to this rent; and if it be true that the lessee was not indebted to the estate of which Vallery was administrator, and that the lessee should have paid this rent money to the reversioner for the use and occupation of the premises instead of paying it to the estate of the tenant for life, still it does not follow that the reversioner is entitled to make Vallery account to her for it. When the life estate terminated the reversioner became entitled to the immediate possession of the estate; to collect rents from tenants who occupied it as such; to collect from the tenant at sufferance the value of the use of the premises so long as such tenant occupied it; but it by no means follows that, because the reversioner was possessed of these rights, therefore she was the owner of the moneys which the lessee saw fit to pay to the estate of the life tenant, or the administrator of that estate, in discharge of his contract made with the tenant for life. The judgment of the district court is

AFFIRMED.

## GEORGE F. CRAM V. BERNARD SICKEL ET AL.

FILED JUNE 3, 1897. No. 7337.

1. **Attorneys at Law:** AUTHORITY: NOTICE. A debtor dealing with an attorney who holds for collection a claim against him is bound to take notice of the extent of the authority of such attorney.
2. ———: ———. Unless specially authorized by his client, an attorney employed to collect a debt has no authority to accept in payment therefor anything but money, nor to release one of two joint debtors in consideration of the other giving security for the debt.
3. **Principal and Agent:** ESTOPPEL: RATIFICATION. In order to estop a principal because of his ratification of the unauthorized act of his agent it is not enough to show that he has in some manner approved of such act, but it must also appear that the principal made the approval with knowledge of what his agent had done and promised in the premises in his behalf.

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

*John S. Bishop*, for plaintiff in error.

*D. L. Love, contra.*

RAGAN, C.

George F. Cram sued Bernard Sickel and Luther P. Ludden, copartners, in the district court of Lancaster county to recover a balance on account for goods sold and delivered by Cram to Sickel and Ludden. The defendants below had a verdict and judgment and Cram prosecutes here a petition in error.

To a proper understanding of the points presented in this case a short statement of the facts admitted and established by the finding of the jury becomes essential.

Prior to August, 1892, Sickel and Ludden dissolved their copartnership, the agreement of dissolution providing that Sickel should assume the liabilities and be entitled to the assets of the firm. Prior to August, 1892, Cram sent the account he held against Sickel and Lud-

den to an attorney at law residing in Lincoln, Nebraska, for collection. Sickel was at that time indebted to the attorney, and the latter presented the claims of Cram to Sickel for payment, and the negotiation between them resulted in Sickel giving to the attorney a note of the firm of Sickel & Ludden, payable to the attorney's order for the full amount of the Cram claim and the amount which Sickel owed the attorney and secured this note by chattel mortgage upon the stock of goods formerly owned by Sickel & Ludden. Subsequently the attorney seized the property conveyed by the chattel mortgage and sold it, paid the debt due to himself from Sickel, the cost of the foreclosure proceeding, and had on hand a few dollars to apply on Cram's debt.

As already stated, this suit is to recover the balance owing from Sickel & Ludden to Cram on his account. As a defense to the action Ludden pleaded that Cram's attorney agreed with Sickel at the time the latter gave him the note and chattel mortgage that he, Ludden, should be released and discharged from all liability to Cram in consideration of Sickel's giving the attorney the note and mortgage which he did give him. Whether this agreement was actually made by the attorney was one of the issues litigated on the trial, and in justice to the attorney it must be said that he strenuously denied having ever made any such arrangement; but the jury found that he had and we are constrained to say that there is sufficient evidence to sustain that finding, although the evidence is very unsatisfactory. Sickel defended the suit on the ground that at the time the attorney seized the property under the chattel mortgage he voluntarily surrendered the mortgaged property under an agreement between him and Cram's attorney that by so doing the mortgaged property should be taken and accepted in full satisfaction of the note which it was pledged to secure. Whether this arrangement was made was another issue litigated on the trial, and the jury found that it was so entered into; and the evidence, we think, supports the

finding, although we frankly confess that had we been trying the issue we should have reached a different conclusion. Soon after the attorney took from Sickel the note and chattel mortgage, he notified Cram of what he had done, and Cram approved of it. The attorney also notified Cram that he had seized the property and foreclosed the chattel mortgage and realized from that sale some $50 or $60 altogether, and the $10 or $15 of this sum that was coming to Cram was, by his consent, retained by the attorney. But Cram never had any knowledge or notice that his attorney had agreed to release Ludden, if such agreement was made, and never had any knowledge or notice that his attorney had agreed to take the mortgaged property in satisfaction of the debt, if such an arrangement was made. On the trial the district court, at the request of the defendants in error, instructed the jury as follows: "The jury are instructed that where a contract made by an agent for his principal is accepted and ratified by the principal the principal is charged with all of the instrumentalities used by the agent in obtaining the contract; and in this case, if J. S. Bishop, as agent or attorney, procured a chattel mortgage for plaintiff's benefit from the defendant Sickel upon the agreement that defendant Ludden should be released and that the chattel mortgage was accepted and enforced by plaintiff, then defendant Ludden is released as per such agreement, whether defendant Bishop had authority to make it or not." The court refused to give an instruction asked by Cram to the effect that an attorney who held a claim for collection had no authority to receive anything in payment of such claim except money, unless specially authorized so to do by his principal. We think the court erred in refusing to give the instruction requested, and erred in giving the instruction which it did. Bishop was the agent of Cram for collecting the debt owing to him by Sickel & Ludden. They dealt with Bishop knowing that he was an agent, and they were bound to take notice of the extent of his authority, and,

in the absence of express authority from his principal, Bishop was not invested with authority to accept in payment of his principal's debt the stock of goods. (*Mathews v. Hamilton*, 23 Ill., 470.)

The authority of an agent to collect the debt of his principal does not invest such agent with authority to take the property other than money of the debtor in payment of such a claim. (*Taylor v. Robinson*, 14 Cal., 396.)

Without special authority an agent can only receive payment of the debt due his principal in money in the legal currency of the country. (*Ward v. Smith*, 74 U. S., 447; *McCormick v. Wood Mowing & Reaping Machine Co.*, 72 Ind., 518; *Graydon v. Patterson*, 13 Ia., 256; *Fellows v. Northrup*, 39 N. Y., 117.)

In *Nowlan v. Jackson*, 16 Ill., 272, it was held that an attorney employed to collect a debt had no authority to compromise the debt on payment of a part thereof, nor to accept in satisfaction of such debt anything but money. (*Lewis v. Gamage*, 18 Mass., 346.)

In *De Mets v. Dagron*, 53 N. Y., 635, an attorney was authorized to collect the debt of his principal and execute a discharge of such debt. Instead of collecting the debt in money he took a promissory note of the debtor payable to his principal's order in payment of a judgment in favor of his principal and against the debtor and released such judgment, and the court held that the attorney exceeded his authority, and the discharge of the judgment did not bind his principal.

In *Miller v. Edmonston*, 8 Blackf. [Ind.], 290, an attorney held three notes for collection belonging to his client signed by A and B. The attorney had no special instructions. He took a note from B for the amount of the three notes of A and B and surrendered the three notes to B, and then, at his request, B confessed a judgment in favor of the attorney's client on the note given by him; and the court held that the attorney had exceeded his authority and that his conduct was not binding upon his client. The court said: "When a demand is

placed in the hands of an attorney at law for collection without any special instructions the authority conferred upon and the duty assumed by him is to use due diligence to collect the debt by suit or otherwise. He has no authority to compromise with the debtor and cannot bind his principal by any arrangement short of an actual collection of the money." (*Hamrick v. Combs*, 14 Neb., 381; *Smith v. Jones*, 47 Neb., 108; *Moore v. Pollock*, 50 Neb., 900.)

From these authorities it is clear that if Bishop agreed that Ludden should be discharged from his debt to Cram in consideration of the note and mortgage executed by Sickel to Bishop the latter exceeded his authority and the agreement did not bind Cram; and if Bishop agreed with Sickel to take the stock of goods in satisfaction of the debt due Cram, in so doing he exceeded his authority and the agreement was not binding upon Cram. But in the instruction first quoted above the court told the jury, in effect, that if Cram accepted and enforced the chattel mortgage given by Sickel to Bishop, this was a ratification of Bishop's acts, although they were unauthorized. In view of the evidence this instruction should not have been given. In order that Cram should be held to a ratification of the unauthorized acts of Bishop in releasing Ludden and accepting the stock of goods in discharge of the debt he must have known, at the time that he approved of Bishop's taking the mortgage and foreclosing it, the terms and conditions upon which Bishop acted. In other words, to estop Cram by ratification in approving of Bishop's taking the mortgage and goods, Cram must have acted with a full knowledge of all the material facts upon which the transaction rested.

The undisputed evidence shows that if such agreements as were pleaded by Ludden and Sickel were ever made, they were not only made without authority of Cram, but made without his knowledge; and when he approved of Bishop's conduct in taking the mortgage on the goods and in selling the goods, he did so without

the slightest intimation of the agreements now pleaded by Sickel and Ludden. The instruction estops Cram by ratification simply because he approved of the taking of the mortgage and the goods, omitting entirely the knowledge upon which Cram acted. It is true that the retention by the principal of the fruits of an unauthorized act of his agent is a ratification of such agent's act. (*Johnston v. Milwaukee & Wyoming Investment Co.*, 49 Neb., 68.) But it is also true that knowledge by the principal of the material facts is an essential element of an effective ratification by him of the unauthorized act of his agent. (*O'Shea v. Rice*, 49 Neb., 893.) It is also true that a principal must repudiate the unauthorized act of his agent within a reasonable time after such act comes to his knowledge or he will be held bound thereby, and that a principal cannot retain the fruits of the unauthorized act of his agent and at the same time repudiate such act. In this case Cram has repudiated the unauthorized agreements which it is alleged were made in his behalf by his agent, surrendered in court the note taken by Bishop for his (Cram's) debt, and sued on the open account existing between him and Sickel and Ludden, after crediting it with the proceeds derived from the sale of the mortgaged property. Cram, then, has not only repudiated the unauthorized contract of his agent, but he has done it within a reasonable time after being informed of such act, and he has restored to Ludden and Sickel all the fruits which came into his hands as the result of the unauthorized agreements made with them by Bishop. In other words, where it is sought to estop a principal because of his approval of an unauthorized act of his agent, it is not enought to show that he has in some manner approved of such act; but it must also appear that he approved it with knowledge of what the agent had done and promised in his principal's behalf.

Counsel for the defendant in error, in support of their contention that the approval by Cram of Bishop's conduct in taking the mortgage and in foreclosing it was of

itself a ratification of all Bishop's acts, cite us to *Hartley State Bank v. McCorkell*, 60 N. W. Rep. [Ia.], 197. In that case an agent surrendered certain chattel security held by the principal to secure the payment of the debt in consideration of the debtor's giving the principal real estate security, and the court held that the principal, by foreclosing the real estate mortgage, had ratified the unauthorized act of his agent; but the court puts its decision upon the ground that the evidence showed that the agent had authority from his principal to change the securities. The case is not an authority in point here.

We conclude, therefore, that Bishop, in agreeing to release Ludden and accept the stock of goods in payment of the debt due Cram from Sickel and Ludden, exceeded his authority, and his principal is not bound by such agreement; that the finding of the jury that Cram had ratified the unauthorized acts of Bishop is wholly unsupported by the evidence. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

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## LOUIS M. COHN ET AL. V. WILLIAM BROADHEAD & SONS.

FILED JUNE 3, 1897. No. 7330.

1. **Sales: FALSE REPRESENTATIONS OF BUYER: RESCISSION.** In order to authorize the rescission of a sale on the ground that it was induced by the false representation of the vendee, such representation must be made as to an existing fact and not relate to something promised to be done by the vendee in the future.

2. **———: ———: EVIDENCE.** A merchant ordered goods of a wholesale dealer, promising to pay one-half the price of the goods on receipt of the same, and the remainder at a day named in the future. He did not pay on receipt of the goods, as promised, but the merchant did not intend at the time the promise was made not to pay for the goods. *Held*, That the facts did not warrant the conclusion that the sale was induced by the fraudulent representation of the vendee.

3. ———: ———: ———. A merchant stated to a commercial agency that in his opinion his stock of goods was worth $8,000. The commercial agency communicated this opinion to a wholesale dealer, and, at the same time, informed the latter that while the opinion of the merchant was given in good faith he had placed too high a value on his stock. The wholesale dealer, nevertheless, relied upon the opinion expressed by the merchant and sold him goods on credit. The goods were worth $5,000. *Held*, That the facts did not warrant the conclusion that the sale was induced by the fraudulent representation of the vendee.

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

*Stevens & Cochran*, for plaintiffs in error.

*Ricketts & Wilson, contra.*

RAGAN, C.

This is an action in replevin brought in the district court of Lancaster county by William Broadhead & Sons against Louis M. Cohn and others. Broadhead & Sons had a verdict and judgment, and Cohn and others prosecute to this court a petition in error.

There are several assignments of error argued in the brief, only one of which we deem it necessary to notice, namely, that the verdict of the jury is not supported by sufficient evidence. On the 30th of August, 1892, Broadhead sold and shipped a bill of goods to Cohn. The goods were received and placed in Cohn's store and more than half of them sold and disposed of in the ordinary course of business prior to the 26th of September, 1892. On this last date Cohn became embarrassed and executed a mortgage on his goods, including the goods purchased of Broadhead and remaining unsold, to one Spiesberger. Broadhead & Sons then attempted to rescind the sale of the goods to Cohn and replevied them, claiming that Cohn procured the sale and delivery of the goods by false representations. The evidence relied upon by Broadhead to sustain his theory that Cohn obtained the goods by false representations was, first, that Cohn promised, in

consideration of the sale of the goods to him, to pay one-half their purchase price on receipt of the goods and the other half on the 1st of October. It is not claimed that the agreement was that the title to these goods should remain in Broadhead until half the purchase price, or any of it, was paid; nor is it claimed that this promise of Cohn's was not made in good faith, or that when he made the promise he made it for the purpose of obtaining the goods intending then not to pay for them. In order to authorize a rescission of a sale induced by the false representation of a vendee such representation must have been made as to an existing fact and not relate to something promised to be done by the vendee in the future. (*Perkins v. Lougee*, 6 Neb., 220; *American Building & Loan Ass'n v. Bear*, 48 Neb., 455. See the rule stated and the authorities collated in 8 Am. & Eng. Ency. of Law [1st ed.], 635.) It is clear, then, that Broadhead is not entitled to have this sale rescinded because Cohn promised to pay for half the goods on their arrival and the remainder on October 1, 1892, and failed to keep that promise.

A second ground on which Broadhead claims the right to rescind this sale is that Cohn made statements as to his financial condition to the Dun Commercial Agency. This agency furnished him, Broadhead, the statements made and he relied upon them. It is not claimed that Cohn ever made any representations as to his financial affairs to Broadhead & Sons, and the evidence fails to show that Cohn ever made any representations to the Dun Commercial Agency as to his financial condition. On the 17th of June, 1892, Cohn, in a conversation with an agent of the Dun Commercial Agency, expressed the opinion that his mercantile stock was of the value of $12,000, and that his indebtedness amounted to about $4,000. On the next day the Dun agency communicated this conversation to Broadhead, and in the communication expressed the opinion that Cohn had acted in good faith in the value placed by him upon his stock, but

warned Broadhead, in effect, that Cohn's judgment of the value of the stock was too high, and also advised Broadhead that if Cohn was seeking credit it would be best not to give any credit to him until further information could be obtained as to his financial standing. Now, if it can be said that Broadhead in giving the credit for the goods sold in this case relied upon the opinion expressed by Cohn to the commercial agency that the stock of goods was of the value of $12,000, the answer is that this was not a representation of a fact by Cohn and it was the mere expression of an opinion of his, and communicated as such to Broadhead; and this opinion, though erroneous and relied upon by him, would not generally justify his rescission of the contract of sale. (*Homer v. Perkins*, 124 Mass., 431; *Gordon v. Butler*, 105 U. S., 553; *Anderson v. McPike*, 86 Mo., 293; *Schramm v. O'Connor*, 98 Ill., 539; *Dawson v. Graham*, 48 Ia., 378; *Ellis v. Andrews*, 56 N. Y., 83; *Shade v. Creviston*, 93 Ind., 591.)

The verdict of the jury is not sustained by sufficient evidence. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

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MARY T. HERBAGE, APPELLEE, V. REBECCA J. MOODIE ET AL., APPELLANTS.

FILED JUNE 3, 1897. No. 7305.

1. **Mortgages: ASSIGNMENT: REGISTRATION: PAYMENT: INNOCENT MORTGAGEE.** Moodie mortgaged her real estate to Toncray to secure the payment to him or order of her negotiable promissory note. Toncray sold and indorsed the note before maturity and delivered it and the mortgage securing the same to the indorsee. The indorsee did not record his assignment of the mortgage. Moodie conveyed the real estate to Sheperd subject to the Toncray mortgage. Sheperd, before the maturity of the Toncray mortgage, executed a mortgage on the real estate to Campbell, the consideration for which was a loan from Campbell to Sheperd. Campbell

paid $36 of this loan to Sheperd and retained the remainder for the purpose of discharging the Moodie-Toncray mortgage debt, and paid the sum retained to Toncray in discharge of that debt, it not then being due, and Toncray released the Moodie mortgage. Toncray was not then the owner of the debt secured by the Moodie mortgage nor was he the agent of the owner. *Held*, (1) That Campbell was not an innocent mortgagee of the real estate, nor entitled to a lien on the premises, as against the indorsee of the Moodie note; (2) that Campbell was entitled to a lien upon the premises as against Moodie to secure the sum of $36 only.

2. ———: PAYMENT: AGENCY. The Moodie mortgage contained this provision: "That these presents are upon this condition: that if the said Rebecca Moodie shall pay to the said C. H. Toncray, his heirs, assigns, or legal representatives, the principal sum, etc., then this mortgage shall be void." *Held*, Not an agreement between the mortgagor and the mortgagee constituting the latter the agent of the indorsee of the note which the mortgage secured.

3. Agency. B is the agent of A; C is B's agent, but C is not necessarily A's agent.

APPEAL from the district court of Cuming county. Heard below before NORRIS, J. *Reversed.*

*Uriah Bruner* and *M. McLaughlin*, for appellants.

*C. C. McNish* and *T. M. Franse, contra.*

RAGAN, C.

Mary T. Herbage brought suit to foreclose a real estate mortgage in the district court of Cuming county, making Rebecca J. Moodie, Katherine Sheperd and husband, and Mary E. Campbell defendants. Miss Herbage had a decree, and the defendants named have appealed.

1. There is no substantial conflict in the evidence and the facts necessary to an understanding of the case are as follows: On the 23d of November, 1885, Rebecca Moodie owned a tract of land in Cuming county. On said date she executed her promissory note for $400, drawing interest at seven per cent, payable semi-annually, from December 1, 1885. This note was payable to the order of C. H. Toncray, and matured December 1, 1890. To secure the payment of this note Rebecca

Moodie executed and delivered to Toncray a mortgage upon her real estate, which was duly filed and recorded in the office of the recorder of deeds of said county about the date of said note and mortgage. Subsequently, but before the maturity of said note, Rebecca Moodie conveyed this real estate to one Langworthy, subject to the Toncray mortgage, and he, prior to the maturity of the Toncray note, conveyed the real estate to the appellant Katherine Sheperd, subject to the Toncray mortgage. In November, 1890, Katherine Sheperd executed her note to the appellant Mary E. Campbell for $450, and secured the same by mortgage upon her real estate. This transaction was the consummation of a loan made by Mary E. Campbell to Katherine Sheperd, but Mary E. Campbell did not pay over the $450 to Katherine Sheperd, but reserved of said loan $414, the amount that it would then take to pay and discharge the Toncray mortgage debt, and undertook to so pay off and discharge said Toncray debt out of this loan of $450 made to Katherine Sheperd. The remainder of the loan, $36, was paid by Mary E. Campbell to Katherine Sheperd, or to her order. Mary E. Campbell paid the $414 to Toncray, the person to whom Rebecca Moodie had made the $400 note and mortgage, and made such payment before the maturity of the Moodie note. Soon after the execution of the note and mortgage by Moodie to Toncray he indorsed the note in blank and transmitted it and the mortgage securing the same to a man named Calder in the state of New York and charged the face of the note to Calder's account. This man Calder, at that time and for some time afterwards, seems to have been in the habit of sending money to Toncray for investment in real estate loans. On receipt of such money, Toncray would give Calder credit for it. He would then make a loan on real estate, indorse the note in blank, and transmit the note and mortgage to Calder and charge Calder's account with the amount of the loan. On receipt of the Moodie note and mortgage Calder sold and delivered it, with the mortgage se-

curing it, to one William Herbage, who retained the note and mortgage until his death, and upon the settlement of his estate it passed to his daughter the appellee herein. Toncray was in the habit of collecting the interest on loans made by him and remitting this interest to Calder when he had sold the mortgage debts to Calder. Calder, if he owned the coupons, would return them to Toncray and he would deliver them to the mortgagors. In the case at bar it seems that Herbage would apply to Calder for the semi-annual interest on the Moodie loan. Calder would pay it to him and then Herbage would surrender the coupon to Calder, and Calder, on receiving the interest on the Moodie loan from Toncray, would remit to him the coupons. It does not appear that Toncray ever knew that Herbage owed the Moodie loan or that Herbage knew anything about the method of business between Toncray and Calder. When Mary E. Campbell paid to Toncray the Moodie loan it seems that Toncray never remitted the same to Calder. When Toncray sold and assigned the Moodie note and mortgage to Calder no formal assignment of the mortgage was made.

These being the established facts in the case, it remains but to inquire what the equities and rights of the parties are. Mary E. Campbell is not an innocent mortgagee of this real estate and not entitled to a lien upon this property as against the Moodie mortgage. At the time Mary E. Campbell took her mortgage the Moodie mortgage stood unsatisfied of record and the debt which it secured had not matured. She dealt, then, with this property at her peril. The payment of the $414 made by Mary E. Campbell to Toncray was not a payment and discharge of the Moodie mortgage, because Toncray did not own the debt which that mortgage secured, nor was he the agent of the owner and holder of that debt. (*Eggert v. Beyer*, 43 Neb., 711; *Stark v. Olsen*, 44 Neb., 646; *Bull v. Mitchell*, 47 Neb., 647; *Richards v. Waller*, 49 Neb., 639; *Porter v. Ourada*, 51 Neb., 510.) Mary E. Campbell is not entitled to a lien on this real estate to the full extent of

her mortgage debt as against Katherine Sheperd. A part of the consideration of Mary E. Campbell's mortgage was the payment of the Moodie mortgage. When Mary E. Campbell undertook to pay the debt secured by the Moodie mortgage she undertook to pay that debt to the legal owner and holder of that debt. Not having done this, she is not entitled to a lien on these premises as against the owner of them for anything further than the sum of $36. The district court was of opinion that the entire consideration for the Mary E. Campbell mortgage had failed and dismissed her cross-petition. In this respect we think the district court erred. Since Katherine Sheperd received the benefit of $36 of that loan, Mary E. Campbell is entitled to enforce her mortgage on the premises to that extent, subject to the first lien of Mary T. Herbage thereon.

2. The mortgage made by Moodie to Toncray contained this provision: "That these presents are upon this condition: that if the said Rebecca Moodie * * * shall pay to the said C. H. Toncray, his heirs, assigns, or legal representatives, the principal sum, etc., * * * then this mortgage shall be null and void." It is somewhat extensively argued here that this provision of the mortgage conferred express authority upon Toncray to collect the debt which the mortgage was given to secure. No authority is cited to sustain this contention, nor do we think one can be found. This was a part of the defeasance found in almost every mortgage that when the debt which the mortgage secures has been paid or the promise which the mortgage was given to secure has been performed the conveyance should cease to be of any force; but it does not amount to an agreement between the mortgagor and the mortgagee that the mortgagee should be the agent of the indorsee of the note which the mortgage secured and that a payment made to the mortgagee should discharge the mortgage; nor was it intended to have any such effect.

Another argument somewhat strenuously insisted on

here is that the payment made by Mary E. Campbell to Toncray discharged the Moodie mortgage, because Toncray was the agent of William Herbage. We do not think he was. It may be that the relations between Calder and Herbage were such that had Mary E. Campbell paid this money to Calder and he embezzled it the payment would have protected Mary E. Campbell; but if Calder was Herbage's agent, it does not follow that Calder's agent was, therefore, Herbage's agent.

The decree appealed from is reversed and the cause remanded, with instructions to the district court (1) to enter a decree in favor of Mary T. Herbage for the full amount due on the Moodie mortgage, making it a first lien upon the premises; (2) to give Mary E. Campbell a second lien upon the premises for $36 and seven per cent interest from the date of her loan; and to tax the entire costs of all these proceedings to Mary E. Campbell and Mary T. Herbage in such proportion as the district court may deem just.

REVERSED AND REMANDED WITH INSTRUCTIONS.

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LOUISA J. BING ET AL. V. E. C. MORSE ET AL., ADMINISTRATORS.

FILED JUNE 3, 1897. No. 7261.

**Mortgage Foreclosure: PLEADING.** Whether any proceeding at law has been had for the recovery of a real estate mortgage debt, or any part thereof, and whether such debt, or any part of it, has been paid, are essential facts which must be averred in the petition filed to foreclose such mortgage, and unless such petition contains such averments it will not state facts sufficient to entitle the plaintiff to the relief he demands.

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

*Harwood, Ames & Pettis,* for plaintiffs in error.

*B. F. Johnson, contra.*

RAGAN, C.

In the district court of Lancaster county was filed a petition for the foreclosure of a real estate mortgage. The petition did not allege whether any proceedings had been had at law for the recovery of the debt secured by the mortgage, or any part thereof, nor whether said debt, or any part of the same, had been paid. The defendants submitted a general demurrer to the petition which the court overruled. The defendants refused to plead further, suffered a decree, and have filed a petition in error.

The sole question presented is the sufficiency of the petition to support the decree. Section 850 of the Code of Civil Procedure provides: "Upon filing a petition for the foreclosure or satisfaction of a mortgage the complainant shall state therein whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether said debt, or any part thereof, has been collected and paid." And section 851 provides: "If it appear that any judgment has been obtained in a suit at law for the money demanded by such petition, or any part thereof, no proceedings shall be had in such case, unless, to an execution against the property of the defendant in such judgment, the sheriff, or other proper officer shall have returned that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution except the mortgaged premises." At common law a real estate mortgagee might bring an action at law to recover the debt secured by his mortgage and at the same time bring a suit in chancery to foreclose the mortgage and an action in ejectment for the possession of the mortgaged premises. It is probable that the statute quoted above was enacted to prevent a real estate

mortgagee from pursuing all these remedies simultaneously. A statute of New York similar to the provisions of our Code, just quoted, was construed in 1834 in *Pattison v. Powers*, 4 Paige Ch., 549, and it was there said: "The complainant in a bill of foreclosure should aver, or state in the terms of the statute, that no proceedings have been had at law for the recovery of the debt secured by the mortgage, or any part thereof; or, if proceedings at law have been instituted, the bill should state what such proceedings were and against whom instituted; and it should also show that such proceedings at law had been discontinued, or that the complainant's remedy at law had been exhausted by the return of the execution unsatisfied for want of property whereon to levy." The New York statute was again considered in *North River Bank v. Rogers*, 8 Paige Ch., 647, and the court said: "The complainant, therefore, is bound to state in his bill whether any proceedings have been had at law to recover the debt secured by the mortgage or the defendant may demur to the bill for that cause; and if the complainant, in making the statement required by the statute, shows that a judgment has been recovered at law for the debt secured by the mortgage, or any part thereof, his bill will still be subject to demurrer, unless he goes further, and shows that he has exhausted his remedy at law upon such judgment by the return of an execution against the property of the defendant therein unsatisfied." To the same effect see *Shufelt v. Shufelt*, 9 Paige Ch. [N. Y.], 137. The statute of Michigan is similar to the New York statutes and to ours, and in 1844 the statute was considered in *Dennis v. Hemingway*, Walker's Ch. [Mich.], 387, and the court said: "No proceeding can be had on a bill for the foreclosure of a mortgage if it appear that any judgment has been obtained in a suit at law for the recovery of the debt secured thereby, or any part thereof, unless to an execution against the property of the defendant in such judgment the sheriff shall have returned the execution unsatisfied in whole or in part, and that the defend-

ant has no property to satisfy the execution except the mortgaged premises." To the same effect see *Cooper v. Bresler*, 9 Mich., 533. The sections of the Code quoted were considered by this court in *Gregory v. Hartley*, 6 Neb., 356, and it was there said: "In an action to foreclose a mortgage the petition must state whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof, and whether such debt, or any part thereof, has been collected and paid." This was recognized as the correct construction of the statute in *Dimick v. Grand Island Banking Co.*, 37 Neb., 394, and in *Meehan v. First Nat. Bank*, 44 Neb., 213. *Hargreaves v. Menken*, 45 Neb., 668, was a suit brought by Hargreaves to foreclose a real estate mortgage. The petition alleged that no proceedings at law had been instituted to recover the mortgage debt; but it appeared from the proofs that suit at law had been brought to recover the mortgage debt and the same reduced to judgment, and that no execution had been returned unsatisfied in whole or in part. The court, speaking through IRVINE, C., after quoting the sections of the Code just mentioned, declared that the manifest intention of these provisions of the Code was to prevent the prosecution of proceedings at law to recover a debt concurrently with proceedings to foreclose a mortgage securing the same; and the decree rendered in the action was reversed and Hargreaves' suit dismissed.

It is insisted by defendants in error that the petition states a cause of action, and that, as the only question made by the demurrer to it was that it did not, the demurrer was properly overruled. The argument of defendants in error is that their cause of action is the mortgagor's failure to perform his contract,—pay the debt secured by said mortgage when it matured. In a certain sense this argument is correct. But for the statute, the breach of the mortgagor's contract constituted the mortgagee's cause of action against him. But the legislature has seen fit to enact that if a

judgment has been obtained in a suit at law for money secured by a real estate mortgage, or for any part thereof, the courts shall then not be authorized to entertain a suit to foreclose such mortgage, unless an execution has been issued upon the judgment at law and returned unsatisfied in whole or in part, and containing the certificate of the officer returning such execution, that the judgment defendant has no property except the mortgaged premises out of which to satisfy such execution. Whether a proceeding at law has been had for the recovery of the mortgage debt, or any part thereof, and whether such a debt, or any part of it, has been paid, are essential facts which must be pleaded in order to invest the mortgagee of a real estate mortgage with the right to invoke a court of equity to foreclose such mortgage. The petition filed, then, for the foreclosure of a real estate mortgage must aver the facts required by section 850 of the Code or the petition will not state facts sufficient to entitle the plaintiff to the relief he demands. The decree of the district court is reversed and the action dismissed, without prejudice, however.

REVERSED AND DISMISSED.

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BERT GLENDORE WHEELER V. GEORGE E. BARKER ET AL.

FILED JUNE 3, 1897. No. 8706.

1. **Ruling on Demurrer: WAIVER OF ERROR: REVIEW.** In general a plaintiff waives error in sustaining a demurrer to his petition by filing an amended petition. But when the amended petition has been stricken from the files because substantially the same as the original, he may, by proceedings in error, review the ruling of the court in striking the amended petition from the files.

2. ———: ———: ———: **PRACTICE.** In such case the court will first examine the amended petition to ascertain if it was substantially the same as the original. If not, it was error to strike it from the files. It will next ascertain whether the amended petition stated a cause of action. If so, the error was prejudicial to the plaintiff.

3. **Administration of Estates: DISTRIBUTION: PAYMENT TO COURT.** While it is the duty of an administrator to distribute funds in his possession in that capacity in pursuance of the orders of the county court, nevertheless the county court having general jurisdiction of the administration of the estate, an order thereof directing money to be paid into court, instead of to the distributee, is at most erroneous and not void.

4. ——: ——: ——: **LIABILITY OF COUNTY JUDGE.** Therefore, where a county judge orders an administrator to pay money into court and the latter does so and the county judge receives the money, it is on his part an official act and he is liable therefor upon his official bond.

5. **Abstract for Review.** In a case submitted under rule 2 on agreed printed abstract the court will not look beyond the abstract so agreed upon and presented. *Closson v. Roman*, 50 Neb., 323, followed.

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

The opinion contains a statement of the case.

*Isaac Adams*, for plaintiff in error:

As courts of record having original and exclusive jurisdiction, county courts follow the practice and procedure of the common law, except as such practice or procedure is modified by statute. (4 Am. & Eng. Ency. Law, 452; 1 Freeman, Judgments, sec. 122; *Woodman v. Somerset*, 37 Me., 29; *Davis v. Hudson*, 29 Minn., 28; *Obert v. Hammel*, 18 N. J. Law, 73; *Brunson v. Burnett*, 2 Pinn. [Wis.], 185; *Sipperly v. Baucus*, 24 N. Y., 46; *Millard v. Harris*, 119 Ill., 185; *Schollenberger's Appeal*, 21 Pa. St., 341; *Shepard v. Clark*, 38 Ill. App., 66; *Seaman v. Duryea*, 11 N. Y., 324; *Wilson v. Coburn*, 55 Neb., 530.)

It has been the practice of courts of record of general jurisdiction to exercise their discretion in assuming the custody of trust funds wherever their jurisdiction over such funds was invoked. (2 Daniels, Chancery Practice [4th Am. ed.], ch. 40, p. 1770; *Blake v. Blake*, 2 S. & L. [Ir.], 26; *Hosac v. Rogers*, 6 Paige Ch. [N. Y.], 415.)

The regularity of the order cannot be attacked collaterally. (*Simpson v. Cook*, 24 Minn., 180.)

The record of a court of competent jurisdiction is not void on account of a mere error appearing by the record. (*Lewis v. Williams*, 54 Mo., 200; *Townsend v. Townsend*, 60 Mo., 246; *Shoemaker v. Brown*, 10 Kan., 383; *Merrick v. Kennedy*, 46 Neb., 264.)

In taking possession of the money the county judge acted in his ministerial capacity, and hence officially. (*In re Finks*, 41 Fed. Rep., 386; *Doogan v. Elliott*, 43 Ia., 342; *Wright v. Harris*, 31 Ia., 272; *McLoskey v. Reid*, 4 Brad. [N. Y.], 334.)

If the county judge obtained the money in question through failure to perform his official duties according to law, he is liable on his official bond. (*Merrick v. Kennedy*, 46 Neb., 264; *Fox v. Meacham*, 6 Neb., 530; *Rouss v. Wright*, 14 Neb., 457; *Smith v. Lovell*, 2 Mont., 332.)

*E. J. Cornish, contra:*

By filing an amended and substituted petition plaintiff waived any error, if any, in the ruling upon the demurrer to the original petition. (*Buck v. Reed*, 27 Neb., 67; *Singer Mfg. Co. v. McAllister*, 22 Neb., 359; *Dorrington v. Minnick*, 15 Neb., 397; *Harral v. Gray*, 10 Neb., 186; *Pottinger v. Garrison*, 3 Neb., 221; *Heman v. Glann*, 129 Mo., 325; *Dorsett v. Greencastle*, 40 N. E. Rep. [Ind.], 131; *Barrett v. Northwestern Mutual Life Ins. Co.*, 68 N. W. Rep. [Ia.], 906.)

Amended pleadings the same in substance as prior pleadings, to which a demurrer has been filed and sustained, may be stricken from the files on motion. (*Barrett v. Northwestern Mutual Life Ins. Co.*, 68 N. W. Rep. [Ia.], 906; *Heman v. Glann*, 129 Mo., 325.)

The money did not come into the hands of the county judge by virtue of his office. Sureties on an official bond are liable only for moneys coming into the possession of their principal by virtue of his office. (*Scott v. State*, 46 Ind., 203; *Dewey v. Kavanaugh*, 45 Neb., 233; *Kendall v. Aleshire*, 28 Neb., 707; *McCormick v. Thompson*, 10 Neb., 484; *Ottenstein v. Alpaugh*, 9 Neb., 237; *Huffman v. Kopplekom*, 8 Neb., 348; *Jenkins v. Lemonds*, 29 Ind., 294;

*Crane v. Bedwell*, 25 Miss., 507; *Mathews v. Montgomery*, 25 Miss., 150; *State v. Odom*, 86 N. Car., 432; *Hardin v. Carrico*, 3 Met. [Ky.], 289; *Schmitt v. Drouet*, 42 La., 1064; *Saltenberry v. Loucks*, 8 La., 95; *McKee v. Griffin*, 66 Ala., 211; *State v. Norwood*, 12 Md., 177; *State v. Rollins*, 29 Mo., 267; *State v. Davis*, 88 Mo., 585; *State v. Bonner*, 72 Mo., 387; *State v. McDonough*, 9 Mo. App., 63; *Gerber v. Ackley*, 37 Wis., 43; *San Jose v. Welch*, 65 Cal., 358; *Linch v. Litchfield*, 16 Ill. App., 612; *United States v. Adams*, 24 Fed. Rep., 348; *Ward v. Stahl*, 81 N. Y., 406; *People v. Pennock*, 60 N. Y., 421.)

IRVINE, C.

This was an action brought by Bert Glendore Wheeler, an infant, by her guardian, Isaac Adams, against James W. Eller, formerly county judge of Douglas county, and George E. Barker and William S. Rector, the sureties on his official bond. The sureties demurred to the original petition. The demurrer was sustained and an amended petition filed. The sureties then moved to strike the amended petition from the files for the reason, in brief, that it was substantially the same as the original petition. This motion was sustained, and the plaintiff electing not to plead further, a judgment of dismissal was entered. The plaintiff prosecutes error, assigning as error the sustaining of the demurrer to the original petition and the striking from the files of the amended petition.

The defendants in error contend that if the amended petition was substantially the same as the original, there was no error in striking it from the files, and that the court cannot review the order sustaining the demurrer to the original petition, because the error, if any, was waived by pleading over. It is no doubt true as a general principle that a party waives error in a ruling upon demurrer by pleading over. It is doubtful, however, whether such error is waived when the amended pleading has been stricken from the files, because in that case the party pleading has never had the benefit of his

amendment. In support of the contention of the defendants we are cited to *Barrett v. Northwestern Mutual Ins. Co.*, 68 N. W. Rep. [Ia.], 906. The court there applied the rule whereby error is waived by pleading over to a similar state of facts, but in that case there had been a failure to assign as error the sustaining of the motion to strike, and the intimation is that that assignment would have been available. We think the correct view is this: That, having elected to plead over, the plaintiff cannot now open up for review the order sustaining the demurrer, but having assigned as error the striking from the files of the amended petition, she is entitled to have that ruling reviewed. If the amended petition differed in any material respect from the original, there was error in striking it from the files; but that error was not prejudicial unless the amended petition stated a cause of action.

It is unnecessary to set out the two petitions at length. The original was brief. After alleging the election and qualification of Eller as county judge, and properly pleading the bond sued on, it proceeds: "That thereafter, on the 29th day of March, 1892, one F. E. McMullen, as administrator of the estate of Bert G. Wheeler, deceased, the father of plaintiff herein, in pursuance of an order theretofore made by said Eller as such county judge, paid into said county court and to said Eller as such county judge the sum of $1,935.92, which said money constituted plaintiff's distributive share of her said deceased father's estate, and that on the 23d day of May thereafter said Eller as such county judge ordered said sum of money so paid into court and in his possession to be paid to the lawful guardian of said minor, thereafter to be appointed by said court, upon the filing by such guardian of his duly verified receipt therefor." Then follow allegations to the effect that on the 2d day of January, 1894, said court appointed Gust Hamel guardian of the estate of the plaintiff; that Hamel qualified and filed a duly verified receipt as required by the order pleaded,

and that subsequently Eller paid to Hamel $484.42; that the remainder, $1,451.50, is in the possession of Eller in his official capacity as judge, and that he refuses to pay it over to the guardian. It will be observed that in this petition the plaintiff confined herself very strictly to the pleading of ultimate facts, and did not, with regard to the estate of Bert G. Wheeler, deceased, allege that the county court of Douglas county was the court which appointed the administrator or had jurisdiction of the estate. For all that appears in the petition, McMullen might have been appointed administrator by another court, and might not have been in any way accountable to the county court of Douglas county, so that the orders pleaded may have been absolutely void. In the amended petition these averments are supplied, and this was in itself sufficient to give the amended petition standing as such and rendered it erroneous to strike it from the files because it was similar to the original. Moreover, the amended petition set forth at large the various orders and pleaded all the facts with greater detail. The rule requiring a pleader to state the ultimate facts, and not the evidence and not conclusions of law, is one always difficult of application; and within certain limits the pleader may for himself determine with what degree of detail he will plead the facts. There was, therefore, error in striking the amended petition from the files. Was the error prejudicial? In other words, did the amended petition state a cause of action against the defendants?

In brief, the amended petition shows that the estate of Bert G. Wheeler, deceased, was in process of administration through the county court of Douglas county; that on application of the administrator for a final settlement and discharge, the court found that all claims had been paid and that there remained in the hands of the administrator $3,934.94, to be applied first to the unpaid costs and expenses of administration, and the remainder to be distributed as might thereafter be decreed; and upon payment into court by the administrator of said sum the

administrator should be discharged; that the money was paid into court and the administrator discharged; that thereafter the court entered a further order finding that Ada Wheeler, the wife of the deceased, and Bert G. Wheeler, minor daughter, were the only heirs at law; and still later ordered distribution of the sum in court, after deducting unpaid costs, to Ada Wheeler, and "the lawful guardian of the said Bert G. Wheeler, who shall be appointed by this court," share and share alike; that Eller subsequently paid to the guardian of the plaintiff $484.42, but has failed and refused to pay the remainder. The matter urged in defense is that it is the duty of the administrator to distribute funds in his hands; that he has no authority to pay into court and that the county judge has no authority to receive funds, and that, the money not coming into the hands of Eller in his official capacity, these defendants are not liable upon his official bond. In the admirable briefs filed on either side it is agreed that this question depends upon the jurisdiction of the county court to make the order directing the administrator to pay the money into court. It is quite satisfactorily demonstrated, by reference to our statutes and adjudicated cases, that the proper and orderly course of administration requires the administrator to retain possession of the funds and distribute them in accordance with the court's orders. The question is not, however, whether the order upon the administrator was erroneous, but whether it was void. If it was void, the payment into court afforded no protection to the administrator, and the judge did not receive the money in his official capacity. If it was erroneous merely, it bound all parties until reversed, affording protection to the administrator against further liability, and the receipt of the money by the judge was an official act, performed by him in his ministerial capacity as clerk of his own court. We are not furnished by counsel with many citations to authorities directly in point; and the evident diligence with which the case has been briefed leads us to believe that

such authorities do not exist. There are many cases holding that payment to the wrong officer does not charge him upon his bond; but these are cases where the law fixed the manner of payment, and not where the court had ordered the payment to be made. Such a case was *Fire Ass'n of Philadelphia v. Ruby*, 49 Neb., 584, and such, also, the case of *Hardin v. Carrico*, 3 Met. [Ky.], 289. In the latter case there was an order directing that the money be "deposited in court," and in pursuance of that order it was paid to the clerk; but the court held that money ordered paid into court should under the statutes be paid to a receiver or to the sheriff, and not to the clerk, so that the order did not direct the clerk to receive the money. Many similar cases are to be found. *Scott v. State*, 46 Ind., 203, is in point in favor of defendants. In that case the money had been ordered paid to the clerk, and the court held that he was not liable upon his bond therefor, because it was not his duty to receive money from a guardian upon the latter's resigning his trust. The opinion contains no reasoning, but cites *Jenkins v. Lemonds*, 29 Ind., 294; *Crews v. Ross*, 44 Ind., 481; *State v. Givan*, 45 Ind., 267. In *Jenkins v. Lemonds* the money had not been paid to the clerk in pursuance of an order of the court, but in pursuance of a statute which had been repealed. In *State v. Givan* there had been no order directing the payment of the money; while in *Crews v. Ross* the holding merely was that the clerk had no right to receive in payment of any costs, except his own, anything but gold or silver or legal tender notes. It will be seen, therefore, that in *Scott v. State* the court, without examining the real question, followed supposed precedents without observing the distinction between the former cases and the one before it. *Wright v. Harris*, 31 Ia., 272, and *Doogan v. Elliot*, 43 Ia., 342, support the contention of the plaintiff, although in the former case the right of the judge to receive the money was traced through statutes providing for enforcement of orders by execution, and in this respect a distinction might be drawn. In no case

where the court has considered the question can we find that an order directing the payment of money into court was held absolutely void because the statute contemplated a different method of distribution. In *Fire Ass'n v. Ruby, supra,* this court held that it is the duty of the sheriff selling lands under decree of foreclosure to distribute the proceeds of the sale to the persons entitled, and that he is not discharged from liability by paying the money to the clerk in the absence of an order of court so directing. (See, also, *Luce v. Foster*, 42 Neb., 818.) It is, however, intimated that the court may, in a proper case, order the proceeds brought into court for distribution. *In re Finks*, 41 Fed. Rep., 383, was an action on a clerk's bond. No statute authorized the clerk to receive the money, but it was held that he was liable because it had been received in pursuance of the established practice of the court, although unsupported by statute or general rule. There may be cases where the preservation of the fund would require such an order. The county court, within its constitutional and statutory jurisdiction, exercises powers not confined to those functions which formerly distinguished a court of law. It may proceed in pursuance of equitable principles. (*Wilson v. Coburn*, 35 Neb., 530; *Glade v. White*, 42 Neb., 336.) Such an exercise of equitable powers is especially required in probate cases. We do not wish, therefore, to be understood as deciding that an order directing an administrator to pay money into court for custody and distribution is necessarily erroneous; nor do we decide that question at all. We think clearly, however, that it is not void. The county court had general jurisdiction over the administrator and the settlement of the estate. It was the duty of the court to ascertain to whom the money should be distributed, and a direction to pay to the wrong party was a judicial error, and not an usurpation of jurisdiction. In *Merrick v. Kennedy*, 46 Neb., 264, NORVAL, J., said: "Had the executor obeyed the order and paid the money, most certainly he would have been protected by the direc-

tion of the county court, even though the money had been ordered paid to a person who by law was not entitled to the same." So here we think that the payment of the money by the administrator in pursuance of an order made by the proper probate court, in the orderly administration of the estate, protected the administrator even though it was erroneous; and that the receipt of the money by the judge in his capacity as clerk in pursuance of that order was an official act.

It is suggested in one of the briefs that there was a subsequent proceeding in the district court which might estop the plaintiff from prosecuting this proceeding. The case was, however, submitted under rule 2, upon an agreed printed abstract, in pursuance of a stipulation that it is "a complete abstract of the record of this case." This abstract shows no such proceeding, and we cannot look beyond the abstract. (*Closson v. Rohman*, 50 Neb., 323.) It follows that it was prejudicial error to strike the amended petition from the files.

REVERSED AND REMANDED.

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## JOHN LENZEN V. JOHN A. MILLER.

FILED JUNE 3, 1897. No. 7334.

**Verdict for Liquidated Damages: ERROR: NEW TRIAL.** In an action for liquidated damages, where the verdict is excessive and it is evident that the error in assessing the damages arose from a misconception of the evidence, which probably affected the determination of the other issues, a new trial will be awarded instead of permitting a remittitur of the excess.

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

*Leslie G. Hurd*, for plaintiff in error.

*C. L. Richards, S. W. Christy,* and *Stewart & Munger, contra.*

IRVINE, C.

Miller sued Lenzen on three promissory notes executed on January 17, 1876, each for $500 and each bearing interest at ten per cent per annum. He recovered judgment for $3,704.11. Miller seeks to reverse this judgment.

The plaintiff, in his petition, evidently for the purpose of avoiding the statute of limitations, pleads, or undertakes to plead, six small payments on each note. These payments amount in the aggregate to $790. The verdict was rendered November 16, 1893. An assignment in the motion for a new trial, preserved in the petition in error and in the briefs, is that the verdict was excessive. It clearly was. The amount of the notes, calculating the interest at ten per cent, would be at the date of verdict a trifle less than $4,175. The plaintiff admits payments of $790, which would render the highest amount recoverable $3,385, each payment being at such a time and for such an amount as not to discharge the interest then due. Ordinarily an error of this character might be cured, at the election of the plaintiff, by permitting a remittitur to be filed, but in this case we think such a course would be unjust to the defendant. The petition sets out each note, and after the copy contains an averment similar to the following: "Said note bears the following indorsements: $50, May 15, 1879; * * * $50, May 8, 1889," and then proceeds: "No part of said note has been paid except the amounts above set forth, which appear indorsed upon the same." This was probably a sufficient averment to toll the statute in the absence of an attack on the petition by motion or demurrer, but it certainly lacks much in certainty in the way of alleging a part payment to take the case out of the statute. The answer, in addition to a defense not insisted on at the

trial, alleged that the defendant owed the plaintiff on a book account, and sent him several sums of money at different times, with directions to apply the same on said account, and that on reading plaintiff's petition the defendant for the first time learned that said money had been applied on said notes. The issue thus framed was that on which the verdict must have turned. We cannot find in the evidence any basis for distinguishing among the various payments and applying some to the notes and others to the book account. The jury evidently drew such a distinction, and applied sufficient payments to the notes to avoid the bar of the statute, and applied sufficient to the other account to show a determination in defendant's favor of the fact of the existence of such an account, —one of the disputed points,—and at the same time to deprive the defendant of the credit on the notes to which he would have been entitled had the issues been found altogether against him. On this state of facts we think that there was such an erroneous determination in one way or the other of the issues of fact that a new trial should be awarded.

REVERSED AND REMANDED.

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## SCHOOL DISTRICT NO. 34, THAYER COUNTY, V. W. L. THOMPSON.

FILED JUNE 3, 1897. NO. 7349.

1. **Liquor License: CANCELLATION: REPAYMENT OF FEE.** Where a liquor license has been issued and is thereafter canceled without fault of the licensee, he is entitled to a repayment *pro tanto* of the sum paid for the unexpired time.
2. **Action for Money Had and Received.** An action in the nature of one for money had and received lies wherever the defendant has obtained possession of money which *ex æquo et bono* he ought to refund; and it is proper to bring the action against the party who has received the money.

3. **License Money**: PAYMENT TO SCHOOL DISTRICT: REPAYMENT. Where license money was paid to a village treasurer and he paid it over to the school district, on cancellation of the license, the licensee may maintain an action against the school district for its repayment.

4. **Res Judicata.** In such case a judgment recovered against the village, being *res inter alios acta*, is not a bar to the action against the school district.

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

*J. B. Skinner*, for plaintiff in error.

*W. E. Goodhue, contra.*

IRVINE, C.

Thompson sued the school district in the county court, recovered judgment, and the school district prosecuted error to the district court, where the judgment of the county court was reversed and the cause reserved for trial. Thereupon Thompson filed an amended petition. A general demurrer to this petition was overruled, and the school district electing to stand on its demurrer, judgment was entered for the plaintiff. This judgment the school district seeks to reverse by this proceeding.

The amended petition alleges that on the 22d of April, 1889, the plaintiff filed with the clerk of the village of Belvidere, in Thayer county, his petition signed by thirty freeholders, residents of said village, wherein he prayed for license to sell malt, spirituous, and vinous liquors in said village; that on the 29th of April he gave bond, and on the 5th of May paid to said village the sum of $500 for said license; that on the 29th of April a license was issued; that on the 5th of May the treasurer of said village "paid to the treasurer of this defendant the amount of money by this plaintiff paid into said treasury of Belvidere for the license heretofore mentioned;" that on the 19th of September the district court issued a *mandamus* to the village board, requiring it to fix a time for hearing

a remonstrance filed against the issuing of the license. Such remonstrance was based on grounds which attacked the jurisdiction or authority of the village board to grant a license under the petition presented; that in pursuance of said writ the village board canceled the license on the 20th of September; that on the 10th of April, 1890, the plaintiff obtained a judgment against the village for $306.60, being the unearned license fee by him paid; that certain payments had been made on such judgment, but $259.27, with interest, remained unpaid; that on the 4th of November the village of Belvidere abolished its incorporation and became dissolved. Plaintiff prays judgment against the school district for the unearned license money less the amount received on its judgment against the village. The question presented is whether this petition states a cause of action.

It is the settled law of this state that where an applicant for a license to sell liquor has paid the license fee and the license is afterwards canceled without fault or act of forfeiture by the licensee, he may recover back a proportionate part of the license fee for the period during which he is not permitted to enjoy the license. (*State v. Johnson*, 12 Neb., 470; *Lydick v. Korner*, 15 Neb., 500; *State v. Weber*, 20 Neb., 467; *Chamberlain v. City of Tecumseh*, 43 Neb., 221.) The general question of the right of the plaintiff to a repayment of his money is, therefore, no longer open to question. May he recover it from the school district under the facts of this particular case? One reason alleged for refusing such recovery is that it nowhere appears from the petition that the defendant school district comprises territory within the former corporate limits of Belvidere. We do not regard this as a material averment, because it is pleaded that the treasurer of Belvidere paid the money over to this school district. This averment traces the money to the defendant, and it is immaterial whether or not it rightly received it.

Another objection urged against the petition is that it discloses no privity between the parties. But in spite

of some statements to the contrary, we doubt whether it is necessary that any such privity should exist in order to maintain an action for money had and received. While this form of proceeding has been abolished by the Code, the substantive legal principle on which the action was based still exists, and by that principle the action lies in any case where the defendant has obtained possession of money which *ex æquo et bono* he ought to refund. Moreover, if privity be necessary it here existed, because the village treasurer in such a case receives the money on behalf of the school district and as its agent. The municipal corporation, of which he is an officer, is not responsible therefor. (*School District v. Board of County Commissioners of Saline County*, 9 Neb., 403.) In *Lydick v. Korner*, *supra*, it was held that the treasurer was not liable for the payment of the money, but this was because he had paid it into the city treasury before the action was brought; and in *Chamberlain v. City of Tecumseh* it was held that there could be a recovery against the city where the money had been paid to the city. But it did not appear in that case that it had been distributed to the school districts. The result of all the cases is that a recovery may be had against the person who, or corporation which, has obtained possession of the money; and it follows that this petition states a cause of action, averring as it does that the money had been paid over to the school district, unless the judgment against the village operated to defeat the action. We cannot see how this judgment could operate as a bar. If the averments of this petition are true, to the effect that the village treasurer the same day he received the money paid it over to the school district, then it is clear that the judgment against the village was improper. Either the judgment was erroneous or the village failed properly to defend the suit. But how can this defendant avail itself of that? It was not a party to that action, it is not estopped by the record in that case, the fact that judgment was therein rendered against the village would not of itself render the school district liable

over to the village, and the school district is not subjected to the hazard of being compelled to pay the money twice. The proceedings against the village were *res inter alios acta*, and cannot be used in this case as an estoppel by either party.

AFFIRMED.

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GEORGE C. KIMBALL, APPELLANT, V. JACOB ZIMMERMANN ET AL., APPELLEES.

FILED JUNE 3, 1897. No. 7361.

**Mortgages**: PAYMENT: AUTHORITY OF AGENT: EVIDENCE. Evidence examined, and *held* to sustain a finding that a mortgagor who had indorsed the notes secured by the mortgage to a third person, had authority as agent of such person to receive payment from the mortgagor.

APPEAL from the district court of Kearney county. Heard below before BEALL, J. *Affirmed.*

*Dryden & Main*, for appellant.

*J. L. McPheely, contra.*

IRVINE, C.

July 25, 1885, Jacob Zimmermann and wife made two promissory notes to the order of H. Fred Wiley of Kearney, each for $600, and due respectively December 1, 1886, and December 1, 1887. These notes were secured by mortgage on land then and still belonging to Zimmermann. Soon after the execution of the notes and mortgage Wiley indorsed and delivered the notes to George C. Kimball, and a few days after the maturity of the first note Zimmermann paid the amount thereof to Wiley, Wiley stating that he had not the note in his possession, but would procure it and deliver it to Zimmermann. When the second note came due both notes were sent by

Kimball to a firm of lawyers in Kearney for collection. Zimmermann then paid the second note, and soon thereafter procured a release of the mortgage from Wiley. In 1892 Kimball began this action to foreclose the mortgage for default of payment of the first note. Zimmermann, by his answer, pleaded payment. The court found for the defendants and dismissed the case. The plaintiff appeals.

The principal question presented is the authority of Wiley to collect the first note. It appears from the evidence that Kimball was, in 1884, in Kearney visiting friends, and there met Wiley, who, after Kimball's return to his home in Michigan, addressed him a letter, evidently in answer to one received from Kimball, but not in evidence, whereby Wiley proposed that he should either make loans on behalf of Kimball, or should borrow money from Kimball and himself lend it at short time. Afterwards a remittance was made by Kimball to Wiley, and Wiley sent to Kimball his note for $2,000, and also the Zimmermann notes together with another, as collateral to the $2,000 note. There seem to have been further advances by Kimball, and another note for $4,000 was executed. Wiley testifies that his understanding was that he was to lend the money, collect it, and relend it, "keeping the securities good" with Mr. Kimball. But it further appears that there was no previous conversation with Mr. Kimball on this subject. The transaction was entirely by mail. Some of the letters are not in the record, and the letters before us leave the matter of Wiley's authority in doubt. From the letters alone we would greatly hesitate to say that any authority was reposed in Wiley to collect notes representing loans made by him from Kimball's money and indorsed to Kimball. There are certain circumstances, however, in the case which persuade us that the finding of the trial court was sustained by the evidence. Mr. Kimball himself testifies that he learned that Wiley had collected the first note in November, 1887. It was soon after that that both notes were sent to lawyers in Kearney for collection. The sec-

ond note was then paid, and there is testimony tending to show that Zimmermann, after paying the second note, said he was going to get the mortgage released by Wiley, and the lawyers said: "That is all right; get it released." It is true that there is no evidence to show authority from Kimball to order the release, but it does not appear that any effort was then made to collect the first note, although Kimball knew at the time that Zimmermann had paid it to Wiley and must have known that Zimmermann supposed he had thereby discharged it. There is no evidence of any further effort on the part of Kimball to enforce the note against Zimmermann until shortly before this action was brought, although in 1889, in response to a letter from Zimmermann's attorneys demanding the surrender of the note, Kimball wrote that he still held it and would expect the full value thereof. It also appears that Kimball made efforts to secure a settlement with Wiley, and while these fell short in our opinion of constituting a ratification of Wiley's conduct, provided it had been entirely unauthorized, they still tended to show that Kimball was looking to Wiley rather than to Zimmermann for payment and so tended to that extent to establish Wiley's original authority. The correspondence leaving it uncertain as to the extent of Wiley's authority, this being a question of fact, and it plainly appearing that Kimball chose to lend money to Wiley for Wiley to relend at short time, in order, as Wiley expresses it, to "make more money than we could in any other way," Kimball knowing for about two years that Wiley had collected the money before informing Zimmermann that he looked to him for payment, his waiting six years before bringing suit, and his waiting one year after the first note became due before making any effort at all to look after its payment, together with his evident attempt to enforce payment from Wiley until he found that remedy ineffectual, all tend to show that his understanding was the same as Wiley's, to-wit, that Wiley should lend money at short time, collect it, and relend it. While the

evidence is far from being conclusive, the finding of the trial court cannot be disturbed.

AFFIRMED.

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## ANDREW RILEY ET AL. V. H. O. BANCROFT'S ESTATE.

FILED JUNE 3, 1897. No. 9182.

1. **Intoxicating Liquors:** LICENSE: SALES. A liquor dealer must have a license from the city or county in which his store is kept. With such license he may send out agents and take orders in any part of the state for goods to be sold and forwarded from the stock kept in such store; and he is not required to obtain a license from the authorities of each city or county in which contracts are made by such agent. *Gillen v. Riley*, 27 Neb., 158, followed.

2. **Statute of Frauds:** CONTRACTS. The object of the statute of frauds is to prevent frauds and perjuries, and while certain contracts are by the terms of the statute declared void, the uniform construction placed upon the statute by the courts renders such contracts not void but merely unenforceable for want of the evidence which the statute requires.

3. **Sales:** ACCEPTANCE: MEMORANDUM. In the case of a sale of goods where the price is $50 and upwards, where there is no note or memorandum in writing of the sale, and where no part of the price was paid at the time, a subsequent acceptance by the vendee of the goods does not constitute a new contract but merely renders enforceable the original verbal contract, and for that purpose relates back to the time and place thereof.

4. **Intoxicating Liquors:** PLACE OF CONTRACT OF SALE: PURCHASE PRICE. A, a licensed wholesale liquor dealer in O., sold liquors to B, a licensed dealer in S., in another county. The sales were in part by negotiations between the parties at the place of business of A; in part through a traveling salesman of A at the place of business of B. The goods were separated from the stock of A at O., were packed and shipped by railroad at O., consigned to B at S. B accepted the goods, paying the cartage from the store of A to the depot at O., and the freight from O. to S. The price was more than $50. There was no memorandum in writing and no part of the purchase money was paid at the time of the sale. *Held*, That the sale was at O., and legal; that the acceptance of the goods by B merely confirmed that sale, and that A could recover the price of the goods.

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

*B. N. Robertson*, for plaintiffs in error.

*George G. Bowman, contra.*

IRVINE, C.

The plaintiffs, partners doing business as Riley Bros., filed a claim in the county court of Douglas county against the estate of H. O. Bancroft, deceased, for goods sold and delivered. An appeal was taken to the district court, where the case was heard on an agreed statement of facts. From the judgment there rendered, disallowing a large portion of the claim, the plaintiffs prosecute error to this court, submitting the case on agreed printed abstracts, under rule 2.

Riley Bros. were engaged in the wholesale liquor business in Omaha, where they had a license under the state law and had satisfied both state and federal requirements to legalize the traffic. Bancroft and another were liquor dealers in Springfield, Sarpy county, under the name of E. E. Cragle. They had procured the necessary license in Springfield. Several sales are in controversy. One of these was negotiated at the place of business of Riley Bros., in Omaha, by Cragle and Bancroft personally, who, after examining the goods, or samples thereof, left an order with Riley Bros. The goods were not separated from the bulk of the stock while the purchasers were present, but thereafter the goods were packed and delivered by Riley Bros. at a railway station in Omaha, consigned to Cragle. They were transported to Springfield and there accepted by Cragle and Bancroft, who paid the cartage from Riley Bros.' store to the depot and the freight from Omaha to Springfield. The other sales were negotiated by a travelling salesman of Riley Bros., at the place of business of Cragle and Bancroft, in Springfield.

The order was sent to Omaha and was filled in the same manner, Cragle and Bancroft accepting the goods and paying the cartage and freight as before. There was no memorandum in writing of any of these sales, and the price was in each case more than $50. The sole question presented is the legality of the sales under the foregoing state of facts.

In *Gillen v. Riley*, 27 Neb., 158, it was held that a liquor dealer must have a license from the city or county in which his store is kept. With such license he may send out agents and take orders in any part of the state for goods to be sold and forwarded from the stock kept in such store, and he is not required to obtain a license from the authorities of each city or county in which contracts are made by such agent. This general principle is conceded to be correct, but it is urged that in order to render it applicable there must have been a technical sale at the place of business of the vendor, and the Kansas and Maine cases, which were avowedly followed in *Gillen v. Riley*, contain intimations that such is the law. It is not contended that a sale consummated in the manner disclosed as to either of the sales in this case would not be an Omaha sale under ordinary circumstances, but the argument is that no portion of the purchase money having at that time been paid, there being no note or memorandum in writing of the sales and the price of the goods being upwards of $50, the contract of sale was void when made, under the statute of frauds (Compiled Statutes, ch. 32, sec. 9); that it did not become valid, if at all, until the acceptance of the goods in Springfield by the vendees, and that this essential act having taken place in Springfield, that place became the *situs* of the sale, and there can be no recovery, because Riley Bros. had no license to do business there. In support of that contention we are cited to *Ex parte Parker*, 11 Neb., 309. That was a proceeding in *habeas corpus* whereby the validity of a sentence for obtaining goods under false pretenses was attacked for want of jurisdiction of the courts of Douglas

county, where the prosecution was had. The goods were obtained in pursuance of a verbal contract of sale, the circumstances being much the same as in the case before us, the goods having been shipped from Douglas county, where the vendors did business, to Sarpy county, the place of business of the vendees. The court held that the venue was improperly laid in Douglas county, because the delivery of the goods to the railway company in Omaha did not, under the circumstances, operate as a delivery and acceptance by the vendees. It was not shown that the vendees themselves ever accepted the goods, and the court held that this fact was immaterial, because if they did, it was in Sarpy county, and would, therefore, require a prosecution there. But this was not because the sale was thereby rendered a sale in Sarpy county, because the sale was only incidental to the offense. The gist of the offense was the obtaining of the goods, and not only were the false pretenses made in Sarpy county, but the goods, if obtained at all, were there obtained.

We are also cited to a number of cases in other states, which it is unnecessary to here review at length. Suffice it to say we do not regard any of them in point. Some of them are cases holding that a delivery to a carrier without an actual acceptance by the vendee himself is insufficient to take the case out of the statute, and this on the ground that no act of the vendor alone can operate to toll the statute. The vendee, to be charged, must act in one of the three ways provided; either by signing a memorandum, by making at the time payment or part payment, or by actually accepting the goods or part thereof. These cases, while establishing the principle that there was no enforceable sale until the vendees accepted the goods in Springfield, do not establish that the sale was thereby made a sale at that point, thus changing the nature of the verbal contract. Other cases are illustrated by *Webber v. Howe*, 36 Mich., 150. In that case the vendor resided and did business in Ohio. The vendee

resided in Michigan, where such sales were then unlawful. The vendor himself made the contract of sale in Michigan. The liquors were shipped from Ohio to Michigan, defendant paying the freight. The court merely held that the delivery to the carrier in Ohio did not take the case out of the statute, and that both the contract of sale and the acceptance of the goods having taken place in Michigan, it was immaterial whether the place of sale was fixed by one fact or the other, as it was in either case illegal.

We think that a recurrence to well established principles with regard to the statute of frauds is sufficient to solve the question before us. While the statute declares that sales not conforming to its requirements shall be void, it is a truism that they are not void, but voidable. Such is the construction that all courts have placed upon the statute. Indeed, the requirements of the statute are in a certain sense merely requirements of certain modes of proof and not requirements of inherent elements in the contract. The title of the original statute of frauds (29 Car. II. [Eng.], cap. 3) is "An act for prevention of frauds and perjuries," and the preamble recites that the enactment is "for prevention of many fraudulent purposes which are commonly endeavored to be upheld by perjury and subornation of perjury." Accordingly, it has always been held that the memorandum required need not be contemporaneous with the contract, but may be supplied through the means of letters and through documents not intended to embody a contract, although they be made subsequently, provided they are signed by the party to be charged and sufficiently disclose the terms of the contract. A notable instance of this is *Leather-Cloth Co. v. Hieronimus*, L. R., 10 Q. B. [Eng.], 140, where it was held that a letter constituted a sufficient memorandum to validate a sale where it acknowledged in general terms the contract, but contained a refusal to pay because of the vendor's failure to follow shipping directions. So, also, a subsequent delivery and acceptance of

the goods is sufficient (*Marsh v. Hyde*, 3 Gray [Mass.], 331; *Rickey v. Ten Broeck*, 63 Mo., 563); and even where the statute does not so expressly provide, an acceptance of a portion of the goods answers the requirements. (*Garfield v. Paris*, 96 U. S., 557; *McNight v. Dunlop*, 1 Seld. [N. Y.], 537.)

From these considerations we think it follows that where a contract is unenforceable at the time it was made, through failure to comply with the statute, and where a subsequent act is performed which satisfies the statutory requirements, this act does not constitute a new contract, but merely supplies a particular kind of evidence necessary to establish and give effect to the contract, already in existence, but theretofore unenforceable. Speaking to this point, the supreme judicial court of Massachusetts says: "In carrying out its purpose the statute only affects the modes of proof as to all contracts within it. If a memorandum or proof of any of the alternative requirements peculiar to the seventeenth section be furnished, if acceptance and actual receipt of part be shown, then the oral contract, as proved by the other evidence, is established, with all the consequences which the common law attaches to it." (*Townsend v. Hargraves*, 118 Mass., 325.) So, too, in *Lawton v. Keil*, 61 Barb. [N. Y.], 558, it is said: "Parties are at liberty to ratify the agreement by performance; and the delivery of the property, or the payment of the money, under the contract, will operate to make valid a contract which otherwise could not be enforced. Such ratification is not a new contract. It only makes valid and confirms the parol agreement, which thereupon becomes an agreement valid and binding on both parties, to be enforced and carried out according to the original terms." (See, also, *Buckingham v. Osborne*, 44 Conn., 133.) The conclusion follows that the acceptance of the goods in Springfield by the vendees did not operate as a new contract; nor did it in any manner change the terms of that already entered into between the parties. It only operated to render enforceable that

which theretofore was nugatory, and for this purpose it related back to the time and place of the original transaction. We are constrained to hold, therefore, that the sales were made at the place of business of the vendors in Omaha, and that they were valid. The whole claim should have been allowed.

REVERSED AND REMANDED.

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## GERMAN-AMERICAN FIRE INSURANCE COMPANY V. CITY OF MINDEN.

FILED JUNE 3, 1897. No. 8962.

1. **Insurance:** LICENSE TAX. Chapter 38, Session Laws, 1895, authorizing the imposition of a license tax on insurance companies for the purpose of maintaining volunteer fire departments, cannot be construed as in any way extending or modifying the powers of cities of the second class in that particular, because to so construe it would render the act in conflict with section 11, article 3, of the constitution.
2. ———: ———. By force of chapter 14, article 1, Compiled Statutes, such cities have, however, independently of the act of 1895, power to impose an occupation tax on fire insurance companies doing business within the city and to apply the proceeds of that tax to the maintenance of volunteer fire departments.
3. **License Tax:** ENFORCEMENT. The payment of such tax cannot, however, be required as a condition precedent to doing business, nor can payment of the tax be enforced by punishing, criminally, persons who do business without first paying the tax.
4. ———: ———. When the law imposing a tax provides a special means for enforcing it, the method so provided is generally exclusive, and if the only method adopted be illegal, the courts cannot substitute a different and legal method.
5. **Municipal Corporations:** OCCUPATION TAX: ORDINANCE. A city ordinance imposed an occupation tax and provided only an illegal method for its enforcement. *Held*, That the whole ordinance was thereby rendered inoperative.

ERROR from the district court of Kearney county. Tried below before BEALL, J. *Reversed.*

*Greene & Breckenridge*, for plaintiff in error.

*L. W. Hague* and *Stewart & Munger, contra.*

IRVINE, C.

The petition of the city of Minden against the German-American Fire Insurance Company alleged that Minden is a city of the second class maintaining a volunteer fire department, and that the defendant is a corporation engaged in the business of fire insurance in said city; that on the 6th of January, 1896, the mayor and council enacted an ordinance requiring all fire insurance companies doing business in said city to pay a license tax of $3 per annum, due and payable on the 1st day of May of each and every year; that the defendant failed and refused to pay the tax. The prayer was for judgment for the sum of $3 and interest. Made a part of the petition was a copy of the ordinance, as follows:

"An ordinance to impose a special license tax on fire insurance companies doing business in the city of Minden, Nebraska, for the support and maintenance of the volunteer fire department of said city.

"*Be it ordained by the Mayor and Council of the City of Minden, Nebraska:*

"Section 1. That for the use, support and maintenance and benefit of the volunteer fire department of the city of Minden, Nebraska, regularly organized under the laws of the state of Nebraska, a license tax of three dollars per annum be and the same is hereby levied upon each and every fire insurance company, corporation, or association doing business in the city of Minden, Nebraska.

"Section 2. Such license tax shall be due and payable on the first day of May of each and every year, and upon payment thereof to the city treasurer, and presentment of his receipt to the city clerk, a license shall be issued by the city clerk authorizing the insurance company paying same to do and transact business in the city of Minden for one year.

"Section 3. It shall be unlawful for any fire insurance company, corporation, or association to write, or cause to be written, any policy of fire insurance without first paying the license tax and procuring license as hereby provided.

"Section 4. It shall be unlawful for any agent or solicitor for any fire insurance company, corporation, or association to solicit, write, or cause to be written any policy of fire insurance for or in the name of any fire insurance company, corporation, or association unless the said fire insurance company, corporation, or association for which said insurance shall be or may be solicited, written, or caused to be written by such agent or solicitor, shall have first paid the license tax and have procured the license herein required.

"Section 5. The license tax herein required shall be due and payable on the first day of May of each and every year thereafter.

"Section 6. Any person, firm, corporation, association, solicitor, or agent violating any of the provisions of this ordinance shall be deemed guilty of misdemeanor, and upon conviction thereof shall pay a fine of not less than five dollars and not more than one hundred dollars.

"Section 7. This ordinance shall be in force and take effect from and after its passage and publication as by law provided."

A general demurrer to the petition was overruled, and the defendant electing to stand on the demurrer, judgment was entered for the city. The defendant prosecutes this proceeding, assigning as error the overruling of the demurrer, and the question involved is the validity of the ordinance.

The city is governed by chapter 14, article 1, Compiled Statutes, and by subdivision 28 of section 39 of that article is authorized "to procure fire engines, hooks, ladders, buckets, and other apparatus, and organize fire engine, hook and ladder, and bucket companies, and to prescribe rules of duty and the government thereof, with such pen-

alties as the council may deem proper, not exceeding one hundred dollars, and to make all necessary appropriations therefor." By subdivision 8 of section 69 of the same article such cities are empowered "to raise revenue by levying and collecting a license tax on any corporation or business within the limits of the city or village, and regulate the same by ordinance; all such taxes shall be uniform in respect to the classes upon which they are imposed." In 1895 there was passed (Session Laws, 1895, ch. 38) "An act authorizing the municipal authorities of cities of the second class and villages to enact an ordinance to impose a special license tax on insurance companies for the support and maintenance of volunteer fire departments." By this act it was provided that such cities and villages shall have authority by ordinance "to impose a license tax of not more than $5 per annum on each fire insurance corporation, company, or association doing business in such city or village, for the use, support, and benefit of volunteer fire departments, regularly organized under the laws of the state of Nebraska regulating the same." The ordinance in question was undoubtedly enacted with a view to complying with the act of 1895. The plaintiff in error attacks the validity of both the act and the ordinance. The applicability of the act of 1895 may be briefly disposed of by the suggestion of a dilemma. The general statute, already quoted, in existence at the time this act was passed, conferred authority to impose a license tax on any occupation for the purpose of raising revenue. If the act of 1895 did not in any manner extend or modify that power, it was at most declaratory of the existing law, and may be disregarded. If, on the other hand, its purpose was to extend or modify the existing grant of power, it failed to comply with that portion of section 11, article 3, of the constitution which requires that "No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed." It is claimed that the act can be

sustained as one complete in itself, but this is not true. It has for its manifest object merely the definition of the power of a certain class of municipal corporations on a particular subject, and that subject already covered by another statute. While it does not purport to be an amendatory act, it is clearly one in effect, and the legislature may not evade this constitutional provision merely by casting the act in the form of new legislation, if it be in fact amendatory in character. (*Board of Education of Aurora v. Moses*, 51 Neb., 288.)

We therefore proceed to consider the ordinance solely in the light of the charter provisions already quoted. It is conceded on all sides that in order to give efficacy to the ordinance it must be supported as an occupation tax, and not as a license. The authority of the legislature to empower municipal corporations to levy occupation taxes, and the validity of such taxes when so levied in pursuance of legislative authority, have been frequently affirmed. (*State v. Bennett*, 19 Neb., 191; *City of Columbus v. Hartford Ins. Co.*, 25 Neb., 83; *State v. Green*, 27 Neb., 64; *Magneau v. City of Fremont*, 30 Neb., 843; *Templeton v. City of Tekamah*, 32 Neb., 542; *Western Union Telegraph Co. v. City of Fremont*, 39 Neb., 692.) It is true that in *State v. Wheeler*, 33 Neb., 563, an act of 1889 attempting to accomplish the same object as the act of 1895 was declared unconstitutional, and it is also true that while the opinion states that its validity was attacked for a number of reasons, it does not show clearly for what particular reason the court held it bad; but by comparing the opinion, the syllabus, and the briefs in the case it is quite evident that it was held bad because it was an attempt by the legislature, not to empower municipal corporations to impose a tax for corporate purposes, but to impose by the legislature itself a tax for corporate purposes on the inhabitants and property of the municipal corporation, this being forbidden by section 7, article 9, of the constitution. This case in nowise implies any restriction on the power of the legislature to authorize municipalities to themselves im-

pose such taxes, and the decisions sustaining that power remain unquestioned. But it is contended that if such tax be imposed it must be for general corporate purposes, and its proceeds may not be restricted to a special use. We cannot see any force in this objection. In *State v. Bennett, supra*, the general right to impose such a tax was sustained under an ordinance providing that its proceeds should be kept in a special fund and used only for certain specified purposes. The maintenance of a volunteer fire department is a public purpose, and one within the express powers of cities of the second class, and we see no reason why, in providing the revenues for such a city, the governing body thereof may not make special provision for this particular expense. It is said that a tax imposed for a special purpose may only be sustained when that purpose is rendered a necessary object of government by reason of the property or business so specially taxed; and in support of that argument we are referred to cases sustaining taxes on saloons for the purpose of maintaining inebriate asylums and alms-houses, because saloons tend to create a necessity therefor; and also taxes upon teamsters to provide a fund to repair streets, on the ground that they make more than the average use of streets. We apprehend, however, that this basis of classification is too narrow. It undoubtedly affords a sufficient reason for discrimination, but not the only reason. Indeed, a special tax on teamsters to repair streets is not defensible alone on the ground that it is the teamsters who wear out the streets, but also upon the ground that they receive a special and peculiar benefit from the maintenance of good streets, and that they may therefore be justly required to pay more than the usual burden for this purpose. So with regard to insurance companies. An occupation tax has a special reason in their case. The corporeal property which they possess at places other than their main office usually consists at most of a leasehold interest in a small room, a desk and chair and other trifling office furniture, so that a property tax is wholly

disproportionate to the advantages they derive from the maintenance of government; and if any special ground be necessary for the application of this tax to the maintenance of a fire department, we think it also exists. It is true that such companies fix their rates as nearly as may be with reference to the hazard of the risk, and that it is the object of such companies to fairly consider the efficiency of a fire department in fixing its rates for a particular city. Nevertheless, such estimates are at best conjectural, and while each property holder is interested in the prevention of conflagrations, a fire insurance company holding a large number of risks throughout the city is particularly so interested, and by reducing the hazard of fire below the average to be expected under circumstances otherwise similar, such an organization obtains an advantage peculiar to itself, and specially enjoys the protection of efficient municipal government in this particular. We have, therefore, no doubt of the authority of a city, under the charter provisions quoted, not only to impose a special occupation tax on insurance companies, but also to provide that such tax shall be applied exclusively to the maintenance of a fire department. Such a provision, instead of operating to the prejudice of the insurance company, is to its advantage, by devoting the proceeds of the tax to that particular municipal purpose in which such a company is chiefly, if not solely, interested.

We now reach the question of the validity of this particular ordinance. Is it an attempt, and a valid one, to execute the power granted to impose an occupation tax, or is it in effect an attempt to impose a license? In *Pleuler v. State*, 11 Neb., 547, Judge LAKE, in an elaborate and learned opinion, distinguished between license fees and taxes, and the court there held that in general a tax must be imposed solely for the purposes of revenue, while a license is imposed in the exercise of the police power, and has for its object the restriction or regulation of a certain occupation, the income derived from the license

fee being only incidental to the accomplishment of the main object. Measured by this test alone, we think the ordinance might be supported as one imposing an occupation tax. It is quite evident from its terms that its sole object is to obtain a revenue. It contains no restriction upon the granting of a license, vests no discretion to grant or refuse the same, and requires that the license shall be issued on payment of the fee. But by a long and unbroken line of decisions this court has held that the payment of such a tax may not be enforced by requiring its payment as a condition precedent to doing business, or by the imposition of a criminal punishment for doing business without payment. (*State v. Bennett*, 19 Neb., 191; *State v. Wilcox*, 17 Neb., 219; *State v. Green*, 27 Neb., 64; *Magneau v. City of Fremont*, 30 Neb., 843; *Templeton v. City of Tekamah*, 32 Neb., 542.) In *State v. Bennett, supra*, it was distinctly held that payment of an occupation tax by saloon-keepers cannot be made a condition precedent to the issuing of a license. It does not clearly appear whether the view of the court in that case was that the requirement of such a condition generally would transform the tax into a license or whether the court merely considered that a license having been obtained under the state law no further condition could be imposed. In either view the case is applicable to the one before us, because an insurance company is required before doing business in the state to comply with certain statutory requirements. It then obtains a certificate authorizing it to do business throughout the state, and in the narrower view of *State v. Bennett* it would be unlawful for a municipal corporation to impose a further condition. In *State v. Bennett*, *Magneau v. Fremont*, and *Templeton v. Tekamah* the ordinance imposing the tax was held valid, notwithstanding provisions whereby it was attempted to constitute the transaction of the business without paying the tax a misdemeanor. In *State v. Bennett*, however, the ordinance expressly provided that a civil action might be brought to recover the tax. In the other cases the ordi-

nance does not appear in full, but it is found on examining the records of those cases that, disregarding the method of enforcement by criminal prosecution, another method of collecting the tax was provided. This court has held that where a law imposing a tax provides a method of enforcement, that method is exclusive and must be strictly pursued. (*Richards v. County Commissioners of Clay County*, 40 Neb., 45; *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb., 374; *Chapell v. Smith*, 40 Neb., 579.) The ordinance before us does not provide for the collection of a tax by civil action, as was the case in *State v. Bennett*, *supra*, and *Western Union Telegraph Co. v. City of Fremont*, *supra;* nor does it provide any method of enforcement except by a criminal prosecution for transacting business without paying the tax and obtaining a license. This portion is invalid. It is a general principle of constitutional law that where an invalid portion of a statute is so interwoven with the rest that the act may not stand and be operative with the invalid portion stricken out, or where it is apparent from an inspection of the act that the invalid portion formed an inducement to the passage of the act, then the whole act fails. (*Trumble v. Trumble*, 37 Neb., 340.) We know no reason why the same principle should not apply to a city ordinance, and applying it, it is found, by striking out the provisions of this ordinance which by repeated decisions of this court are clearly invalid, there is no method left of enforcing the tax, because the reason for permitting the enforcement by civil action, when no other method is provided, is founded upon an implication that the legislative body in failing to provide another remedy contemplated this. (*Richards v. Clay County*, *supra.*) But where that body did undertake to provide an exclusive remedy, and that a remedy beyond its power, it must be taken as an essential part of the act, without which the whole ordinance becomes inoperative. It follows that the ordinance was void and the judgment of the district court must be reversed.

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6. Where, in a replevin action brought in the county court, the appraised value of the property, as well as its actual value found by the court, is less than $1,000, and the plaintiff appeals from the judgment entered against him, the district court may give judgment for the defendant for an amount in excess of the jurisdiction of the county court, if warranted by the facts. *Id.*

7. The appraised value of the property, and not its actual value proved on the trial, is made the criterion for determining whether a county court has jurisdiction to hear and determine an action of replevin; and where jurisdiction has attached, it continues to judgment, except such court cannot render a judgment for a larger sum than $1,000, exclusive of costs. *Id.* ... 252

8. A defendant who prevails in replevin before the county court may, where the property has been delivered to the plaintiff under the writ, recover the value thereof or the value of his right of possession, not exceeding $1,000. *Id.* ... 253

9. Where, in an action of replevin, the property has been delivered to the plaintiff, the county court on finding for the defendant may render judgment for the value of the property, although it exceed $1,000. *Id.*

*Judicial Notice.*

10. A court takes notice of its own records, including the signatures of its officers and the dates of proceedings. *Fenton v. American Jewelry Co* ... 395

*Prejudice.*

11. Evidence *held* not to show that the trial judge was biased or prejudiced against plaintiff or his counsel. *Oliver v. Lansing* ... 818

**Covenants.**

1. Covenants of warranty not broken when made pass with the title, unaffected by the fact that the conveyances are by quitclaim deed. *Walton v. Campbell* ... 788

2. Oral notice to warrantor of the pendency of a suit hostile to

**Covenants**—*concluded.*

the title warranted *held* sufficient to conclude him as to the adjudication in the case. *Id.*

3. Under the evidence in an action for breach of covenant of warranty, *held* that plaintiff was not entitled to recover interest on costs and attorney's fees incurred in defending a suit hostile to the title involved in his warranty deed. *Id.*
4. Where a cause has been tried on the theory that an averment of eviction under title paramount has been sufficiently established by proof of a yielding to such asserted title by purchase of the adversary interest, the supreme court, while it may accept that theory, will not extend its operation so as to countenance an assumption that the yielding was earlier than the date of the quitclaim deed obtained by purchase of the paramount title. *Id.*

**Creditors' Bill.** See HUSBAND AND WIFE, 4.

**Criminal Law.** See BANKS AND BANKING. INSTRUCTIONS, 2-17. JURY, 2-4. TRIAL, 1-4. WITNESSES, 2-9.

1. The defining of crimes and the prescribing of punishment therefor is a legislative function. *Davis v. State*..... 302

*Abatement. Jury Trial.*

2. A denial of a jury trial upon an issue of fact tendered by a plea in abatement *held* not reversible error, where the record fails to disclose that the prisoner was prejudiced. *Bolln v. State* ..... 582

*Alibi.*

3. It is error to instruct that the burden of proof is upon the accused to establish an alibi by a preponderance of the evidence. *Beck v. State* ..... 106
4. Proof of an alibi will entitle accused to an acquittal whenever the evidence is sufficient to create in the minds of the jurors a reasonable doubt of his presence at the commission of the offense. *Henry v. State*..... 150
5. It is not essential that the proof of an alibi should include the entire period during which the offense might possibly have been committed. *Id.*

*Assumption of Facts.*

6. It is not error for the trial court to assume the existence of facts asserted by the accused on the trial, or treated by him as proved. *Morgan v. State*..... 673

*Circumstantial Evidence.*

7. Jurors are judges of the probative force of evidence. *Henry v. State* ..... 150
8. It is the province of the jury to determine the circumstances surrounding an alleged crime; and if, assuming as proved the facts which the evidence tends to establish, they can be accounted for upon no rational theory which does not in-

**Criminal Law**—*continued.*

clude the guilt of the accused, the proof cannot, as a matter of law, be said to have failed. *Morgan v. State*..... 672

9. The test to determine the sufficiency of circumstantial evidence is whether the facts and circumstances tending to connect accused with the crime are of such conclusive nature as to exclude, to a moral certainty, every rational hypothesis except that of his guilt. *Id.*

10. The state may introduce evidence of any number of facts and circumstances tending to connect accused with the crime, and if the facts proved are sufficient to establish his guilt beyond a reasonable doubt, he is not entitled to an acquittal because of a failure of proof with respect to one or more of the facts relied upon for a conviction. *Id*..... 673

*Confession.*

11. The confession of accused that he committed the crime is not alone sufficient evidence to sustain a conviction. *Davis v. State* ..... 305

*Delay of Trial. Discharge.*

12. Accused *held* not entitled to a discharge because not brought to trial before the end of the second or third term of court, where it was shown that the indictment was filed at the September term, 1894; that he was put on trial at the February term, 1895; that the jury was discharged after failing to agree; that there was a May term, 1895; and that he was tried and convicted at the September term, 1895. *Id*.. 301

*Exclusion of Evidence.*

13. Exclusion of evidence of a fact proved and undisputed *held* not prejudicial error. *Kelly v. State*..... 572

14. The district court may place a reasonable limit upon the time for the production of evidence. *Morgan v. State*..... 674

*Former Jeopardy.*

15. A plea of former jeopardy should set out the record. *Davis v. State* ..... 304

16. Where a plea of former jeopardy neither signed nor sworn to by accused was filed after entry of plea of not guilty which he permitted to remain upon record, the plea of former jeopardy is invalid, the state is not obliged to demur or reply thereto, and the court may strike it from the files. *Id.*

*Insanity of Juror.*

17. Prisoner *held* not entitled to a discharge on ground of former jeopardy upon a record showing that after a trial began a member of the jury became sick; that the juror was examined by a commission and found to be insane; and that the jury was discharged. *Id*..... 305

*Issues.*

18. There can never properly be more than one issue before the court in a criminal case at one time. *Id*..... 304

**Criminal Law**—*concluded.*

*Order of Proof.*

19. The action of the trial court in respect to the order of introducing proof is not ground for reversal of a judgment in absence of an abuse of discretion. *Id.*

*Plea in Bar.*

20. An invalid plea in bar was treated as a motion to discharge accused. *Id.* ..... 305
21. In a proper case accused may be permitted to withdraw his plea of not guilty and to file a plea in bar. *Id.* ..... 304
22. So long as the plea of not guilty remains on the record, a plea in bar is improper, and may be disregarded. *Id.*

*Presence of Accused.*

23. One convicted of a felony who was represented by counsel, cannot, as a matter of right, insist on being present in court when his motion for a new trial is filed, argued, or decided. *Id.* ..... 307
24. The presence of accused at the trial, being once shown by the record, will be presumed to have continued to the end. *Bolln v. State* ..... 582

*Presumption of Innocence.*

25. One accused of a crime is presumed to be innocent, and the presumption begins with the accusation and continues until the state has established his guilt beyond a reasonable doubt. *Davis v. State* ..... 305

*Reasonable Doubt.*

26. The jury cannot return a verdict of guilty while a juror entertains a reasonable doubt as to defendant's guilt, but they are not obliged to acquit accused because of such doubt. *Id.* ..... 306

**Crops.** See CONTRACTS, 5.

**Cross-Examination.** See WITNESSES, 1-6.

**Custom and Usage.**

A custom or usage repugnant to the commands of a statute cannot prevail. *Bolln v. State* ..... 582

**Damages.** See CARRIERS. CONSTITUTIONAL LAW, 4. CONTRACTS, 1. EMINENT DOMAIN. INTOXICATING LIQUORS, 1, 2. NEW TRIAL, 6. PLEADING, 11. RES JUDICATA, 11.

1. In an action *ex delicto*, where expenses incurred by reason of the tort are recoverable, it is not essential that the plaintiff should have actually paid the money, it being sufficient if he has incurred a legal obligation to do so. *Minneapolis Threshing-Machine Co. v. Regier* ..... 403
2. The agreement of an employe of a railroad company that acceptance of funds from the relief department shall release the company from liability in case of injury, is not a waiver

Damages—*concluded.*
of his right to sue for damages where he does not accept benefits. *Chicago, B. & Q. R. Co. v. Curtis*..... 442
3. Damages assessed by the jury in an action for wrongful attachment *held* excessive. *Jensen v. Hallam*..... 492
4. In a suit against a county by one whose land was taken for a highway, judgment for plaintiff for $65 *held* sustained by the evidence. *Lane v. Harlan County*..... 641
5. Evidence *held* not to sustain a judgment for substantial damages in an action for breach of contract between employer and employe. *Jewett v. Wilmot*..... 700
6. The measure of damages upon refusal of an employer to permit his employe to proceed under a contract for specific work at an agreed price, is the difference, if any, in favor of the latter between the stipulated price and the cost of completing the work as per contract. *Id.*

Death by Wrongful Act. See EXECUTORS AND ADMINISTRATORS, 1. MASTER AND SERVANT, 1.

Deceit. See SALES, 7-10.

Dedication. See COUNTIES, 4.

Deeds. See COVENANTS.

Default. See JUDGMENTS, 2.

Depositories.
1. To constitute a bank a state depository it must give bond for the safe-keeping and payment of deposits and accretions, conditioned as required by law, and approved by the governor, secretary of state, and attorney general, or any two of them where all were present and conferred upon the subject. *In re State Treasurer's Settlement*..... 116
2. A deposit of public moneys by a state treasurer in a legally constituted depository in compliance with the provisions of the depository law, is in substance and legal effect a loan. *Id.*
3. Excessive deposit of a state treasurer will not release the principal in the depository bond or the sureties from their obligation to repay deposits to the amount of 50 per cent of the bond and accretions. *Id.*
4. A state treasurer is not required to withdraw public funds lawfully remaining in a state depository and physically deliver them to his successor in office. *Id.*

Deposits. See BANKS AND BANKING, 4.

Deputies. See EXECUTIONS, 4.

Description. See EXECUTIONS, 8. TAXATION, 5.

Diminution of Record. See REVIEW, 81.

**Directing Verdict.** See TRIAL, 7.

**Disclaimer.** See APPEARANCE. COSTS, 5.

**Dismissal.** See RES JUDICATA, 10. REVIEW, 6-8, 23, 27, 58.

1. A trial court has no authority to enter an involuntary nonsuit and dismissal, but may instruct the jury to return a verdict for defendant where plaintiff fails to establish his cause of action. *Thompson v. Missouri P. R. Co*..... 527
2. Where the evidence justifies the court in directing a verdict for defendant, the entry of a nonsuit is error without prejudice to plaintiff. *Id.*

**Distribution.** See EXECUTORS AND ADMINISTRATORS, 6.

**District Courts.** See COURTS.

**Divorce.**

1. Petition *held* to state a cause of action for vacating a decree of divorce on account of fraud. *Hard v. Hard*..... 412
2. A district court has jurisdiction to hear and determine an application for the modification of a decree for permanent alimony. *State v. Cook*..... 822

**Drafts.** See PAYMENT, 1, 2.

**Drainage.** See MANDAMUS, 3.

In a proceeding to establish a ditch under article 1, chapter 89, Compiled Statutes, one of the jurisdictional facts which the county board is required to find and enter upon the journal is whether the line described in the petition is the best route. *State v. Colfax County*..... 28

**Election of Remedies.** See REVIEW, 24-27.

**Elections.** See CONSTITUTIONAL LAW, 5, 6.

**Embezzlement.**

1. The disbursement of public funds by a city treasurer, except upon a warrant drawn by proper authority, constitutes embezzlement. *Bolln v. State*..... 582
2. Under an information against a public officer charging embezzlement on a certain date, evidence of a continuous series of conversions at different times and in different amounts before that date will support a verdict finding the aggregate sum as the amount of a single embezzlement. *Id.*
3. Under section 124, Criminal Code, the failure of any public officer to account to, or make settlement with, the proper authority within reasonable time after notice to do so, as well as the refusal of such officer to promptly pay over to his successor any public moneys or securities on the legal requirement of any authorized officer, is made *prima facie* evidence of embezzlement. *Id.*
4. Instructions omitting to state that a reasonable time must elapse, after notice to a city treasurer to make accounting

**Embezzlement**—*concluded.*

and settlement, before the law, from his failure to do so, will raise a presumption of embezzlement, *held* not prejudicial to accused. *Id.*

5. Evidence *held* sufficient to warrant defendant's conviction for embezzlement of public moneys. *Id.*

**Eminent Domain.** See DRAINAGE.

1. Where private property is to be taken for public use proper steps must be taken to ascertain the damages and provide for payment. *Propst v. Cass County*..... 736
2. An inebriate husband who conveyed realty to his wife to be preserved for the benefit of the family cannot waive her right to recover damages for a portion of the land subsequently taken by a county for a highway. *Id.*

**Employe.** See MASTER AND SERVANT.

**Equity.** See MARSHALING ASSETS. MORTGAGES, 14. REVIEW, 66. TRUSTS.

When a court of equity has acquired jurisdiction over a cause for any purpose, it may retain it for all purposes. *Fowler v. Brown* ..... 415

**Error.** See REVIEW.

**Estoppel.** See RES JUDICATA. REVIEW, 66.

1. Negligence of a party in signing an instrument does not estop him in a suit between the original parties or their privies, where the party seeking enforcement practiced fraud in order to procure the signature. *Woodbridge v. DeWitt*..... 98
2. The fact that attached property does not belong to defendant does not estop him from moving to discharge the attachment. *McCord v. Bowen*..... 247
3. An attaching plaintiff is estopped to assert that defendant has not sufficient interest to defend against the attachment. *Id.*
   *South Park Improvement Co. v. Baker*..... 392
4. A railroad company *held* not estopped from maintaining a suit to enjoin a school tax levied on a bridge not within the school district, though the company listed the bridge with the district for taxation and paid taxes thereon in previous years. *Chicago, B. & Q. R. Co. v. Cass County*..... 370
5. An employe of a railroad company who accepts from the relief department benefits for an injury, under an agreement of membership releasing the company from liability in case of such acceptance, is estopped from suing for damages. *Chicago, B. & Q. R. Co. v. Curtis*..... 442
6. To estop a principal because of the ratification of his agent's unauthorized acts, it must be shown that the approval was made with knowledge of what the agent did and promised. *Cram v. Sickel*..... 823

**Evidence.** See BANKS AND BANKING, 5. CARRIERS, 9. CONTRACTS, 11. CRIMINAL LAW, 6-11. EMBEZZLEMENT, 3, 4. EXECUTORS AND ADMINISTRATORS, 5. HOMICIDE. HUSBAND AND WIFE, 7. INSTRUCTIONS, 18. INTOXICATING LIQUORS, 1, 2. JURY, 1. MORTGAGES, 12. PRINCIPAL AND AGENT, 2. REPLEVIN, 10. RES JUDICATA, 1, 5, 6. REVIEW, 28-38. SCHOOLS AND SCHOOL DISTRICTS, 7, 8. USURY, 2.

1. Plaintiff in a suit to recover the proceeds of property stolen by defendant is only required to establish the allegations of the petition by a preponderance of the evidence. *Nebraska Nat. Bank v. Johnson*..... 546

*Confessions.*

2. Confessions freely and voluntarily made by one charged with a crime are competent evidence to be considered by the jury in connection with other evidence in determining whether accused did in fact commit the crime. *Davis v. State*..... 305

*Confidential Communications.*

3. Without the consent of the client, an attorney is prohibited from disclosing any confidential communication properly intrusted to him in his professional capacity. *Sloan v. Wherry*..... 703

*Crimes.*

4. In a prosecution for rape, evidence set out in opinion *held* to be irrelevant and prejudicial. *Myers v. State*..... 517
5. Evidence of certain collateral facts *held* inadmissible to support the charge of robbery. *Williams v. State*..... 711

*Experiments.*

6. On trial of one charged with causing the derailment of a train and the death of a passenger by unscrewing nuts from fish-plate bolts with a monkey-wrench introduced in evidence, testimony of a witness on behalf of the state that with the monkey-wrench he unscrewed nuts from fish-plate bolts on a portion of the railway similar to that where the wreck occurred, was *held* admissible in rebuttal of evidence of an expert that it was impossible for a man with the monkey-wrench to unscrew the nuts on the fish-plate bolts. *Davis v. State*..... 306

*Harmless Error.*

7. Exclusion of evidence of a fact proved and undisputed *held* not prejudicial error. *Kelly v. State*..... 572

*Judicial Notice.*

8. A court takes notice of its own records, including the signatures of its officers and the dates of proceedings. *Fenton v. American Jewelry Co*..... 395

*Newspaper Accounts.*

9. In an action for malicious prosecution plaintiff may prove newspaper publications containing plain accounts of the

**Evidence**—*concluded.*

prosecution, without comment thereon. *Minneapolis Threshing Machine Co. v. Regier*..... 403

*Weights.*

10. Manner of showing weight of cattle where a buyer alleged that the seller fraudulently announced an excessive weight. *Alter v. Bank of Stockham*..... 797

*Writings.*

11. Note *held* admissible in evidence when a qualified witness testified as his opinion that the signatures to the note were genuine. *Mosher v. Farmers & Merchants Nat. Bank*..... 55
12. In case stated in opinion, parol proof of notes and guaranties *held* admissible as primary evidence. *Meyer v. Shamp*... 435

*Values.*

13. Notice to a railroad company of injury to live stock on an unfenced track, *held* incompetent evidence for the purpose of establishing the value of the stock. *Grand Island & W. C. R. Co. v. Swinbank*..... 521
14. Testimony that goods were sold "at a great sacrifice" without reference to their value or the price realized, *held* a mere conclusion of the witness. *Sloan v. Wherry*,..... 703

**Examination of Witnesses.** See WITNESSES, 1-6.

**Exceptions.** See BILL OF EXCEPTIONS. INSTRUCTIONS, 19.

**Executions.** See REVIEW, 75-78.

*Appraisement. Objections.*

1. A sheriff seizing realty on execution must appraise it and file a copy of the appraisement in the office of the clerk of the district court before the sale is advertised. *First Nat. Bank of Broken Bow v. Hamer*..... 23
2. Objections to the appraisement of property made under an order of sale should be filed in the trial court prior to the sale. *Hamer v. McFeggan*..... 227
3. Objection that realty sold under a decree was appraised too low comes too late when made for the first time after the sale. *Omaha Loan & Trust Co. v. Bertrand*..... 509
4. Where a decree of foreclosure directs that a sale shall be made by the sheriff, his deputy may act for him in appraising the property. *Nebraska Loan & Building Ass'n v. Marshall*... 534
5. Evidence *held* to sustain the district court in refusing to set aside an appraisement on the ground that it was too low. *Id.*
6. Objection that realty was appraised too high or too low cannot be raised for the first time after sale. *Nebraska Land, Stock-Growing & Investment Co. v. Cutting*..... 647
7. The owner of the equity of redemption of realty sold under mortgage foreclosure cannot object to the confirmation of sale because prior liens against the property were not deducted from the appraisement. *Id.*

**Executions**—*concluded.*

*Description.*

8. Description of realty in a decree as the "S. E. ¼ of section 24 in township 12 N," *held* not at variance with that in the notice of sale describing the property as the "S. E. ¼ of section 24 in township 12." *Id.*

*Special Master.*

9. A district court may appoint one other than the sheriff special master to sell realty under a decree. *Omaha Loan & Trust Co. v. Bertrand*..... 503
10. A special master appointed to sell realty under a decree is not an officer within the meaning of section 1, chapter 10, Compiled Statutes, relating to official bonds. *Id.*
11. The district court should require a special master to take an oath and give a bond, though there is no statute requiring the master to do so. *Id.*..... 509

**Executors and Administrators.** See REVERSION.

1. The county court of a county wherein a non-resident of the state is killed may appoint an administrator to prosecute a statutory action for the injury causing the death of the decedent, though the latter left no property in the state. *Missouri P. R. Co. v. Bradley*..... 596
2. Where a resident of another state dies intestate, an administrator may be appointed by the county court of any county in Nebraska in which there shall be an estate to be administered, irrespective of the value of such estate. *Id.*
3. The fact that one has been sued by an administrator will not authorize such person to petition the county court for a revocation of the letters of administration. *Id.*
4. The acts of an administrator *de facto* are binding between the estate and innocent third persons, though his appointment be erroneous and voidable. *Id.*
5. The record of appointment of an administrator not disclosing want of jurisdiction of the court, the existence of jurisdictional facts will, in a collateral proceeding, be conclusively presumed. *Bradley v. Missouri P. R. Co*..... 653
6. It is the duty of an administrator to distribute funds in pursuance of orders of the county court, but an order thereof directing money to be paid into court, instead of to the distributees, is not void, though erroneous. *Wheeler v. Barker*.. 847

**Experiments.** See EVIDENCE, 6.

**Experts.** See EVIDENCE, 6.

**Fees.** See COUNTY CLERK, 2. COUNTY TREASURERS, 4.

**Fences.** See RAILROAD COMPANIES, 2, 3.

**Final Orders.** See REVIEW, 39-44.

**Foreclosure.** See MORTGAGES.

**Former Jeopardy.** See CRIMINAL LAW, 15-17.

**Fraud.** See DIVORCE, 1. ESTOPPEL, 1. HUSBAND AND WIFE, 1. NEGOTIABLE INSTRUMENTS, 1. REPLEVIN, 8. SALES, 1. STATUTE OF FRAUDS.

The rule that facts showing fraud must be pleaded does not require probative or evidential facts to be stated, it being sufficient to allege ultimate facts showing the fraud. *Johnston v. Spencer*..... 198

**Fraudulent Conveyances.** See HUSBAND AND WIFE, 4, 5.

1. Where creditors of a husband attack a transfer from him to his wife, the burden is on her to show, by a preponderance of evidence, the *bona fide* character of the transaction. *Kirchman v. Kratky*..... 191
2. The rule that fraud must be established by the party alleging it does not apply to a case where creditors of a husband attack a transfer from him to his wife. *Id.*
3. Evidence *held* to sustain a finding that property in a wife's name was not held in trust for the husband, and was not subject to payment of his debts. *First Nat. Bank of Wahoo v. Havlik* ..... 668
4. An insolvent debtor may lawfully secure a portion of his creditors to the exclusion of the others, if in so doing he acts in good faith and without a fraudulent intent. *Smith v. Bowen* ..... 245
5. The disproportion between the value of chattels mortgaged and the amount of the debt secured is not a basis for presumption of fraud. *Id.*

**Fraudulent Representations.** See SALES, 7-10.

**Garnishment.**

1. Purchase money in the hands of garnishees who bought buggies from defendant as agent for his wife, *held* not subject to payment of the husband's debts. *Harris v. Weir-Shugart Co*..... 486
2. Proceedings in garnishment are binding from and after service of summons upon garnishee, and the property of the debtor in the garnishee's hands is thereby placed *in custodia legis*. *Meyer v. Miller*..... 620
3. Where a mortgagee of chattels is in possession, the interest of mortgagor therein, after the debt is paid, may be reached by process of garnishment. *Id.*

**Gifts.** See HUSBAND AND WIFE, 7, 8.

A gift from a husband to his wife will be upheld, if made when the former was solvent, and existing rights of creditors were not thereby impaired. *Studebaker v. Welch*..... 228

**Government Homestead.** See HOMESTEAD, 3.

Guaranty. See PRINCIPAL AND SURETY, 1.

1. The liability of a guarantor cannot be extended beyond the exact terms of his contract. *Lininger v. Webb*..... 10
2. An agent whose contract required him to guaranty all notes taken for the purchase price of goods sold by him for his principal, and to pay expenses incurred in collecting the notes, *held* not liable for the costs and expenses of a suit by the principal to recover goods wrongfully taken from the agent under a writ of attachment. *Id.*

Handwriting. See EVIDENCE, 11.

Harmless Error. See REVIEW, 45-50.

Highway. See EMINENT DOMAIN, 2. WITNESSES, 10, 11.

Homestead. See HUSBAND AND WIFE, 5. MORTGAGES, 3, 4.

1. Validity of conveyance from husband to wife *held* not raised by pleadings or evidence. *Klamp v. Klamp*..... 17
2. "Lot" is employed in the statute exempting homesteads to heads of families in its popular sense, and denotes a parcel of land within the limits of a city or village as surveyed and platted. *Norfolk State Bank v. Schwenk*..... 146
3. Though lands acquired as a government homestead are forever exempt from liability for the debts of the patentee created before the patent was issued, such lands in the hands of a subsequent owner are not exempt by the federal homestead law from the payment of the debts of the latter incurred prior to the issuance of the patent. *Duell v. Potter*... 241
4. One who has entered public lands under the provisions of the United States homestead law has, from the date of his entry, an inchoate title subject to defeat only by his failure to comply with the conditions imposed by the act of congress. *Culbertson Irrigating & Water-Power Co. v. Olander*..... 539

Homicide. See EVIDENCE, 6.

*Murder in Perpetration of Felony.*

1. In order to sustain a conviction for murder in the first degree under section 3, Criminal Code, relating to homicides committed in perpetration of felonies, it is not essential that the killing be such as, in the absence of the statute, would amount to murder as distinguished from manslaughter. *Henry v. State*..... 149
2. By section 3, Criminal Code, homicide in perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, is declared to be murder in the first degree, the turpitude of the act being made to supply the place of deliberate and premeditated malice, while a purpose to kill is conclusively presumed from the intention which is the essence of the enumerated felonies. *Morgan v. State*..... 673
3. Under an information for murder containing two counts,—the first charging deliberate and premeditated malice, and the

**Homicide**—*continued.*

second alleging that the homicide was committed in perpetration of a rape,—it was *held* proper to instruct that murder in the second degree and manslaughter are not included in the second count, and that, in case accused is found guilty as therein charged, the verdict should be for murder in the first degree. *Id.*

4. Evidence stated in opinion *held* to warrant the conclusion that accused killed his victim in the perpetration of a rape upon her person. *Id.* ..... 672

5. Section 93 of the Criminal Code providing for the punishment of persons who maliciously injure railroad property, is not void for uncertainty because the crimes of murder in the first degree, murder in the second degree, and manslaughter, are not defined in the proviso of the section. *Davis v. State*.. 302

*Malice. Evidence. Railway Wreck.*

6. "Malice," in its legal sense, means a wrongful act done intentionally without just cause or excuse. *Id.*

7. Malice is an essential element in the crime of murder, both at common law and under the Code. *Id.*

8. When the fact of unlawful killing is proved, and no evidence tends to show express malice on the one hand, or any justification, mitigation, or excuse, on the other, the law implies malice, and the offense is murder in the second degree. *Id.*

9. Evidence *held* sufficient to sustain a finding that a railway wreck and death of a passenger were caused by the displacement of fixtures of the track, and that defendant purposely and maliciously displaced the fixtures. *Id.* ..... 307

*Superstition. Evidence.*

10. On trial of defendant for the murder of a passenger who was, on Thursday, killed in a railway wreck occasioned by the displacement of fixtures of the track, evidence that accused was possessed of a superstitious belief that Thursday was a lucky day for him, *held* admissible. *Id.* ..... 303

11. Circumstances stated in opinion *held* sufficient to warrant the jury in finding accused guilty of murder. *Morgan v. State*.... 673

12. On trial of defendant for the murder of a passenger who was killed in a railway wreck, whether accused acted maliciously in displacing fixtures of the railway track, was *held* a question of fact for the jury. *Davis v. State*..... 301

13. On trial of defendant for the murder of a passenger who was killed in a railway wreck, statements of accused that, in displacing fixtures, he did not intend to derail the train, but intended to signal it in the hope of procuring a reward, are admissible in evidence, but the jury is not bound to accept such proof as conclusively showing that accused did not act maliciously. *Id.*

14. Where one is charged with the murder of a passenger who was killed in a railway wreck occasioned by displacement of

**Homicide**—*concluded.*

fixtures of the track, in order for the killing to be murder in the second degree it is not essential the evidence should show that the prisoner was possessed of a specific intent to either kill or injure the passenger or any other person on the train. *Id.*

**Husband and Wife.** See MORTGAGES, 3, 4. TRUSTS, 2.

1. Whether a business was in good faith carried on by the husband for the wife for her benefit, or, as his own enterprise in her name, for the purpose of defrauding his creditors, *held* a question of fact. *Harris v. Weir-Shugart Co*..... 483
2. Where an inebriate husband conveyed realty to his wife to be preserved for the benefit of the family, it was *held* that the title was in her, and that there was no trust relation created under which he could release the damages for a portion of the land subsequently taken by a county for a highway. *Propst v. Cass County*..... 736

*Fraudulent Conveyances.*

3 Where creditors of a husband attack a transfer from him to his wife, the burden is on her to show, by a preponderance of evidence, the *bona fide* character of the transaction. *Kirchman v. Kratky*..... 191

4. Realty taken in a wife's name when purchased with the proceeds of the husband's endowment policy during the solvency of the husband, *held* not subject to the claims of his creditors upon his becoming insolvent. *Studebaker v. Welch*..... 228

*Sale to Wife.*

5. The signing by a wife of a mortgage upon a homestead to raise money for payment of her husband's debts, *held* a sufficient consideration to support a sale of the husband's personalty to the wife. *Sloan v. Van Buskirk*..... 390

*Agency.*

6. A husband may act as the agent of his wife in the management of her separate trade and business. *Harris v. Weir-Shugart Co*..... 483

*Gifts.*

7. Where a husband purchases realty with his own funds and causes the title to be conveyed to his wife, the presumption is that he intended the property as a gift. *Kobarg v. Greeder*... 365
8. The married woman's act does not abrogate the equitable rule upholding gifts made by a husband to his wife during his solvency. *First Nat. Bank of Wahoo v. Havlik*..... 668

**Improvements.**

In a suit to quiet title of a purchaser at tax sale the value of improvements neither demanded nor pleaded by him, *held* not recoverable. *Browne v. Finley*..... 465

**Indemnity.**

Petition *held* to state a cause of action on a bond to secure the discharge of incumbrances on realty. *Mott v. Bissicummer*... 645

**Indictment and Information.** See HOMICIDE, 3.

1. Chapter 54 of the Criminal Code authorizes prosecutions by information of the public prosecutor. *Bolln v. State*..... 581
2. It is not essential to the validity of an information that it should conclude, "against the peace and dignity of the state." *Id*..... 582

**Information.** See INDICTMENT AND INFORMATION.

**Injunction.** See SCHOOLS AND SCHOOL DISTRICTS, 9.

1. Where the council of a city are proceeding, without authority, to remove the mayor, the latter may be protected by injunction. *Stahlhut v. Bauer*..... 64
2. A court of equity may restrain the sale of land in satisfaction of a void special assessment. *Ives v. Irey*..... 136
3. Injunction may issue on petition of a taxpayer to restrain the levy of taxes to pay void railway-aid bonds voted by a precinct having no legal existence. *Morton v. Carlin*..... 203
4. A railroad company may maintain a suit to enjoin a school tax levied on a bridge not within the school district, though the company listed the bridge with the district for taxation, and paid the taxes thereon in previous years. *Chicago, B. & Q. R. Co. v. Cass County*..... 370

**Insanity.** See CRIMINAL LAW, 17.

**Insolvency.** See ACTIONS, 1. BANKS AND BANKING, 1-3. HUSBAND AND WIFE, 4.

**Insolvent Banks.** See SCHOOLS AND SCHOOL DISTRICTS, 9.

**Instructions.** See CONTRACTS, 1. HOMICIDE, 3. RAILROAD COMPANIES, 6.

*Assignments of Error.*

1. An assignment of error in a motion for a new trial that "the court erred in giving paragraphs 3, 5, 7, 8, 9, 10, 11, 12, and 13 of the instructions, and in giving each of them, given by the court on its own motion," is sufficiently specific. *Kirchman v. Kratky*..... 191
   *Meyer v. Shamp*..... 425

*Criminal Law.*

2. A judgment should not be reversed because the court refused an instruction the substance of which had already been given. *Davis v. State*..... 305
3. Where the law is incorrectly stated in one instruction, the error is not cured by another which correctly states the law upon the same subject. *Beck v. State*..... 106
4. An erroneous instruction is not cured by the mere giving of another on the same subject contradicting it. *Henry v. State*..... 150
5. In a criminal prosecution it is error to discredit a defense by advising the jury that it is one "easily fabricated, that it has

**Instructions**—*continued.*

occasionally been successfully fabricated, and that the temptation to resort to it as a spurious defense is very great, especially in cases of importance." *Id.*

6. To examine a word or a phrase separately from other parts of the instruction is not a fair method of criticism. *Davis v. State* ..... 302
7. All that an instruction contains should be looked to for the purpose of determining whether the party complaining of it was prejudiced. *Id.*
8. Instruction as to reasonable doubt *held* not prejudicial to accused, though it contained the words "incriminating circumstances." *Id.*
9. The court is not obliged to repeat in every instruction the degree of proof required when the jury has been properly instructed that the state must make out its whole case beyond a reasonable doubt. *Id.*
10. In defining a crime it is proper to use the language of the statute. *Id.*
11. Where the import of language used in an instruction defining a crime is the same as the statute, the instruction will not be held erroneous because the language employed by the court differs from the language of the statute. *Id.*
12. Charge of the court on the subject of reasonable doubt set out in the opinion and approved. *Id.*..... 305
13. One complaining of the court's refusal to give an instruction should show that prejudice probably resulted from the ruling, and that the instruction was correct as a proposition of law applicable to the evidence. *Id.*
14. Charge as to weight of evidence and credibility of witnesses set out in opinion *held* not prejudicially erroneous. *Id.*..... 306
15. On trial of one charged with a crime, an instruction containing the statement that, in a certain event, circumstantial evidence should be given the same weight as direct evidence, was *held* erroneous, but not prejudicial to accused. *Id.*
16. It is not prejudicial error for a court in its charge to say to the jury that the evidence before them is both direct and circumstantial. *Id.*
17. Instructions *held* properly refused as not being applicable to the evidence in a prosecution against one charged with stealing a steer. *Kelly v. State*..... 572

*Evidence.*

18. An instruction erroneously directing the jury that certain evidence introduced collaterally is directly applicable to the issues, *held* properly refused. *Hibbard v. Wilson*..... 436

*Exceptions.*

19. Exceptions to instructions as a whole are unavailing unless each paragraph is erroneous. *Home Fire Ins. Co. v. Phelps*... 623

Instructions—*concluded.*

*Guaranty.*

20. In a suit against a guarantor an instruction that his liability cannot be extended beyond the exact terms of his contract, *held* not erroneous. *Lininger v. Webb*..... 10

*Harmless Error.*

21. An instruction which, though technically inaccurate in some respects, correctly states the principles involved, *held* not prejudicially erroneous. *Chicago, B. & Q. R. Co. v. Gardiner*.. 70

*Repetitions.*

22. The court may refuse an instruction upon a point already stated. *Lininger v. Webb*..... 10

23. An instruction may be refused where the subject-matter thereof has already been given. *Meyer v. Shamp*..... 425

24. An instruction may be refused where its substance has been given properly in another instruction. *First Nat. Bank of Tobias v. Barnett*..... 397

*Unintelligibility.*

25. An unintelligible instruction *held* properly refused. *Id.*

Insurance. See CONTRACTS, 6. COSTS, 1-3. PAYMENT, 1, 2.

1. Where an insurer, with knowledge of insured's breach of conditions, fails to declare a forfeiture of the policy and recognizes liability by demanding proofs of loss, it waives the defense based upon such breach of policy. *Home Fire Ins. Co. v. Phelps*..... 624

2. In rendering judgment for plaintiff in an action on a policy insuring realty, the court may allow a reasonable attorney's fee, to be taxed as part of the costs, but an additional attorney's fee should not be allowed in the supreme court upon review of the judgment. *Home Fire Ins. Co. v. Skoumal*..... 655

3. Under article 1, chapter 14, Compiled Statutes, independently of chapter 38, Session Laws, 1895, cities of the second class have power to impose an occupation tax on fire insurance companies, and to apply the proceeds of the tax to maintenance of volunteer fire departments. *German-American Fire Ins. Co. v. City of Minden*..... 870

4. Chapter 38, Session Laws, 1895, authorizing the imposition of a license tax on insurance companies, does not extend or modify the powers of cities of the second class in that particular. *Id.*

Interest. See COVENANTS, 3. USURY.

A county may recover interest on a claim for fees retained by a county clerk in excess of his salary. *Hazelet v. Holt County*.. 716

Interstate Commerce. See CARRIERS, 10.

Intervention. See REPLEVIN, 8.

Intoxicating Liquors.

1. An action under the civil damage laws by a widow against

**Intoxicating Liquors—*concluded.***

licensed saloon-keepers cannot be defeated by proof that the liquors were furnished to the husband with plaintiff's consent. *Kliment v. Corcoran*..... 142

2. In a suit under the civil damage laws by a widow against licensed saloon-keepers, evidence tending to prove that her deceased husband, in consequence of the wrong alleged, had been reduced from a prosperous business man to a condition bordering upon imbecility and insolvency *held* properly admitted. *Id*..... 143
3. Where a liquor license has been issued, and is thereafter canceled without fault of the licensee, he is entitled to a repayment *pro tanto* of the sum paid for the unexpired time. *School District v. Thompson*..... 857
4. A liquor dealer must have a license from the city or county in which his store is kept. *Riley v. Bancroft's Estate*..... 864
5. A licensee may send out agents and take orders in any part of the state for goods to be sold and forwarded from the stock kept in his store in the city or county which issued the license, and he is not required to procure a license from each city or county in which contracts are made by such agents. *Id.*

**Judges.** See COUNTY COURT. COURTS, 1, 2. JUDGMENTS, 3.

**Judgments.** See COURTS, 6-9. DIVORCE, 1. RES JUDICATA. REVIEW, 39-44, 75, 76.

1. A judgment is contrary to law when the finding on which it is based is not responsive to the issues. *Wilson v. City Nat. Bank*..... 87
2. Upon default of defendant, where the petition states a cause of action, plaintiff is entitled to judgment without proof except as to the *quantum* of damages. *Slater v. Skirving*..... 109
3. A judge of the district court is without authority, in vacation and out of term time, to either pass upon a motion for a new trial, or to render a money judgment in a cause. *Hodgin v. Whitcomb*..... 617

*Collateral Attack.*

4. Where a sufficient petition for administration is presented to the county court, and statutory notice given, the action of the court in appointing an administrator cannot be collaterally attacked. *Bradley v. Missouri P. R. Co*..... 653

*Lien.*

5. The lien of a judgment of the district court attaches to all the lands of the debtor within the county where the judgment was rendered, whether then owned by him or subsequently acquired. *Duell v. Potter*..... 241
6. A judgment ceases to be a lien on the land of the debtor after five years unless an execution has been issued within that time. *Cotton v. First Nat. Bank of Superior*.....751, 754

**Judgments**—*concluded.*

7. Petition *held* insufficient to show that a judgment pleaded had not become dormant. *Id.*
8. Lien of a judgment of a circuit court of the United States, on land, *held* not destroyed by a subsequent act of congress providing how a judgment lien might be created as against land situated as was that of the judgment defendant. *Commercial Bank of St. Louis v. Eastern Banking Co* ..... 766

*Modification. Correction of Entry. Notice.*

9. One moving to vacate or modify a judgment after the term at which it was rendered must give reasonable notice to the adverse party. *Fisk v. Thorp* ..... 1
10. Reasonable notice of a motion to vacate a judgment is such as is fair in view of the circumstances. *Id.*
11. Failure to give sufficient notice of a motion to vacate a judgment may not be prejudicial where the hearing is postponed, giving ample time for preparation to resist the motion. *Id.*
12. Evidence *held* insufficient to sustain a motion filed under subdivision 3, section 602 of the Code, to correct the record entry of a judgment. *Hogue v. Ogle* ..... 223
13. Where a judgment was rendered, but not recorded, the court, any time afterward, in a proper proceeding and upon a proper showing, may enter such judgment *nunc pro tunc*. *Hamer v. McKinley* ..... 496

**Judicial Notice.** See EVIDENCE, 8.

**Judicial Sales.** See EXECUTIONS, 2.

**Jurisdiction.** See COURTS, 1-7. EQUITY. MUNICIPAL CORPORATIONS, 3.

**Jury.** See CRIMINAL LAW, 2, 26. REVIEW, 72.

1. Jurors are judges of the probative force of evidence. *Henry v. State* ..... 150

*Special Panel.*

2. In a county with a population of 70,000, where a trial for a felony is pending in the district court, a judge thereof, if satisfied that a jury to try the case cannot be obtained from the regular panel, may direct the drawing and summoning of a special panel from which to select a jury. *Davis v. State*.. 303
3. Where, in the selection of a jury to try one accused of a felony, the regular panel and a special panel have been exhausted, and the jury selected has been discharged before reaching a verdict, the judge may direct the drawing and summoning of a second special panel from which to select a jury to try the case. *Id.*
4. In selecting a jury from a second special panel, accused, unless he demands that the exhausted regular panel be recalled and re-examined, cannot be heard to complain that the court erred in not causing that to be done. *Id.*

**Jury**—*concluded.*

*Insanity.*

5. Insanity of a juror *held* to be a calamity authorizing the discharge of a jury. *Id.* ..... 305

*Challenge.*

6. A party by failing to exercise his right of peremptory challenge will be held to have waived any objection on account of a juror's disqualification then known to exist. *Morgan v. State* ..... 674

*Opinions.*

7. An opinion based on rumor and newspaper reports does not afford cause for challenge, where it is shown that the opinion will not interfere with the juror's rendering a fair and impartial verdict upon the evidence under the instructions. *Bolln v. State* ..... 582
8. An opinion formed by a juror does not affect his competency, or afford cause for challenge, unless it is unqualified as to the guilt or innocence of accused. *Id.*

**Justice of the Peace.** See REPLEVIN, 4-6.

**Landlord and Tenant.** See CONTRACTS, 5.

1. Where the tenant abandons the premises before the end of his term, the landlord is not required to relet the property for the tenant's benefit. *Merrill v. Willis* ..... 162
2. Where the tenant abandons the premises in violation of the contract, the landlord may suffer the premises to remain vacant and recover rent for the remainder of the term in a suit on the lease. *Id.*
3. The death of a tenant for life terminates the lease between him and his lessee, and the latter may quit possession without incurring liability to the reversioner for rent. *Guthmann v. Vallery* ..... 824
4. The lessee of a tenant for life is charged with notice of the extent of his landlord's title, and on the termination of the life estate he becomes a tenant at sufferance. *Id.*
5. A life-tenant's lessee who remains in possession after the termination of the life estate, in absence of an express contract with the reversioner, becomes liable to the latter for the reasonable value of the use and occupancy of the premises, but not liable on the contract with the tenant for life. *Id.*

**Larceny.** See EVIDENCE, 1.

1. Instructions *held* properly refused as not being applicable to the evidence in a prosecution against one charged with stealing a steer. *Kelly v. State* ..... 572
2. To sustain a conviction of larceny, the value of the property must be proved by competent evidence. *Rooney v. State* ..... 576
3. Evidence *held* insufficient to sustain a conviction of larceny. *Id.*

Law of the Case. See REVIEW, 74.

Lease. See LANDLORD AND TENANT.

License.

1. Where a law imposing a license tax provides a special means for enforcing it, the method so provided is generally exclusive, and if the only method adopted be illegal, the courts cannot substitute a different and legal method. *German-American Fire Ins. Co. v. City of Minden*..... 870
2. The payment of an occupation tax on fire insurance companies cannot be required as a condition precedent to doing business, nor can payment of the tax be enforced by punishing criminally persons who do business without first paying the tax. *Id.*

Liens. See CHATTEL MORTGAGES. JUDGMENTS. MARSHALING ASSETS.

Malice. See HOMICIDE, 6-10.

Malicious Prosecution.

1. Defendant in a suit for malicious prosecution will not be permitted to urge as a defense to the action the insufficiency of the complaint on which he caused plaintiff's arrest. *Minneapolis Threshing-Machine Co. v. Regier*..... 403
2. In an action for malicious prosecution plaintiff may prove newspaper publications containing plain accounts of the prosecution, without comment thereon. *Id.*
3. Plaintiff, if successful in a suit for malicious prosecution, is entitled to recover damages for the injury to his reputation. *Id.*

Mandamus.

1. County commissioners will not be required to construct a drainage ditch, when their record fails to show that the proposed line is the best route. *State v. Colfax County*..... 28
2. Where a *mandamus* proceeding is instituted to redress a private wrong or to enforce a private right, the party beneficially interested should be named as relator. *Van Horn v. State*..... 232
3. *Mandamus* will not issue to a county board to compel the construction of a drainage-ditch under article 1, chapter 89, Compiled Statutes, where relator is not shown to be interested in the improvement, independent of the interest he has in common with the public at large. *Id.*
4. *Held* that the writ was properly refused upon an application for *mandamus* to require a school district to issue a warrant for the balance due on a building contract. *State v. School District*..... 237
5. Writ denied upon an application to require the auditor of public accounts to issue a warrant for the salary of an officer who failed to comply with the statute providing for a uni-

**Mandamus**—*concluded.*

form system of verified vouchers. (Compiled Statutes, ch. 83, art. 8, secs. 6-10.) *State v. Cornell*..... 553

6. *Mandamus* may issue against a clerk of the district court to require him to approve a sufficient supersedeas bond upon appeal from an order made on application for the modification of a decree for permanent alimony. *State v. Cook*..... 822

7. The duty of a county clerk to enter in the fee book a statement of the amounts paid him for his services as clerk of the county board, and for making the tax lists, may be enforced by *mandamus*, on application of the county, after the expiration of the clerk's term of office. *State v. Russell*..... 774
*Russell v. State*..... 774

**Manslaughter.** See HOMICIDE, 1, 3.

**Marshaling Assets.**

Equity may require a creditor having the right to resort to two funds, upon one of which alone another creditor has a junior lien, to first exhaust the funds upon which the latter has no claim. *Norfolk State Bank v. Schwenk*..... 146

**Master and Servant.**

1. Evidence *held* not sufficient to sustain a verdict that the death of plaintiff's intestate was caused by the negligence of defendant's servants. *Union P. R. Co. v. Clark*..... 220

*Defective Appliances.*

2. Evidence in regard to the danger in coupling cars equipped with double deadwoods *held* insufficient to sustain a finding that it was negligence of a railroad company not to furnish a brakeman with a coupling-knife. *Chicago, B. & Q. R. Co. v. Curtis* ..... 442

3. Where a car is equipped with double deadwoods, that fact is open and apparent, and a brakeman making a coupling assumes the risks, though the cars in general use on the railroad where he is employed are differently equipped. *Id.*

4. Construction of chapter 19, Session Laws of 1891, requiring railway companies to equip their cars with automatic couplers. *Thompson v. Missouri P. R. Co*..... 527

5. The exceptions to the rule that a servant assumes the risks of using obviously defective appliances, do not apply where a brakeman is injured by a defective coupling on a car which he, without protest, has habitually handled with knowledge of the defect and without his master's promise to repair it. *Id.*

6. In an action against a railroad company for the death of plaintiff's intestate,—a brakeman who was killed while coupling cars,—it was *held* that the case should have been submitted to the jury on the question of negligence in the construction of a car, from the end of which a bolt projected, and as to this being the proximate cause of the death. *Id.*... 528

**Master and Servant**—*concluded.*

*Vice-Principal.*

7. A conductor in charge of a freight train sustains towards brakemen thereon employed the relation of a vice-principal, and towards them his negligence in the line of his duty is presumably the negligence of his principal. *Clark v. Hughes*.. 780
8. A petition *held* sufficient where it stated a cause of action founded on negligent acts of a vice-principal, though on the trial there was not sufficient evidence to sustain additional averments that the principal had continued the employ of the vice-principal with knowledge of his incompetency. *Id.*

**Master Commissioner.** See EXECUTIONS, 9-11.

**Maxim.**

Where one of two innocent parties must suffer loss, he whose negligence caused the injury should bear it. *Porter v. Ourada* ..... 510

**Measure of Damages.** See CARRIERS, 6-9.

**Mechanics' Liens.**

1. Evidence *held* sufficient to sustain a decree establishing the order of liens, mortgages and mechanics' liens being involved. *Chicago Lumber Co. v. Anderson*..... 159
2. Acceptance of a note for the amount of a claim is not necessarily a waiver of a mechanics' lien. *Hersh v. Carman*..... 784
3. In foreclosure, a petition showing the due filing of a claim, the taking of a note for the amount due, and the repudiation of a note as having been taken under a misapprehension of the effect of accepting it, is not open to attack by general demurrer. *Id.*

**Misconduct of Attorney.** See NEW TRIAL, 9.

**Mistake.** See CARRIERS, 10. TAXATION, 5.

**Money Had and Received.** See ASSUMPSIT, 2.

**Mortgages.** See CHATTEL MORTGAGES. EXECUTIONS, 4-8. REVIEW, 75-78. SUBROGATION, 2.

1. A subsequent mortgagee of realty is a subsequent purchaser within the meaning of section 16, chapter 73, Compiled Statutes. *Dorr v. Meyer*..... 94
2. Evidence *held* sufficient to sustain a decree establishing the order of liens, mortgages and mechanics' liens being involved. *Chicago Lumber Co. v. Anderson*..... 159

*Acknowledgment. Execution.*

3. A mortgage on realty other than the homestead may be valid between the parties, though not lawfully acknowledged or witnessed. *Prout v. Burke*..... 24
4. A purchase-money mortgage given by a wife in buying realty to be used as a family homestead, *held* valid, though not signed by the husband. *Id.*

**Mortgages**—*concluded.*

*Agency. Payment. Evidence.*

5. Finding that an insolvent bank in forwarding payment was the agent of mortgagee, and not of mortgagor, affirmed on conflicting evidence. *Wyman v. Connery*..... 59
6. Evidence *held* to entitle plaintiff to a decree of foreclosure, payment having been made to one who had no authority to receive it. *Greenman v. Swan*..... 81
7. Evidence *held* sufficient to sustain a finding for mortgagor on an issue as to whether a loan company receiving payment was the agent of the holder of the security, though the company was not in possession of the note and mortgage. *Phœnix Ins. Co. v. Walter*..... 182
*Phœnix Ins. Co. v. Robinson*..... 188
*Phœnix Ins. Co. v. Hale*..... 189
8. Evidence *held* not to show that one to whom a mortgage debt was paid was the agent of the owner and holder. *City Missionary Society v. Reams*..... 225
9. Where a mortgagee sold his security, failed to record the assignment, received payment of the debt without authority from his assignee, satisfied the lien of record, and embezzled the money, it was *held* that a *bona fide* purchaser of the realty took title unincumbered by the assignee's mortgage. *Porter v. Ourada*..... 510
10. A lender who took a real estate mortgage agreeing to satisfy, with the proceeds of the loan, a former unmatured mortgage upon the same property, and paid the money to the original mortgagee, who retained it and entered upon the record satisfaction of the first mortgage without authority from one to whom it had been assigned, *held* not an innocent mortgagee, nor entitled to a lien as against the assignee. *Herbage v. Moodie*..... 837
11. Recital in a mortgage *held* not an agreement between mortgagor and mortgagee constituting the latter the agent of the indorsee of the note which the mortgage secured. *Id*..... 838
12. Evidence *held* to sustain a finding that a mortgagee who had indorsed to a third person the notes secured by the mortgage, had authority, as agent of the indorsee, to receive payment from mortgagor. *Kimball v. Zimmermann*..... 861

*Foreclosure. Pleading.*

13. After decree of foreclosure against all defendants and confirmation of judicial sale, the service of an alias summons on another proposed defendant does not justify the foreclosure of his rights without the filing of a pleading calling such rights in question. *Eastman v. Cain*..... 786
14. A petition for foreclosure not stating whether any proceeding at law has been had for the recovery of the debt, or any part thereof, and whether such debt, or any part of it, has been paid, is insufficient. *Bing v. Morse*..... 842

**Motions.** See JUDGMENTS, 9-11. PLEADING, 14.

**Municipal Bonds.** See COUNTIES, 2, 3. SCHOOLS AND SCHOOL DISTRICTS, 9.

**Municipal Corporations.** See CONTRACTS, 1. EMBEZZLEMENT, 1. INTOXICATING LIQUORS, 3.

1. A statutory provision that the mayor and council of a city are authorized to provide for removing city officers for misconduct, does not clothe the council with power to remove the mayor. *Stahlhut v. Bauer*..... 64
2. Where an ordinance authorizes the construction of sidewalks after notice to property owners, strict compliance with the provision for notice is essential in order to confer upon the city authority to charge private property with the cost. *Ives v. Irey*..... 136
3. It is competent for a city, in the absence of constitutional or statutory restrictions, to prescribe by ordinance the means by which it may acquire jurisdiction over a particular subject. *Id.*
4. A court of equity may restrain the sale of land in satisfaction of a void special assessment. *Id.*
5. A city ordinance imposing an occupation tax and providing only an illegal method for its enforcement, *held* inoperative. *German-American Fire Ins. Co. v. City of Minden*..... 870

**Murder.** See HOMICIDE.

**Negligence.** See CARRIERS, 3-9. MASTER AND SERVANT. MAXIM. RAILROAD COMPANIES, 6.

1. Whether negligence is the proximate cause of injuries is ordinarily a question of fact for the jury, but if its finding is manifestly wrong it will be set aside. *Chicago, B. & Q. R. Co. v. Spirk*..... 169
2. The question of negligence should be submitted to the jury where there is a conflict in the evidence. *Guthrie v. Missouri P. R. Co*..... 746
3. Where the facts are undisputed, and but one reasonable inference can be drawn therefrom, the question of negligence is for the court. *Id.*
4. Where contributory negligence of a person was the proximate cause of personal injury, there can be no recovery for damages. *Id.*

**Negotiable Instruments.** See MECHANICS' LIENS, 2, 3. MORTGAGES, 10. PRINCIPAL AND AGENT, 3. TRIAL, 7.

1. In a suit on a note by an indorsee the burden is on plaintiff to prove that he is a *bona fide* holder for value, where the defense is fraud or illegality in the inception of the contract. *Nat. Bank of Battle Creek v. Miller*..... 156
2. In a suit on a note by an indorsee the burden is on defendant to overcome the presumption that the note was transferred

**Negotiable Instruments**—*concluded.*

before due for value in the usual course of business, where the only defense is the failure of consideration. *Id.*

3. The rule of the common law respecting the presentment of instruments with grace which expire on Sunday is not abrogated by the act of 1873. (General Statutes, ch. 32, sec. 8.) *Capital Nat. Bank of Lincoln v. American Exchange Nat. Bank of Chicago* ..... 707
4. When, uninfluenced by statute, a bill or note without grace falls due on Sunday or a legal holiday, it is payable on the business day next following. *Id.*
5. When grace on a note or bill expires on Sunday or other non-business day, it becomes due, and should be presented for payment or acceptance, on the latest business day within or before the period of grace. *Id.*

**Newly-Discovered Evidence.** See NEW TRIAL, 10.

**Newspaper Publications.** See EVIDENCE, 9.

**New Trial.** See INSTRUCTIONS, 1. JUDGMENTS, 3. REVIEW, 12, 59-63.

*Assignments of Error.*

1. It is not necessary that the grounds for a new trial should be stated in the motion in the exact language of the statute. *Chicago, B. & Q. R. Co. v. Cass County*..... 370
2. Errors in respect to giving or refusing instructions must be separately assigned in the motion for a new trial. *Home Fire Ins. Co. v. Phelps*..... 624
3. Upon review, instructions not properly called to the attention of the lower court in the motion for a new trial may be disregarded. *Union P. R. Co. v. Thorne*..... 472

*Absent Witness.*

4. A new trial should not be allowed on account of the absence of a witness who, on a subsequent day of the trial, attends and testifies for the complaining party. *Morgan v. State*..... 674

*Compromise Verdict.*

5. Where it is clear that the verdict is based on a compromise of the differences of opinion of the jurors, in disregard of the evidence, it may be set aside. *Meyer v. Shamp*..... 425

*Excessive Damages.*

6. In an action for liquidated damages, where the verdict is excessive, and it is evident that the error in assessing the damages arose from a misconception of the evidence, which probably affected the determination of the other issues, a new trial will be awarded, instead of permitting a remittitur of the excess. *Lenzen v. Miller*..... 855

*Joint Motion.*

7. Where a motion for a new trial made jointly by two or more parties cannot be sustained as to all, it must be overruled as to all. *Osborne v. Plano Mfg. Co*..... 502

**New Trial**—*concluded.*

*Judgment Contrary to Law.*

8. A judgment is contrary to law when the finding on which it is based is not responsive to the issues made by the pleadings. *Wilson v. City Nat. Bank*..... 87

*Misconduct of Attorney.*

9. Remarks of plaintiff's counsel that a witness who was being examined by defendant had been "fixed" and that defendant's counsel had to depend upon "fixing witnesses," *held* grounds for setting aside the verdict. *Ashland Land & Live-Stock Co. v. May*..... 474

*Newly-Discovered Evidence.*

10. The overruling of a motion for a new trial based upon the ground of newly-discovered evidence will not be held erroneous where it appears that such evidence is cumulative and would not probably change the result already reached. *Davis v. State*..... 307

*Presence of Convict.*

11. One convicted of a felony cannot, as a matter of right, insist on being present in court when his motion for a new trial is decided. *Id.*

**Nonsuit.** See DISMISSAL, 1, 2.

**Notice.** See COVENANTS, 2. JUDGMENTS, 9-11. MUNICIPAL CORPORATIONS, 2. SUMMONS.

**Novation.** See REVERSION.

**Oath.** See EXECUTIONS, 11.

**Occupation Tax.** See INSURANCE, 3, 4.

**Office and Officers.** See ACTIONS, 1. COUNTY CLERK, 2. DEPOSITORIES. EMBEZZLEMENT. EXECUTIONS, 4. INJUNCTION, 1.

A county treasurer *held* not chargeable with the mistake of a taxpayer who misdescribed his property and paid taxes on that of another. *Browne v. Finley*..... 465

**Ordinances.** See LICENSE, 1.

**Parliamentary Law.**

Where authority is conferred by law upon three or more persons to execute a public trust or agency, and in the execution thereof all are assembled to deliberate, or had notice to be present, the act of a majority is binding, unless the statute expressly requires the concurrent action of all. *In re State Treasurer's Settlement*..... 116

**Parties.** See ACTIONS, 3. ASSUMPSIT, 2. MANDAMUS, 2, 7. MORTGAGES, 13. REPLEVIN, 13.

1. Where the subject-matter of an action has been transferred pending litigation, the suit may be prosecuted to judgment in

**Parties**—*concluded.*
the name of the original plaintiff, or the transferee may be substituted as plaintiff. *Harrington v. Connor*..... 214
2. A purchaser at a judicial sale may become a party to the case. *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co*.... 659

**Partnership.** See ACTIONS, 1.

**Passengers.** See CARRIERS, 3-9.

**Patents.** See HOMESTEAD, 3.

**Payment.** See ACCORD AND SATISFACTION. ATTORNEY AND CLIENT, 2. MORTGAGES, 5-12. SALES, 7. SUBROGATION, 2.
1. A written receipt is not conclusive of payment where the draft upon which the receipt was based was not paid. *National Life Ins. Co. v. Goble*..... 5
2. Remittance of a bank draft is not a payment until the draft has been received, presented, and honored. *Id.*
3. It is not essential to constitute payment that legal-tender money should be delivered. *First Nat. Bank of Tobias v. Barnett* ..... 397
4. The question of payment is a matter of defense, which, to be available, the defendant is required to set up in the answer and establish on the trial. *Ashland Land & Live Stock Co. v. May* ..... 474
5. Evidence *held* not to show payment. *Hart v. Bank of Commerce* ..... 486
6. Sufficiency of evidence to show payment to a subcontractor. *School District of Beatrice v. Thomas*..... 740

**Plea in Bar.** See CRIMINAL LAW, 21.

**Pleading.** See CONTRIBUTION. DIVORCE, 1. FRAUD. MASTER AND SERVANT, 8. MECHANICS LIENS, 3. MORTGAGES, 13, 14. REPLEVIN, 10.
1. A breach of the contract on which an action is based must be pleaded in the petition. *Hudelson v. First Nat. Bank of Tobias* ..... 557
2. Covenants and promises of obligors *held* sufficiently pleaded in a petition alleging the execution and delivery of a bond and containing a copy thereof. *Hazelet v. Holt County*..... 716
3. As a general rule a party waives error in a ruling upon demurrer by pleading over. *Wheeler v. Barker*..... 846

*Amendment.*

4. Granting of permission to amend a pleading during trial is within the discretion of the trial court. *Harrington v. Connor* ..... 214
5. Refusal to allow an answer to be amended during trial *held* proper. *Id.*
6. An amendment of a petition during trial should not be stricken out because plaintiff, by reason of the change, is en-

**Pleading—*concluded.***

titled to recover on either of two theories dependent upon the same evidence. *Security Nat. Bank v. Latimer*..... 498

*Construction. Sufficiency.*

7. Where objection that a petition does not state a cause of action is made after the trial begins, the pleading will be liberally construed and, if possible, sustained. *Chicago, B. & Q. R. Co. v. Spirk*..... 168
*Johnston v. Spencer*..... 198

8. Where a statement in an affidavit is susceptible of two meanings, the construction sustaining the affidavit should be adopted. *Hudelson v. First Nat. Bank of Tobias*..... 557

9. Where a petition fails to state a cause of action it will not support a judgment, and may be attacked on account of such infirmity at any stage of the proceedings. *Id.*

10. The word "made" in a petition in an action on a bond *held* to express the same meaning as "executed." *Hazelet v. Holt County*..... 716

*Default.*

11. Where a defendant is in default the allegations of the petition are to be taken as true, except allegations of value and amount of damage. *Slater v. Skirving*..... 109

12. Permitting a defendant in default to file an answer is a matter resting largely in the discretion of the trial court. *Grand Island & W. C. R. Co. v. Swinbank*..... 521

*Motion to Strike.*

13. A motion to strike matter out of a pleading should refer specifically to the alleged objectionable statement. *Chicago, B. & Q. R. Co. v. Spirk*..... 167

14. A motion to strike objectionable statements from a pleading may be overruled where the motion includes pertinent matter with that assailed as impertinent. *Id.*

15. An order striking from the files an amended petition as being like one to which a demurrer had been sustained, may be reviewed by a proceeding in error. *Wheeler v. Barker*..... 846

*Replevin.*

16. Ordinary rules of pleading do not apply in replevin. *Woodbridge v. De Witt*..... 98

**Powers.** See COUNTIES, 1.

**Practice.** See JUDGMENTS, 9-11. REVIEW, 20, 73.

It is the proper practice to instruct the jury to return a verdict for defendant, where plaintiff fails to establish his cause of action. *Thompson v. Missouri P. R. Co*..... 527

**Precincts.** See COUNTIES, 2, 3.

**Preferences.** See FRAUDULENT CONVEYANCES, 4.

**Principal and Agent.** See HUSBAND AND WIFE, 6. INTOXICATING LIQUORS, 5. MORTGAGES, 11, 12.

1. Ostensible authority is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess. *Phœnix Ins. Co. v. Walter*..... 182
   *Phœnix Ins. Co. v. Robinson*..... 188
   *Phœnix Ins. Co. v. Hale*..... 189
2. The fact that one who collected a debt was not in possession of the note and mortgage *held* not to show conclusively that he was not the agent of the mortgagee. *Id.*
3. Contract of agency *held* to apply to indorsement and guaranty of the agent only upon such notes as were received by him in sales of goods of his principal. *Lininger v. Webb*..... 10
4. To estop a principal because of the ratification of his agent's unauthorized acts, it must be shown that the approval was made with knowledge of what the agent did and promised. *Cram v. Sickel*..... 828

**Principal and Surety.** See CONTRACTS, 14. COUNTY COURTS. DEPOSITORIES, 3.

1. An undertaking will be strictly construed in favor of sureties, and their liability will not be extended by construction beyond their specific agreement. *Godfrey v. City of Beatrice*.... 273
2. Petition in a suit for contribution between sureties on the bond of county treasurer *held* not to state a cause of action. *Fullerton v. Dilworth*..... 409
   *Fullerton v. Kay*..... 411
3. The fact that a mortgagee collected interest due on the mortgage and remitted it to his assignee is not alone sufficient to justify the conclusion that the agency of mortgagee authorized him to collect the unmatured debt. *Porter v. Ourada*.... 510
4. In an action on the bond of a county clerk, the sureties are liable for interest on a claim for fees retained by him in excess of his salary, though the county made no demand upon him for payment of the excess. *Hazelet v. Holt County*..... 716

**Privileged Communications.** See EVIDENCE, 3.

**Probate Court.** See COUNTY COURT.

**Process.** See SUMMONS.

**Promises.** See CONTRACTS.

**Public Funds.** See DEPOSITORIES. EMBEZZLEMENT.

**Public Lands.** See TRESPASS, 1.

**Public Policy.** See CARRIERS, 1.

**Quantum Meruit.** See CONTRACTS, 9-11.

**Question of Fact.** See HOMICIDE, 12. MASTER AND SERVANT, 6. NEGLIGENCE, 2, 3.

**Quieting Title.** See TAXATION, 6.

**Quitclaim Deeds.** See COVENANTS, 1.

**Quo Warranto.** See INJUNCTION, 1.

**Railroad Companies.** See CARRIERS. CONTRACTS, 6. COUNTIES, 2, 3. MASTER AND SERVANT. STATUTES, 7.

1. A railroad company may maintain a suit to enjoin a school tax levied on a bridge not within the school district, though the company listed the bridge with the district for taxation, and paid the taxes thereon in previous years. *Chicago, B. & Q. R. Co. v. Cass County*..... 370
2. Where injury to live stock upon an unfenced track, which the company ought to have fenced, is caused by a moving train, the company is liable, though there was no actual collision. *Chicago, B. & Q. R. Co. v. Cox*..... 479
3. That part of section 2, article 1, chapter 72, Compiled Statutes, allowing a recovery for double the value of live stock injured on an unfenced railroad track is unconstitutional. *Grand Island & W. C. R. Co. v. Swinbank*..... 521
4. Construction of chapter 19, Session Laws of 1891, requiring railway companies to equip their cars with automatic couplers. *Thompson v. Missouri P. R. Co*..... 527
5. The negligence of a traveler on a highway in attempting to drive across a railroad track in front of an approaching train, *held* to preclude a recovery for his death. *Guthrie v. Missouri P. R. Co*..... 746
6. In a suit against a railroad company for damages resulting from failure of its servants to ring a bell or blow a whistle at a crossing, it is error to instruct the jury that the omission to give the signals required by statute is *prima facie* evidence of negligence. *Chicago, St. P., M. & O. R. Co. v. Brady*..... 758

**Rape.** See HOMICIDE, 2.

Evidence set out in opinion, *held* to be irrelevant and prejudicial. *Myers v. State*..... 517

**Reasonable Doubt.**

Charge of the court on the subject of reasonable doubt set out in the opinion and approved. *Davis v. State*..... 305

**Receipts.** See PAYMENT, 1, 2.

**Receivers.** See BANKS AND BANKING, 1-3.

**Records.** See REVIEW, 23.

**Registration.** See CHATTEL MORTGAGES, 1, 2.

**Rehearing.** See REVIEW, 63.

**Relation.** See CHATTEL MORTGAGES, 1. STATUTE OF FRAUDS, 3.

**Release and Discharge.**

An employe of a railroad company who accepts from the relief department benefits for an injury, under an agreement of membership releasing the company from liability in case of such acceptance, is estopped from suing for damages. *Chicago, B. & Q. R. Co. v. Curtis*..... 442

**Relief Departments.** See CONTRACTS, 6.

**Remittitur.** See NEW TRIAL, 6.

Where judgment is too large and the amount of excess appears from the record, the party who recovered the judgment, in absence of other error, may be permitted to remit the excess and have the judgment for the balance affirmed. *School District of Beatrice v. Thomas*..... 741

**Replevin.** See COURTS, 6-9. GUARANTY, 2. REVIEW, 39, 40.

*Affidavit.*

1. An affidavit omitting the statement that the property is wrongfully detained by defendant, *held* sufficient to give the district court jurisdiction to issue a writ of replevin, where a duly verified petition on file contains such a statement. *Hudelson v. First Nat. Bank of Tobias*..... 557
2. An affidavit alleging that plaintiffs "are entitled to the possession" of the property is not insufficient because the word "immediate" is not used in connection with "possession." *Id.*
3. Where defendants appear, answer to the merits, and go to trial without making objections to amendable defects in the affidavit, they waive such defects. *Id.*
4. In replevin before a justice of the peace plaintiff need not file a bill of particulars, as the affidavit may be used in lieu thereof. *Bolin v. Fincs*..... 650
5. To invest a justice of the peace with jurisdiction to issue a writ of replevin, it is necessary for plaintiff to file an affidavit. *Id.*
6. Where plaintiff claims property by virtue of a chattel mortgage, an affidavit containing no allegation that the debt is due, or that part of the debt remains unpaid, or that an exigency exists entitling plaintiff to immediate possession of the chattels, does not invest a justice of the peace with jurisdiction to issue a writ. *Id.*

*Pleading and Proof. Fraud. Liens.*

7. Ordinary rules of pleading do not apply in replevin. *Woodbridge v. De Witt*..... 98
8. The rule that a party may prove fraud under general allegations of ownership and right of possession, applies to intervenors in a replevin suit. *Id.*
9. A party may prove fraud under general allegations of ownership and right of possession. *Id.*
10. Under allegations of general ownership and right of possession, evidence that plaintiff has a special interest in, or lien upon, the property is irrelevant. *Wilson v. City Nat. Bank*... 88
11. In replevin in the district court, the petition must be sufficient without reference to the affidavit. *Hudelson v. First Nat. Bank of Tobias*..... 557
12. Where plaintiff claims right of possession under a chattel

**Replevin—*concluded.***

mortgage, he must allege in his petition that the mortgage debt has matured and that it remains unpaid. *Id.*

*Parties.*

13. In a replevin suit, where the plaintiff has taken the property, it is error to permit a stranger to be substituted for the original plaintiff over defendant's objection. *Flanders v. Lyon*... 102

*Damages.*

14. The successful party to an action of replevin should recover therein all damage sustained by him by reason of the unlawful detention of the property. *Teel v. Miles*..... 543

*Attachment.*

15. Evidence *held* sufficient to sustain a judgment for plaintiff in a suit for property seized by a sheriff under a writ of attachment. *Sloan v. Wherry*..... 703

*Bond.*

16. A defendant who filed an answer and participated in the trial waived his right to object to defects in the replevin bond. *Hudelson v. First Nat. Bank of Tobias*..... 558

**Rescission.** See SALES, 8.

**Res Judicata.** See COVENANTS, 2.

*Issues. Effect of Adjudication. Evidence. Default.*

1. Where plaintiff alleges several facts, the proof of any one of which entitles him to judgment, and there is a general finding against him, it will be conclusively presumed that each fact so averred was determined against him. *Slater v. Skirving*.. 108
2. Where the suits are based on the same claim, the judgment in the first is a bar to the second, not only as to every matter offered and received to sustain or defeat the claim, but as to any other matter which might have been offered for that purpose. *Id.*
3. Where the second suit is based upon a different claim, the judgment in the first operates as an estoppel only as to the matters in issue upon the determination of which the finding or verdict was rendered. *Id.*
4. Plea of *res judicata* sustained as to all issues in a suit to enjoin the enforcement of a judgment by default on the grounds that it was procured through fraud, that it had been irregularly obtained, and that the petition failed to state a cause of action, where the same grounds, in a suit to vacate the judgment, had been alleged in a petition dismissed on a general finding. *Id.*
5. Where the record is uncertain as to the issues adjudicated, extrinsic evidence is admissible, in a subsequent suit brought for a different object, to show the issues determined in the first case. *Id.*
6. Extrinsic evidence is not admissible to contradict the record of a former judgment. *Id.*

**Res Judicata**—*concluded.*

7. A party cannot avoid the effect of an estoppel by showing that while he presented issues which, if proved, would have resulted in a different judgment, he withheld the proof. *Id.*. 114

*Estoppel.*

8. Defendants *held* not estopped by a former judgment pleaded to allege the failure of consideration for the notes sued on. *Nat. Bank of Battle Creek v. Miller*..... 156

*Finding and Judgment.*

9. To render the proceedings in a case a bar to a suit on the same cause of action, there must in the first suit be a general finding and a final judgment. *Hart v. Bank of Commerce*..... 486

*Dismissal.*

10. Where there were special findings for plaintiff, except one showing the action was prematurely brought, a mere dismissal was *held* not a bar to a subsequent suit on the same cause of action when it matured. *Id.*

*Replevin. Damages.*

11. Where defendant in replevin recovered judgment for the return of the property and for damage for wrongful detention, he cannot thereafter maintain an action against the plaintiff for damage on account of depreciation in the value of the property while in possession of the latter. *Teel v. Miles*..... 543

*Order of County Board.*

12. Where, through fraud or mistake, a county clerk is allowed to retain fees in excess of his salary, the adjustment of the account between him and the county is not a bar to an action by it to recover the excess. *Hazelet v. Holt County*..... 716

*Repayment of License Money.*

13. A judgment against a village for unearned license money paid by plaintiff before his license was revoked, *held* not a bar to an action by the same plaintiff against a school district which had received the money from the village treasurer. *School District v. Thompson*..... 858

**Resulting Trusts.** See TRUSTS, 1-3.

**Reversion.**

Where a life-tenant's lessee, without a contract with the reversioner, remained in possession after termination of the life estate and paid rent to the administrator of the tenant for life, the administrator is not liable to the reversioner for the rent. *Guthmann v. Vallery*..... 824

**Review.** See COVENANTS, 4. NEW TRIAL. REMITTITUR.

*Abstracts.*

1. A judgment in a case submitted on an abstract will only be reversed where error appears from the abstract itself. *Home Fire Ins. Co. v. Skoumal*..... 655
2. In reviewing a case submitted on an agreed printed abstract,

**Review**—*continued.*
the court will not look beyond the abstract. *Wheeler v. Barker* ..... 847

*Affirmance.*

3. Judgment on a verdict may be affirmed where it is the only one that could have been correctly rendered under the undisputed evidence. *Nebraska Land, Stock-Growing & Investment Co. v. First Nat. Bank of Minden*..... 516

*Appealable Interest. Parties.*

4. An appealable interest exists when the judgment or decree so affects a party or privy to the record that he would derive a substantial benefit from its modification or reversal. *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co*..... 659
5. A bidder at a judicial sale, whose bid has been accepted, may appeal from an order setting the sale aside. *Id*..... 660
6. On a motion to dismiss an appeal on the ground that the appellants are without an appealable interest, the question is not whether on the merits they are entitled to a reversal of the decree. *Id.*
7. Where the report of a judicial sale is ambiguous as to acceptance of a bid, but affords a fair basis for contention that a particular bid was accepted, the bidder may appeal from an order setting aside the sale, and on motion to dismiss the appeal the court will not inquire whether the contention is well founded and the appellant entitled to a reversal. *Id.*
8. A motion to dismiss an appeal on the ground that appellants are without an appealable interest should be overruled where the record shows they are in the attitude of parties claiming a substantial right defeated by the decree. *Id*..... 659

*Assignments of Error.*

9. An assignment that the court erred in permitting the introduction of evidence must specifically designate the ruling complained of. *Woodbridge v. De Witt*..... 98
10. Errors in the admission and rejection of evidence cannot be reviewed unless the particular rulings complained of are pointed out in the petition in error. *Grand Island & W. C. R. Co. v. Swinbank*..... 521
11. The court is not without jurisdiction to review a case on error simply because the petition in error does not specifically allege that the court below erred in overruling the motion for a new trial. *Chicago, B. & Q. R. Co. v. Cass County*..... 370
12. An assignment of error relating to a group of instructions, where the ruling as to any one of the group against which the assignment is directed is without error, may be overruled.
*Woodbridge v. De Witt*..... 102
*Kliment v. Corcoran* ..... 142
*Everingham v. Harris* ..... 627
*Sloan v. Wherry* ..... 703
*Clark v. Hughes*..... 784

**Review—*continued.***

13. An assignment of error relating to instructions as a whole, in a motion for a new trial or in a petition in error, is insufficient, unless each paragraph is erroneous. *Hodgin v. Whitcomb* ..... 617
14. Assignments of error involving an examination of an unauthenticated bill of exceptions will be disregarded. *Hazelet v. Holt County*..... 724

*Bill of Exceptions.*

15. Refusal to give instructions *held* not reviewable in absence of a bill of exceptions. *Union P. R. Co. v. Thorne*..... 472
16. Questions of fact cannot be considered in absence of a bill of exceptions. *Everingham v. Harris*..... 627
17. A bill of exceptions not authenticated by the certificate of the clerk of the trial court will not be examined in the supreme court. *Hazelet v. Holt County*..... 724
*Gray v. Elbling*..... 726

*Briefs.*

18. Assignments of error not presented by the brief or oral arguments are waived. *Hamer v. McFeggan*..... 227

*Costs.*

19. Upon review of a judgment for plaintiff in an action on a fire insurance policy covering realty, attorney's fees for services in the supreme court should not be allowed. *Home Fire Ins. Co. v. Skoumal* ..... 655
20. Where the supreme court in remanding a cause directs the trial court to tax all costs to appellee, the latter may move for a rehearing or for a modification of the order as to costs. *Oliver v. Lansing*..... 818

*Discretion.*

21. A judgment should not be reversed because defendant was permitted to answer out of time, unless the record affirmatively discloses an abuse of discretion on part of the trial court. *Grand Island & W. C. R. Co. v. Swinbank*..... 521
22. An exercise of discretion in placing a reasonable limit upon the time for the production of evidence is not subject to review except in case of an abuse of power on part of the trial court. *Morgan v. State*..... 674

*Dismissal.*

23. On motion to dismiss appeal because the transcript was filed too late, an affidavit of appellee's attorney containing, *inter alia*, a statement that he searched the records after the time to appeal expired and did not find the transcript, *held* insufficient to contradict a record showing that the transcript was filed in time. *Fenton v. American Jewelry Co*..... 395

*Election of Remedies.*

24. The filing of a petition in error is an abandonment of review by appeal. *Shaw v. Robinson*..... 164

**Review**—*continued.*

25. An appealable judgment may be reviewed on error or appeal at the election of the party aggrieved. *Chicago, B. & Q. R. Co. v. Cass County* ..... 369
26. One seeking to review an appealable judgment may elect as to error or appeal any time before the final submission of the case in the supreme court. *Id.*
27. A decree will be reviewed on error where a party who filed a petition in error does not elect to rely upon appeal. *Id.*

*Evidence.*

28. The judgment will not be disturbed where the only question presented is one of fact as to which the evidence is conflicting. *Central Nebraska Nat. Bank v. Cline*..... 63
*McGinnis v. Kyd*..... 282
29. A judgment sustained by sufficient evidence may be affirmed upon a record presenting no question of law. *Bradford v. Eke* ..... 643
30. A finding will not be disturbed where the evidence is conflicting. *Spelts v. Sutherland*..... 423
*Hibbard v. Wilson*..... 436
*Hamer v. McKinley*..... 496
*Chicago, B. & Q. R. Co. v. Spirk*..... 168
31. A verdict based on conflicting evidence will not be disturbed. *Home Fire Ins. Co. v. Phelps*..... 624
32. A verdict will not be disturbed merely because it is against the preponderance of the evidence. *Ashland Land & Live-Stock Co. v. May*..... 474
33. Where the evidence is such as to justify impartial minds in reaching different conclusions, the trial court's finding thereon will not be disturbed. *Wyman v. Connery*..... 59
34. An order dissolving an attachment on conflicting evidence will not be disturbed. *Smith v. Bowen*..... 245
35. Where the evidence is conflicting the verdict will not be disturbed as lacking support in the proofs. *Doane v. Smith Bros. Loan & Trust Co*..... 280
36. A finding of the district court should not be reversed on the ground that it is not supported by the evidence, solely because the supreme court might have reached a different conclusion. *South Park Improvement Co. v. Baker*..... 392
37. Where the evidence was conflicting as to service of a summons it was *held* that the finding would not be disturbed. *Commercial Bank of St. Louis v. Eastern Banking Co*..... 766
38. A verdict reached upon consideration of conflicting evidence will not be disturbed, though the proofs made by the prevailing party are not entirely satisfactory in character or preponderance. *Alter v. Bank of Stockham*..... 797

*Final Orders.*

39. In replevin, where the county court found for plaintiff as to

**Review**—*continued.*

certain of the goods, and for defendant as to the residue, and rendered an appropriate judgment on each finding, the determination was *held* to constitute a single judgment, so that an appeal by plaintiff to the district court brought up the whole case for trial *de novo*. *Bates v. Stanley*..... 253

40. In case two separate and distinct judgments are entered in a replevin action,—one for the plaintiff covering a portion of the property and the other in favor of the defendant for the remainder,—and an appeal is taken alone from one of them, the other is final and conclusive as to all matters thereby adjudicated. Per NORVAL, J. *Id.*

41. From the mere fact that there was filed in the district court a copy of a petition and an answer entitled "In the County Court," and indorsed as therein filed, it will not be assumed that there was a judgment in, or an appeal from, the county court. *Walton v. Campbell* ..... 788

42. An order of the district court taxing costs as directed by a mandate of the supreme court *held* not reviewable. *Oliver v. Lansing* ..... 818

43. An order made on application to modify a decree for permanent alimony is appealable. *State v. Cook*..... 822

44. An order striking from the files an amended petition as being substantially the same as the original, to which a demurrer had been sustained, may be reviewed by a proceeding in error. *Wheeler v. Barker*..... 846

*Harmless Error.*

45. Admission of irrelevant evidence in a trial to the court without a jury is not ground for reversal of a judgment. *Phœnix Ins. Co. v. Walter*..... 182

46. Where an answer to a question for a special finding would be immaterial, it is not prejudicial error to render judgment on the general verdict without first requiring a special finding in answer to the question. *Doane v. Smith Bros. Loan & Trust Co.* ..... 280

47. Refusal to require a non-resident plaintiff to give security for costs is not reversible error where, on final hearing, the costs are properly taxed to defendant. *Hard v. Hard*..... 412

48. Error, if any, in admitting writings in evidence without a proper foundation, *held* harmless, where their contents were properly proved by parol testimony. *Meyer v. Shamp*..... 435

49. Where the evidence justifies the court in directing a verdict for defendant, the entry of a nonsuit is error without prejudice to plaintiff. *Thompson v. Missouri P. R. Co*..... 527

50. Denial of a jury trial upon an issue of fact tendered by a plea in abatement *held* not reversible error, where the record fails to disclose that the prisoner was prejudiced. *Bolln v. State*.. 582

**Review**—*continued.*

*Instructions.*

51. An instruction should be examined as a whole. *Davis v. State* ..... 302

*Issues.*

52. An issue not raised by the pleadings or evidence will be disregarded. *Klamp v. Klamp* ..... 17
53. Parties will, as a rule, be restricted to the theory upon which the cause was tried below. *Shaw v. Robinson* ..... 164
54. A judgment should not be reversed for the erroneous admission of evidence upon a proposition not controverted in the supreme court. *Sloan v. Wherry* ..... 703
55. Ordinarily a cause should be tried in the appellate court with the issues unchanged. *Morrill v. Crawford* ..... 286

*Laches.*

56. A judgment rendered more than a year before a proceeding in error was instituted cannot be reviewed. *Hogue v. Ogle* ..... 223
57. Omission to file a transcript for review within the statutory period is not excused by the fact that plaintiff in error was unable to obtain a bill of exceptions in time. *Stull v. Cass County* ..... 760
58. An error proceeding may be dismissed for want of jurisdiction where the petition in error and transcript are not filed in the supreme court within one year from rendition of the judgment below. *Id.*

*New Trial.*

59. Objection that the judgment is unsupported by the evidence will not be considered on petition in error unless presented below by motion for a new trial. *Shaw v. Robinson* ..... 164
60. Where two or more plaintiffs or defendants join in a motion for a new trial or in a petition in error, an assignment of error which is not good as to all who join must be overruled as to all. *Minneapolis Threshing-Machine Co. v. Regier* ..... 403
61. An objection that the court refused to direct a verdict was disregarded because it was not raised below in the motion for a new trial. *Home Fire Ins. Co. v. Phelps* ..... 623
62. An objection to a charge, the objection not having been called to the attention of the lower court by the motion for a new trial, will be disregarded. *Hodgin v. Whitcomb* ..... 617
63. A rehearing will not be granted when it is clear that no other conclusion than that already reached is possible. *Tecumseh Nat. Bank v. Saunders* ..... 801

*Pleading.*

64. A ruling on a motion for leave to amend a pleading during the trial may be reviewed to ascertain whether there was an abuse of discretion. *Harrington v. Connor* ..... 214
65. In reviewing an order striking from the files an amended petition as being like one to which a demurrer had been sus-

Review—*continued.*

tained, the court will ascertain whether the petitions are substantially the same, and if they are not, the ruling below will be *held* erroneous and the error prejudicial where the amended petition states a cause of action. *Wheeler v. Barker* ..... 846

*Questions Not Raised Below.* (See also REVIEW, 59, 61, 62.)

66. One who answered to the merits of the case and submitted to the jurisdiction of a court of equity cannot complain for the first time on appeal that plaintiff had an adequate remedy at law. *Stahlhut v. Bauer*..... 65

67. A petition failing to state a cause of action may be first attacked on that ground in the appellate court. *Hudelson v. First Nat. Bank of Tobias*..... 557

68. An instruction not excepted to below will be disregarded on review. *Hodgin v. Whitcomb*..... 617

69. In reviewing the confirmation of a judicial sale, objections not brought to the attention of the district court in the motion to set the sale aside, will not be considered. *Nebraska Land, Stock-Growing & Investment Co. v. Cutting*..... 647

70. Objection that an instruction contains two or more distinct propositions will be disregarded when made for the first time in the supreme court. *Morgan v. State*..... 673

*Reversal. Proceedings Below.*

71. Under an order of reversal it was *held* that the case was not remanded generally for a new trial of the issues, where all the questions were determined upon appeal except one as to the value of certain realty. *Oliver v. Lansing*..... 818

72. Where the issues in a suit in equity were all determined upon appeal except one as to the value of realty, it was *held* that the parties were not entitled to a jury trial under an order remanding the cause for a trial of the issue undetermined. *Id.*

73. Under an order reversing a decree in equity and remanding the cause with instructions to the trial court to ascertain the value of certain realty, the action of the trial court in refusing to hear further testimony, and in making a finding from the bill of exceptions preserving the evidence at the first trial, *held* proper. *Id.*

*Stare Decisis.*

74. A judgment or ruling of the supreme court will be held to be the law of the case throughout the litigation in which the judgment or ruling was rendered. *Meyer v. Shamp*..... 425

*Supersedeas.*

75. Subdivision 3, section 677, of the Code, providing for superseding orders directing the sale or delivery of possession of realty, contemplates appeals by the owner or person in possession, and has no application to an appeal by a purchaser

**Review**—*concluded.*
from an order setting aside a sale and directing a resale. *Penn Mutual Life Ins. Co. v. Creighton Theatre Building Co.*... 660
76. In cases not within subdivision 3, section 677 of the Code, providing for superseding orders directing the sale or delivery of possession of realty, the district court may allow a supersedeas on proper terms. *Id.*
77. Where an order may be superseded as a matter of right, the clerk of the district court should examine the supersedeas bond tendered and approve it when it is found to be sufficient. *State v. Cook*..... 822
78. Where an order made on application to modify a decree for permanent alimony directs the payment of money, it may be superseded as a matter of right. *Id.*

*Transcripts.*

79. Matters certified as part of a record cannot be controlled by statements contained in an affidavit. *Security Nat. Bank v. Latimer* ..... 498
80. A properly certified record of a trial court imports verity. *Morgan v. State* ..... 674
81. Where a record for review is partial or incorrect, the remedy is by means of an appropriate proceeding to secure a correction in the lower court. *Id.*

**Robbery.**
Evidence *held* sufficient to sustain a conviction for robbery by putting in fear. *Williams v. State*..... 711

**Sales.** See BANKS AND BANKING, 1-3. ESTOPPEL, 1. HUSBAND AND WIFE, 5. PRINCIPAL AND AGENT, 3. VENDOR AND VENDEE.
1. It is not, in order to charge a purchaser of goods with the fraud of the seller, permissible to prove that the latter, about the time in question, sold other goods of like character "at a great sacrifice" without reference to their value or the price realized. *Sloan v. Wherry*..... 703
2. Manner of showing weight of cattle where the buyer alleged that the seller fraudulently announced an excessive weight. *Alter v. Bank of Stockham*..... 797
3. A verbal contract for the sale of goods for more than $50, no part of which was paid at the time of sale, *held* enforceable, where the buyer accepted the goods as consigned and paid the cartage and freight. *Riley v. Bancroft's Estate*..... 864
4. A contract for the sale of liquors *held* to have been made at the licensee's store and not at the place to which the goods were consigned. *Id.*

*Conditional Sales.*

5. Contract set out in opinion *held* not a contract of agency, but a contract of conditional sale. *Osborne v. Plano Mfg. Co*..... 502
6. Section 26, chapter 32, Compiled Statutes, relating to registra-

**Sales**—*concluded.*

tion of contracts of conditional sales, protects only good-faith purchasers and judgment and attaching creditors without notice. *Id.*

*False Representations.*

7. Verdict and judgment on a petition, by which it was sought to recover the unpaid purchase price of personal property, are not sustained by proof that while in fact such payment had actually been made, yet that by false representations the defendant had induced the plaintiff to pay the defendant an amount equal to the amount of such purchase price. *Cockrell v. Wood* ..... 269

8. To authorize the rescission of a sale on the ground of the buyer's false representation, the representation must have been made as to an existing fact. *Cohn v. Broadhead*..... 834

9. An order for goods, a promise, in good faith, to pay one-half the purchase price on delivery and the balance in the future, and a violation of the promise, *held* not to warrant the conclusion that the sale was induced by the fraudulent representations of the buyer. *Id.*

10. The fact that a merchant in making a statement as to his stock overestimated its value, *held* not to warrant the conclusion that a sale to him was induced by fraudulent representation. *Id*..... 835

**Schools and School Districts.** See CONTRACTS, 12-14. MANDAMUS, 4. TAXATION, 7.

*Supplies.*

1. Section 10, subdivision 18, chapter 79, Compiled Statutes, providing for the purchase of "school supplies," is valid, though the title to the act is as follows: "An act to provide cheaper text-books, and for district ownership of the same." *Affholder v. State*..... 91

*High Schools.*

2. "An act to provide free attendance at public high schools" (Session Laws, 1895, p. 226, ch. 60), is unconstitutional as amending former statutes without referring to them. *Board of Education v. Moses*..... 288

*Organization of Districts.*

3. Under section 3, subdivision 1, chapter 79, Compiled Statutes, a county superintendent has exclusive original jurisdiction to form school districts from territory not formerly organized as such, and his right to proceed does not depend upon an expression of the residents nor upon notice of his purpose to act. *Bay State Live-Stock Co v. Bing*..... 570

4. Where a county superintendent formed a school district from new territory, a subsequent entry of his order on the record does not control as to the time it became effectual. *Id.*

*Taxes. Injunction.*

5. A suit to enjoin a school tax on the ground that the property

**Schools and School Districts—*concluded.***

assessed is not within the limits of the school district *held* not to call in question the legal organization of the school district. *Chicago, B. & Q. R. Co. v. Cass County*..... 370

6. A school district is without jurisdiction to levy a tax on realty not within the limits of the district. *Id.*

7. In a suit to enjoin a school tax on the ground that the property assessed is not within the limits of the school district, the court is not required by section 8, subdivision 3, chapter 79, Compiled Statutes, to conclusively presume anything further than the legal organization of the school district. *Id.*

8. Evidence *held* to establish that no part of a railroad bridge taxed by a school district is within the limits of the district. *Id.*

9. Where a county treasurer collected taxes to pay a school district bond and, without the knowledge and consent of the holder, lost the money by depositing it in insolvent banks, it was *held* that the loss did not fall on the bondholder, and that the collection of a tax levied on the property of the district to pay the amount due on the bond would not be restrained by injunction. *Jacobson v. Cary*..... 762

*Repayment of License Money.*

10. Where license money was paid to a village treasurer, and he paid it over to a school district, on cancellation of the license the licensee may maintain an action against the school district for its repayment. *School District v. Thompson* ..... 858

**Set-Off and Counter-Claim.**

An instruction that defendant, in order to recover, must prove his counter-claim, or the items thereof, by a preponderance of the evidence, *held* applicable to the issues and correct as to the burden of proof. *Ashland Land & Live-Stock Co. v. May*.. 474

**Settlement.** See COMPROMISE AND SETTLEMENT. DEPOSITORIES, 3.

**Sheriffs and Constables.** See EXECUTIONS. TRESPASS, 2.

**Sidewalks.** See MUNICIPAL CORPORATIONS, 2.

**Special Assessments.** See MUNICIPAL CORPORATIONS, 4.

**Special Findings.** See REVIEW, 46.

**Stare Decisis.** See REVIEW, 74. STATUTES, 13.

**State.** See DEPOSITORIES.

**State and State Officers.**

The act providing for a uniform system of verified vouchers (Session Laws, 1895, p. 234, ch. 65; Compiled Statutes, ch. 83, art. 8, secs. 6-10), applies to legislative acts appropriating a definite amount of money, or so much thereof as may be required, for a designated purpose. *State v. Cornell*..... 553

**State Treasurer.** See DEPOSITORIES.

Statute of Frauds.

1. The object of the statute of frauds is to prevent frauds and perjuries. *Riley v. Bancroft's Estate*..... 864
2. While certain contracts are by the terms of the statute declared void, the uniform construction placed upon the statute renders such contracts not void, but unenforceable for want of the evidence which the statute requires. *Id.*
3. In case of a sale of goods for more than $50, where there was no note or memorandum in writing, and no part of the price was paid at the time, a subsequent acceptance by the purchaser of the goods does not constitute a new contract, but merely renders enforceable the original verbal contract, and for that purpose relates back to the time and place thereof. *Id.*

Statutes. See INSURANCE, 3, 4. TABLE, *ante*, p. liii.

*Amendments.*

1. The state depository law (Session Laws, 1891, ch. 50) is not amendatory of subdivision 8, section 2, article 4, chapter 83, Compiled Statutes, in such a sense as to render it inimical to section 11, article 3, of the constitution, relating to amendments. *In re State Treasurer's Settlement*..... 116
2. An act amendatory of existing statutes is unconstitutional when it does not mention or describe them. *Board of Education v. Moses*..... 288
3. An entire amendatory act is void where part of it amending existing statutes without referring to them was the inducement for the passage of the remainder of the amendatory act. *Id.*
4. The act of 1877 (Session Laws, p. 60; Compiled Statutes, ch. 72, art. 1, sec. 2), purporting to amend section 2 of the act relating to the liability of railroad companies for live stock injured where no lawful fence has been constructed (General Statutes, p. 202), is unconstitutional because it did not repeal the section amended. *Grand Island & W. C. R. Co. v. Swinbank* ..... 521

*Constitutional Law.*

5. Every legislative act comes before the courts surrounded with the presumption of constitutionality, and this presumption continues until the act under review clearly appears to contravene some provision of the constitution. *Davis v. State*... 302
6. A statute is not void for uncertainty, which prescribes, as a punishment for doing a certain act, the same punishment which is prescribed for doing another named act, when the same criminal code defines the latter act and prescribes its punishment. *Id.*
7. Section 93 of the Criminal Code, providing for the punishment of persons who maliciously injure railroad property, does not violate any provision of the constitution. *Id.*

**Statutes**—*concluded.*

*Construction.*

8. Effect, if possible, must be given to every part of a statute. *McIntosh v. Johnson* ..... 33
9. Statutes remedial in their nature should receive a liberal construction. *Id.*
10. An act will be given a prospective operation unless a contrary intent is clearly expressed. *Id.*
11. Sections 40, 41, Compiled Statutes, providing for the collection of public funds and money, operate prospectively as well as retroactively. *Id.*
12. A court will not give a retrospective effect to a statute unless it is clear from the language used that the legislature intended to give it that effect. *Commercial Bank of St. Louis v. Eastern Banking Co* ..... 766
13. The legislature of Nebraska, in the enactment of the Ohio Criminal Code, is presumed to have adopted the construction thereof by the courts of Ohio, but such construction may be rejected for reasons which would require the overruling thereof had it been first adopted in Nebraska. *Morgan v. State* ..... 673

*Titles.*

14. Chapter 46, Session Laws, 1891, entitled "An act to provide cheaper text-books, and for district ownership of the same," does not violate section 11, article 3, of the constitution relating to titles of bills and to amendments of laws. *Affholder v. State* ..... 91
15. Under the title "An act to provide cheaper text-books, and for district ownership of the same," the legislature may insert a section authorizing school boards to purchase "school supplies." *Id.*

**Subrogation.**

1. The right of subrogation must rest upon some recognized subject of equitable cognizance. *Chicago Lumber Co. v. Anderson* ..... 159
2. Where a lender took a real estate mortgage agreeing to satisfy, with the proceeds of the loan, a former unmatured mortgage upon the same realty, and paid the money to the original mortgagee, who embezzled it and entered upon the record satisfaction of the first mortgage without authority from one to whom it had been assigned, it was *held* that the assignee should be subrogated to the rights of the lender under the latter's mortgage. *Porter v. Ourada* ..... 510

**Substitution.** See PARTIES, 1. REPLEVIN, 13.

**Summons.** See MORTGAGES, 13. REVIEW, 37.

1. Where the purpose of an action is to enforce a personal obligation against defendant, personal service within the state is essential. *Fowler v. Brown* ..... 415

Summons—*concluded.*

2. Service by publication, or in such manner as may be authorized by statute, is sufficient in proceedings *in rem*. *Id.*
3. The service of a summons is not essential, in order to give the district court jurisdiction over a defendant in an action *in rem*, for the purpose of a cross-petition filed by a co-defendant after answer day. *Id.* ..... 414

Sunday. See NEGOTIABLE INSTRUMENTS, 3-5.

Supersedeas. See COURTS, 5. REVIEW, 75-78.

Suretyship. See PRINCIPAL AND SURETY.

Taxation. See INJUNCTION, 3. INSURANCE, 3-4. MUNICIPAL CORPORATIONS, 2. SCHOOLS AND SCHOOL DISTRICTS, 9.

*Void School Tax. Injunction.*

1. A tax levied by a school district on realty not within the limits of the district is void. *Chicago, B. & Q. R. Co. v. Cass County* ..... 370
2. In a suit to enjoin a school tax the court is not required to presume that the property taxed is within the limits of the school district, because it had assumed the right to tax the property for more than a year. *Id.*
3. In a suit to enjoin a school tax levied on a bridge which plaintiff alleges is not within the school district, the *situs* of the bridge is a question of fact to be determined from the evidence. *Id.*
4. A railroad company *held* not estopped from maintaining a suit to enjoin a school tax levied on a bridge not within the school district, though the company listed the bridge with the district for taxation and paid taxes thereon in previous years. *Id.*

*Description. Mistake.*

5. A taxpayer who misdescribed his property, in requesting a county treasurer for a statement, and paid taxes on another's realty, *held* liable for the consequences of the mistake, though it resulted in the sale of his own property. *Browne v. Finley*.. 465

*Cancellation of Tax Deed.*

6. In a suit to quiet title of a purchaser at tax sale, a defendant who sets up title and prays for cancellation of the tax deed must pay the taxes justly chargeable against the property, which plaintiff paid. *Id.*

*Exempt Property.*

7. Under section 2, article 1, chapter 77, Compiled Statutes, all property used directly, immediately, and exclusively for school purposes is exempt from taxation. *Academy of the Sacred Heart v. Irey*..... 755
8. The fact that a portion of lots, upon which a school building had been erected, is used for a vegetable garden to supply the school tables with vegetables, does not subject to taxation the land thus cultivated. *Id.*

**Tenant for Life.** See LANDLORD AND TENANT, 3, 4.

**Tickets.** See CARRIERS, 3-9.

**Torts.** See CARRIERS, 3, 8. DAMAGES, 1. TRESPASS.

**Transcripts.** See REVIEW, 79-81.

**Treasurers.** See ACTIONS, 1. DEPOSITORIES.

**Trespass.**

1. The title of a settler who has entered public lands under the provisions of the United States homestead law will support an action for trespass committed after the entry and before his right to a patent becomes absolute. *Culbertson Irrigating & Water-Power Co. v. Olander*..... 539
2. One who delivers to an officer a valid writ, without direction as to service, will not, except in case of subsequent ratification, be liable for torts committed by the officer in executing the writ. *Teel v. Miles*..... 542

**Trial.** See CRIMINAL LAW. INSTRUCTIONS. NEW TRIAL. PLEADING, 6. REVIEW, 45, 46.

*Rulings as to Evidence.*

1. The trial court may, on its own motion, refuse to permit a witness to answer a question calling for incompetent, immaterial, or irrelevant evidence. *Davis v. State*..... 303
2. The order in which a party shall introduce proof is to a great extent discretionary with the trial court. *Id*..... 304
3. A party who propounds a question to a witness and obtains a responsive answer cannot complain that the court did not, on motion, expunge the answer from the record. *Id.*
4. A party *held* not prejudiced by a refusal to strike out testimony as to a fact, where he introduced evidence of the same fact. *Id.*
5. The district court may place a reasonable limit upon the time for the production of evidence. *Morgan v. State*..... 674

*Findings and Verdicts.*

6. Where the evidence shows that individual defendants are liable to plaintiff in different amounts, a verdict assessing the amount due plaintiff from each defendant is not ground for reversing a judgment on the verdict. *Lininger v. Webb*..... 10
7. In a suit on a note admitted in evidence upon uncontradicted testimony of a qualified witness who gave it as his opinion, on the only issue, that the signatures were genuine, the action of the court in directing a verdict for plaintiff was *held* proper. *Mosher v. Farmers & Merchants Nat. Bank*..... 55
8. Where plaintiff fails to establish his cause of action, the court should instruct the jury to return a verdict for defendant. *Thompson v. Missouri P. R. Co*..... 527
9. In a trial to the court, denial of a request to state separately in writing findings of fact and conclusions of law, was *held* reversible error. *Lyman v. Waterman*..... 283

Trial—*concluded.*

10. A general verdict will be set aside if in conflict with a special finding of fact material to the issues. *Culbertson Irrigating & Water-Power Co. v. Olander*..... 540

Trover and Conversion. See REVERSION.

1. All are principals in conversion, and every person who knowingly aids and abets another in the conversion of the property of a third person is liable to the latter for the value of the property so converted. *Osborne v. Plano Mfg. Co*..... 592
2. An action for conversion of personalty is an action at law, and should be so tried where neither party presents an equitable ground for relief or defense. *Alter v. Bank of Stockham*... 797

Trusts. See BANKS AND BANKING, 4. CONTRACTS, 12. HUSBAND AND WIFE, 2.

*Resulting Trusts.*

1. To establish a resulting trust the evidence must be full, clear, and satisfactory. *Klamp v. Klamp*..... 17
2. In a suit by a husband to have it decreed that the title to a farm was taken by his wife in trust for him, *held* that the evidence was insufficient to establish a resulting trust in his favor. *Id.*
3. Evidence *held* to sustain a finding that property in a wife's name was not held in trust for the husband. *First Nat. Bank of Wahoo v. Havlik*..... 668

*Parol Declarations.*

4. Loose and indefinite expressions, and such as indicate only an incomplete and executory intention, are insufficient to fasten a trust upon realty by means of a parol declaration. *Kobary v. Greeder* ..... 365
5. In order to fasten a trust upon realty by means of a parol declaration, the words employed must amount to a clear and explicit declaration of trust. *Id.*
6. In order to fasten a trust upon realty by means of a parol declaration, the words employed must point out with reasonable certainty the subject-matter of the trust, and the person who is to take the beneficial interest. *Id.*
7. Evidence *held* insufficient to sustain a finding that realty purchased with funds of a husband and conveyed to his wife was held by her in trust for him. *Id.*

*Proceeds of Stolen Property.*

8. A court of equity has jurisdiction to declare and enforce a trust with respect to property stolen from the beneficial owner, though a fiduciary relation does not exist between him and defendant. *Nebraska Nat. Bank v. Johnson*..... 546
9. Equity may declare a trust in favor of a bank with respect to the proceeds of money stolen from it by a janitor charged with the duty of caring for plaintiff's offices and of preserving the property therein. *Id.*

**Usury.**

1. Under the national banking act an action will lie against a national bank to recover the penalty for taking usury, though the borrower paid both principal and interest. *First Nat. Bank of Tobias v. Barnett*..... 397
2. In a suit against a national bank to recover the penalty for taking usury, evidence of the whole course of transactions *held* material in order to trace different debts and the interest reserved on each, though some transactions were not pleaded as usurious. *Id.*

**Vendor and Vendee.** See COVENANTS. MORTGAGES, 9.

1. One taking a real estate mortgage to secure a pre-existing debt, without notice of the existence of an unrecorded mortgage against the property, is a subsequent purchaser in good faith within the meaning of section 16, chapter 73, Compiled Statutes. *Dorr v. Meyer*..... 94
2. Petition *held* to state a cause of action on a bond to secure the discharge of incumbrances on realty conveyed to plaintiff. *Mott v. Bissicummer*..... 645

**Venue.**

1. The statutes do not authorize a court, of its own motion, to order a change of venue. *Fisk v. Thorp*..... 2
2. Unless empowered by statute, a court has no authority, of its own motion, to change the venue of a trial. *Id.*

**Verdict.** See NEW TRIAL, 5, 6. REVIEW, 46. TRIAL, 6.

**Vice-Principal.** See MASTER AND SERVANT, 7, 8.

**Vouchers.** See STATE AND STATE OFFICERS.

**Waiver.** See DAMAGES, 2. EMINENT DOMAIN, 2. INSURANCE, 1. JURY, 6. MECHANICS' LIENS, 2, 3. REPLEVIN, 3.

**Warranty.** See COVENANTS.

**Water Companies.** See CONTRACTS, 1.

**Weights.** See EVIDENCE, 10.

**Witnesses.** See EVIDENCE, 3.

*Cross-Examination. Bias.*

1. The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea? *Johnston v. Spencer*..... 198
2. When a witness is cross-examined on a matter collateral to the issue he cannot, as to his answer, be contradicted by the party putting the question. *Id.*
*Myers v. State*..... 517
3. A witness may be cross-examined as to his interest or bias, but the extent of the examination rests largely in the discretion of the trial court. *Davis v. State*..... 303

**Witnesses—*concluded.***

4. Limitation of cross-examination as to bias of witness is not ground for reversal unless the party complaining was prejudiced. *Id.*
5. It is not competent to prove the bias or prejudice of one witness by the cross-examination of another witness without first having cross-examined the former as to his interest or bias. *Id.* ..... 304
6. Where one who had employed attorneys testified in a suit by him against them that their fees should be restricted to 10 per cent of the collection, it was error to hold that he could not be asked, on cross-examination, if he did not say, upon receiving a check for 75 per cent, that he would not expect the attorneys to do the work for 10 per cent. *McClanahan v. Dingman* ..... 628

*False Testimony.*

7. The maxim, "*Falsus in uno, falsus in omnibus,*" is applicable alone where a witness has willfully testified falsely to a material fact. *Davis v. State* ..... 314

*Names. Indorsement on Information.*

8. A witness whose name was not indorsed on the information may give testimony which is purely rebuttal. *Kelly v. State* .. 572
9. A witness whose name was not indorsed on the information cannot give testimony as to matters not in rebuttal, and which might have been introduced as evidence in chief. *Id.*

*Competency.*

10. A county supervisor who participated in locating a highway and in passing upon the claim for damages is a competent witness for the county in an action against it by the landowner. *Lane v. Harlan County* ..... 641
11. On trial of a suit against a county by one whose land was taken for a highway, the conduct of a county supervisor who took part in locating the road and in passing on the claim for damages may go to the jury to affect his credibility, or the weight of his evidence, as a witness. *Id.*

**Words.**

1. "Lot." *Norfolk State Bank v. Schwenk* ..... 146
2. "Made." *Hazelet v. Holt County* ..... 716
3. "Malice." *Davis v. State* ..... 301
4. "School supplies." *Affholder v. State* ..... 91
5. "Text-books." *Id.*

**Work and Labor.** See CONTRACTS, 9-11.

**Writs.** See EXECUTIONS. SUMMONS. TRESPASS, 2.